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8 **BOARD OF EQUALIZATION**
9 **STATE OF CALIFORNIA**

10
11 In the Matter of the Appeal of:) **HEARING SUMMARY**
12) **PERSONAL INCOME TAX APPEAL**
13 **EDIE GLASS**¹) Case No. 573366
14)
15)

		<u>Proposed</u>	
		<u>Assessment</u>	
	<u>Year</u>	<u>Tax</u>	<u>Penalty</u>
	2006	\$1,825.00	\$453.25 ²

18 Representing the Parties:

19 For Appellant: Edie Glass
20 For Franchise Tax Board: Marguerite Mosnier, Tax Counsel III
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22 QUESTIONS: (1) Whether appellant has demonstrated error in the underlying assessment, which
23 was based upon federal adjustments.
24 (2) Whether appellant has shown reasonable cause for the abatement of the late filing
25 penalty.
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27 ¹ Appellant resides in Pasadena, Los Angeles County.

28 ² The penalty imposed is a late filing penalty. The 25 percent penalty is based upon an unpaid tax liability of \$1,813.00 (i.e., \$1,813.00 x .25 = \$453.25).

1 (3) Whether the proposed assessment was timely.

2 HEARING SUMMARY

3 Background

4 Appellant did not file a timely 2006 tax return. For the 2006 tax year, respondent
5 Franchise Tax Board (“FTB”) received information which indicated that appellant earned enough
6 income to require her to file a California tax return. On February 19, 2008, respondent mailed appellant
7 a “Request for Tax Return” (“Request”), asking that she file her 2006 California return or explain why
8 none was due by March 26, 2008. (Resp. Opening Br., Exhibit A.) Appellant requested additional time
9 to file her return, and respondent issued a deferral letter extending the due date to respond to the Request
10 until April 25, 2008. (*Id.* at Exhibit B.)

11 Appellant filed a 2006 California return (Form 540), which was received by respondent
12 on April 30, 2008, and dated April 25, 2008. (Resp. Opening Br., Exhibit C.) In her return, appellant
13 reported state wages of \$93,069, federal adjusted gross income (“AGI”) of \$86,069, itemized deductions
14 of \$32,523, and taxable income of \$53,546. (*Id.* at Exhibit C, p. 1.) Appellant reported tax of \$1,716,
15 applied exemption credits of \$376, and reported a total tax of \$1,340, which was fully satisfied by
16 income tax withholding credits of \$1,352. Appellant also reported an overpayment of \$12 (*Id.* at Exhibit
17 C, p. 2), which respondent transferred to the Employment Development Department on May 24, 2008,
18 pursuant to an Interagency Intercept Agreement. (*Id.* at Exhibit D, ln. 3.)

19 It appears that, on July 8, 2008, the Internal Revenue Service (“IRS”) informed appellant
20 of several changes to her 2006 return, including decreasing appellant’s wages, increasing interest
21 income, and disallowing unreimbursed employee expenses, the Archer MSA deduction, and other
22 expenses subject to the two percent AGI limitation. (*Id.* at Exhibit E.) Appellant did not report these
23 changes to respondent. Instead, on April 23, 2009, the IRS notified respondent of the federal
24 adjustments. On May 13, 2010, respondent issued a Notice of Proposed Assessment (NPA) and made
25 the following corresponding changes to appellant’s California tax account: decreased appellant’s wages
26 by \$570, increased interest income by \$98, disallowed unreimbursed employee business expenses of
27 \$20,604, and disallowed the Archer MSA deduction of \$350. (App. Opening Br., NPA.) The NPA
28 proposed an additional tax of \$1,825.00 and a late filing penalty of \$453.25, plus applicable interest.

1 (*Id.*)

2 Appellant protested the NPA on the grounds that her business expenses were legitimate,
3 that the late filing penalty was improper because there was no outstanding balance due when she filed
4 her return, and that the federal action was not final because she was filing an amended federal return.
5 (Resp. Opening Br., p. 2, Exhibit F, p. 1.) Respondent replied to appellant on February 18, 2011,
6 advising her of the federal adjustments to her income and deductions and explaining that “any
7 adjustment the IRS makes to the federal return will affect the California return.” (*Id.* at Exhibit G.)
8 Respondent also requested that appellant provide further information and documentation concerning any
9 more recent IRS adjustments to appellant’s federal tax account. (*Id.*)

10 Appellant replied to respondent’s request on April 7, 2011, stating that she did not
11 understand the IRS adjustments or how she could be assessed an additional tax liability when the IRS
12 decreased her income. (*Id.* at Exhibit H.) Appellant did not include any information or documentation
13 indicating that the IRS revised its adjustments, and respondent issued a Notice of Action (“NOA”)
14 affirming the NPA, on May 2, 2011. (*Id.* at pp. 2-3; App. Opening Br., NOA.) Appellant’s timely
15 appeal followed.³

16 Contentions

17 Appellant’s Contentions

18 Appellant first contends that she did not owe additional taxes to California at the initial
19 due date of the return (April 15, 2007), and therefore, respondent acted improperly by imposing a
20 penalty. (App. Opening Br.) Although appellant concedes that she earned enough income in 2006 to be
21 required to file a tax return, she asserts that she paid 2006 taxes through payroll tax deductions. (App.
22 Reply Br., p. 1.) Appellant also argues that the IRS’s calculation upon which respondent based its 2006
23 assessment was not final, as it was “in consideration for an Offer in Compromise (“OIC”).” (*Id.*)
24 Appellant asserts that she cannot meet her burden of proof to show that the federal assessment is in error
25 because of the difficulty of obtaining documentation from the IRS. (*Id.* at pp. 1-2.) Furthermore,
26 appellant argues that respondent’s use of the IRS’s determination is unfair because respondent only uses
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28 ³ This appeal was deferred pending a proposed regulation regarding late filing penalties. When that proposed regulation was ultimately not adopted, this appeal was reactivated.

1 the IRS's determination when it is convenient to respondent's position. (*Id.* at p. 2.)

2 In disputing the late filing penalty, appellant asserts that from 2006 to 2007 she
3 "inadvertently neglected to complete certain tasks such as filing tax returns on time" because she was a
4 student and worked two jobs. (*Id.* at p. 2.) Appellant also argues that she mistakenly relied on an IRS
5 rule of "no filing necessary if nothing is owed." (*Id.*) Therefore, appellant asserts that she was not
6 acting with willful neglect when she did not file her 2006 tax return. (*Id.*)

7 Appellant contends that the proposed assessment was not timely mailed because the four-
8 year statute of limitations does not apply between the State of California and the taxpayer, as there was
9 no written contract and the "implied consent is disputable." (*Id.*) Furthermore, due to her "precarious"
10 employment situation, appellant asserts that she would need at least 120 days before making any
11 payments towards the proposed assessment.⁴ (App. Additional Reply Br., p. 2.)

12 Respondent's Contentions

13 Respondent contends that appellant has not met her burden of proof to establish that the
14 federal changes, or the FTB's proposed assessment based on those changes, are erroneous. (Resp.
15 Opening Br., p. 3.) Respondent notes that when the IRS makes a change or correction to a taxpayer's
16 federal account that results in an increase in the amount of state tax, the taxpayer is required either to
17 concede the accuracy of the federal determination or explain when it is in error. (*Id.*, citing Rev. & Tax.
18 Code, § 18622.) Respondent asserts that it is not required to follow federal actions, but it does so to the
19 extent such actions apply under California law. (*Id.*, citing *Der Weinerschnitzel International, Inc.*,
20 79-SBE-064, April 10, 1979.) Respondent argues that appellant has not submitted any evidence proving
21 error in the federal actions, reflected on the federal audit report. (*Id.*)

22 Additionally, respondent asserts that it examined a copy of the IRS Account Transcript of
23 actions taken by the IRS on appellant's 2006 account. (*Id.*) Respondent contends that there are no
24 entries indicating that (1) the IRS subsequently adjusted appellant's liability, (2) appellant filed an
25 amended return, or (3) any pending IRS action remained unresolved. (*Id.* at 3-4.) Therefore, respondent
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28 ⁴ The FTB notes in its opening brief that both an installment agreement and an OIC may be available to appellant after the appeal is final. Furthermore, respondent sent information about these two payment plans to appellant, along with a copy of its brief.

1 argues that the IRS's determination, on which respondent's actions were based, is final.

2 Respondent also contends that appellant has not met her burden of proof to establish that
3 reasonable cause exists to abate the late filing penalty. (*Id.* at p. 4.) Respondent notes that appellant's
4 2006 return was due on April 15, 2007, but that appellant filed the return on April 30, 2008. (*Id.*)
5 Furthermore, respondent argues that Revenue and Taxation Code (R&TC) section 19131 requires the
6 FTB to impose a late filing penalty if a taxpayer does not file a tax return on time. Respondent concedes
7 there is an exception to this penalty, if a taxpayer's failure to file the return on time is due to reasonable
8 cause and not willful neglect. (*Id.*) Respondent argues, however, that appellant did not demonstrate her
9 "failure to file her return timely occurred even though she acted with ordinary business care and
10 prudence." (Resp. Reply Br., p. 1, citing *Appeal of Steven C. Bieneman*, 82-SBE-148, July 26, 1982.)
11 Furthermore, respondent contends that work or business constraints do not constitute reasonable cause
12 for not filing a tax return. (*Id.*, citing Resp. Opening Br., Exhibit K, section 4.) Respondent asserts that
13 appellant has not explained or submitted proof of how her employment and schooling prevented her
14 from filing a timely California return, and thus did not meet her burden in establishing that reasonable
15 cause exists to abate the late filing penalty. (*Id.*)

16 Respondent argues that the proposed assessment was timely mailed. (Resp. Opening Br.,
17 p. 3.) Respondent asserts that the general statute of limitations for mailing a notice of deficiency is four
18 years from the original due date of the return. (*Id.*, citing Rev. & Tax. Code, § 19057.) Respondent
19 notes that appellant's return was due April 15, 2007, and the NPA was mailed on May 13, 2010;
20 therefore, respondent contends that the proposed assessment was timely mailed. (*Id.*; App. Opening Br.,
21 NPA.)

22 Applicable Law

23 Burden of Proof

24 R&TC section 17041 imposes a tax ". . . upon the entire taxable income of every resident
25 of this state . . ." and upon the entire taxable income of every nonresident or part-year resident (while not
26 a resident) which is derived from sources in this state. R&TC section 18622 provides that a taxpayer
27 shall either concede the accuracy of a federal determination or state wherein it is erroneous. It is well-
28 settled that a deficiency assessment based on a federal audit report is presumptively correct, and the

1 taxpayer bears the burden of proving that the determination is erroneous. (*Appeal of Sheldon I. and*
2 *Helen E. Brockett*, 86-SBE-109, June 18, 1986; *Todd v. McColgan* (1949) 89 Cal.App.2d 509.)
3 Unsupported assertions are not sufficient to satisfy an appellant’s burden of proof. (*Appeal of Aaron*
4 *and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence of uncontradicted, credible,
5 competent, and relevant evidence showing error in respondent’s determinations, respondent’s proposed
6 assessments must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.)
7 An appellant’s failure to produce evidence that is within her control gives rise to a presumption that such
8 evidence is unfavorable to her case. (*Appeal of Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.)

9 Timely Assessment

10 In general, the FTB must issue an NPA within four years of the date the taxpayer filed his
11 or her California return. (Rev. & Tax. Code, § 19057.) However, there are special statutes of
12 limitations when federal adjustments are involved.

13 A taxpayer is required to report federal changes to income or deductions to the FTB
14 within six months of the date the federal changes become final. (Rev. & Tax. Code, § 18622.) If the
15 taxpayer complies with that requirement, the FTB may issue the NPA within two years of the date of
16 notification, or within the general four-year period, whichever expires later. (Rev. & Tax. Code,
17 § 19059.) If the taxpayer notifies the FTB more than six months after the date the federal changes
18 became final, then the FTB may issue the NPA within four years of the date of notification. (Rev. &
19 Tax. Code, § 19060, subd. (b).) Finally, if the taxpayer fails to notify the FTB of the federal changes,
20 then the Franchise Tax Board may issue the NPA at any time. (Rev. & Tax. Code, § 19060, subd. (a);
21 *Ordlock v. Franchise Tax Board* (2006) 38 Cal.4th 897.)

22 Late Filing Penalty

23 California imposes a penalty for the failure to file a return on or before the due date,
24 unless it is shown that the failure is due to reasonable cause and not due to willful neglect. (Rev. & Tax.
25 Code, § 19131.) When respondent imposes the late filing penalty, the law presumes that the penalty was
26 imposed correctly. (*Todd v. McColgan, supra*; *Appeal of David A. and Barbara L. Beadling*, 77-SBE-
27 021, Feb. 3, 1977.) To establish reasonable cause, the taxpayer “must show that the failure to file timely
28 returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as

1 would prompt an ordinary intelligent and prudent businessman to have so acted under similar
2 circumstances.” (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) A taxpayer’s
3 misunderstanding of the law does not constitute reasonable cause. (*Appeal of Diebold, Incorporated*,
4 83-SBE-002, Jan. 3, 1983.) The mere uninformed and unsupported belief of a taxpayer, no matter how
5 sincere that belief may be that she is not required to file a tax return is insufficient to constitute
6 reasonable cause for her failure to file. (*Appeal of J. Morris and Leila G. Forbes*, 67-SBE-042, Aug. 7,
7 1967, citing *Robert A. Henningsen* (1956) 26 T.C. 528.)

8 STAFF COMMENTS

9 Respondent based its assessment on information from the IRS, and appellant has the
10 burden to produce credible evidence showing error in the FTB’s determination, including evidence of
11 her actual income. Appellant should be prepared to provide evidence to support an error in the proposed
12 assessment, including any relevant and reliable information regarding appellant’s income, expenses,
13 deductions, and sources of financial support for 2006 tax return purposes. This information should be in
14 appellant’s possession, regardless of any assertion that this information is attainable only through the
15 IRS. Furthermore, appellant should be prepared to discuss the FTB’s contention that her federal
16 assessment has not been revised, amended, or reopened by the IRS, and to explain how her participation
17 in the OIC program demonstrates error in the proposed assessment.⁵

18 Appellant’s 2006 tax return was due on April 15, 2007. Appellant filed her return in
19 April of 2008, and only after respondent issued a Request for her return. Therefore, it appears that the
20 late filing penalty is properly imposed. Appellant should also be prepared to provide any evidence
21 showing reasonable cause for the late filing of her return to support her claim for an abatement of the
22 late filing penalty. Although appellant lists her 2006 and 2007 school and work responsibilities as
23 causes for her late filing, appellant should be prepared to explain and provide evidence showing
24 precisely how those two factors impacted her ability to file a timely 2006 California return. Although
25 personal difficulties which prevent a taxpayer from filing a timely return may sometimes be considered
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27 ⁵ Although appellant asserts the IRS changes to her 2006 tax account are not final, she also suggests that she is a participant
28 in the federal OIC program. Appeals Division staff notes that participation in the federal OIC program requires a final
deficiency assessment by the IRS.

1 reasonable cause, if the difficulties simply cause the taxpayer to sacrifice the timeliness of one aspect of
2 the taxpayer's affairs to pursue other aspects, then the taxpayer must bear the consequences of that
3 choice. (*Appeal of W.L. Bryant*, 83-SBE-180, Aug. 17, 1983; *Appeal of Michael J. And Diane M.*
4 *Halaburka*, 85-SBE-025, Apr. 9, 1985; *Appeal of William T. and Joy P. Orr*, 68-SBE-010, Feb. 5,
5 1968.) Therefore, appellant should present credible proof that she did not simply sacrifice the timeliness
6 of her tax return to optimize her performance in school and work.

7 Appellant should prepare to explain why she believes that respondent's assessment was
8 not timely. Appellant did not notify respondent of the federal adjustments made to the year at issue
9 within the six-month period prescribed in R&TC section 18622 and the IRS's notification of the
10 adjustment was received more than six months after the final federal determination date. Therefore,
11 respondent had four years from the date of that notification (i.e., April 23, 2009) in which to issue its
12 proposed assessment, and it did so within that statute of limitations on May 13, 2010. Moreover,
13 respondent had four years after appellant filed her return to issue a proposed assessment. (Rev. & Tax.
14 Code, § 19057.) Appellant did not file her 2006 return until April of 2008. Consequently, respondent's
15 proposed assessment was timely.

16 Finally, appellant states that she is unable to pay, which suggests that she might be
17 eligible for the OIC program, a program which is administered by respondent, not this Board. In this
18 appeal, the Board's jurisdiction is limited to determining the correct amount of appellant's California
19 personal income tax liability. (*Appeal of Fred R. Dauberger, et. al.*, 82-SBE-082, Mar. 31, 1982.) This
20 Board cannot determine whether appellant is eligible to participate in the OIC program or whether
21 appellant may enter into an installment agreement with respondent. Once the decision in this appeal
22 becomes final, appellant may contact respondent to apply for these programs.

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26 Glass_ss

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