

1 Mai C. Tran
Tax Counsel
2 Board of Equalization, Appeals Division
450 N Street, MIC: 85
3 PO Box 942879
Sacramento CA 95814
4 Tel: (916) 324-8244
Fax: (916) 324-2618
5

6 Attorney for the Appeals Division

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

10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **DAXIUS DONALD GREGORY**) Case No. 625150
13)
14)

15 Proposed
Assessment

16
17 Year
2008

Tax
\$ 257

Late Filing
Penalty
\$ 100

18
19 Representing the Parties:

20 For Appellant: Daxius Gregory

21 For Franchise Tax Board: Donna L. Webb, Staff Operation Specialist
22

23 QUESTIONS: (1) Whether appellant has established error in respondent's proposed assessment;
24 (2) Whether appellant has shown reasonable cause to abate the late filing penalty;
25 and
26 (3) Whether the Board should impose a frivolous appeal penalty.¹
27

28 ¹ It appears that this is appellant's first appeal of this nature before the Board.

1 HEARING SUMMARY

2 Background

3 Appellant has not filed a timely California income tax return for the 2008 tax year.²
4 Respondent received wage and salary information from the Employment Development Department
5 (EDD) through its Integrated Non-Filer Compliance Program indicating that appellant earned
6 sufficient income from Cal-India Foods International to prompt a return-filing requirement.³ On
7 November 16, 2010, respondent issued a Request for Tax Return, requiring appellant to respond by
8 December 22, 2010. In response, appellant forwarded a document dated December 21, 2010, entitled
9 "Certificate of Fraudulent Form W-2, Wage and Tax Statement and Official Criminal Complaint".
10 After reviewing the submission, respondent issued a letter to appellant informing him of respondent's
11 assessment authority and directing appellant to information regarding frivolous tax arguments on
12 respondent's website. (Resp. Op. Br., p. 1-2, Ex. A, B, C & D.)

13 Respondent issued a Determination of Filing Requirement dated May 19, 2011, to
14 appellant stating that appellant was required to file his 2008 tax return by June 20, 2011. Respondent
15 did not receive a response, and issued a Notice of Proposed Assessment (NPA) for the 2008 tax year
16 on October 3, 2011, based on appellant's income of \$22,884 in wages reported by Cal-India Foods
17 International. Respondent applied the California standard deduction of \$3,692, resulting in taxable
18 income of \$19,192 and proposed tax of \$356, which was reduced by an exemption of \$99, for a total
19 tax due of \$257. Respondent also imposed a late filing penalty of \$100, plus interest. (Resp. Op. Br.,
20 p. 2, Exhs. E & F.)

21 Appellant timely filed a protest of the NPA. Respondent acknowledged appellant's
22 protest and requested additional information from appellant because it was unclear whether appellant
23 was protesting the NPA. Appellant responded by requesting a due process hearing, proof of
24 respondent's jurisdiction, and a redress of grievances. Respondent subsequently issued a Notice of
25 Action (NOA) on July 12, 2012, affirming the NPA. (Resp. Op. Br., p. 2, Exhs. G, H, I, J, K & L.)
26

27 ² According to respondent, federal records indicate that appellant has not filed a 2008 federal income tax return.

28 ³ According to appellant's 2008 Internal Revenue Service Wage and Income Transcript, appellant had \$22,884 of wage compensation from Cal-India Foods International in that year.

1 Appellant then filed this timely appeal.

2 Contentions

3 Appellant's Opening Brief

4 First, appellant appears to contend that the proposed assessment was made without
5 probable cause and that respondent failed to produce any evidence of a lawful assessment. Second,
6 appellant questions the Form W-2 information because he claims that he did not have a voluntary
7 agreement in place with the company and he submits a "corrected" Substitute for Form W-2. Third,
8 appellant contends that he was not "engaged in a trade or business" and he was not an "employee".
9 Fourth, appellant contends that he is a nonresident with no earnings from the United States and
10 therefore he is a nontaxpayer and not subject to the Internal Revenue Code (IRC). Fifth, appellant
11 contends that he is a nonresident of the "State of California" because he lives in Riverside, "Republic of
12 California". Sixth, appellant contends that he is not a taxpayer and respondent has not produced any
13 evidence to establish that appellant is a taxpayer. Appellant appears to contend that he has diplomatic
14 status as an "agent of God's government here on earth". (Appeal Letter, pp 1-6., Exhs. 1-5.)

15 Respondent's Opening Brief

16 Respondent contends that appellant refuses to file a 2008 return for which he is legally
17 obligated to file under the California Personal Income Tax Law and attempts to avoid tax through his
18 assertion of frivolous arguments. Respondent contends that appellant's arguments have been
19 determined to be frivolous, citing IRS Notice 2008-14 and IRS Notice 2010-33. Respondent further
20 contends that appellant has not met his burden of proof in showing error in respondent's proposed
21 assessment. Respondent notes that appellant has never denied receiving the income the payor reported
22 paying to him in 2008, which is the basis of the proposed assessment for 2008.

23 Respondent also notes that the Board's Rules of Tax Appeals, as set forth in California
24 Code of Regulations, title 18 (Regulation) section 5412, subdivision (b), expressly enumerate the issues
25 the Board will not consider, including any alleged violations of substantive or procedural rights based
26 on law that does not apply to the assessment of tax. Respondent contends that it provided a reasonable
27 foundation for its proposed assessment and appellant's mere allegation that the assessment is arbitrary
28 does not carry appellant's burden of proof in demonstrating error in the proposed assessment. (Resp.

1 Op. Br., pp. 3-4, Exhs. M & N.)

2 With regard to the late filing penalty, respondent contends that appellant has not
3 established reasonable cause for an abatement of the penalty. (Resp. Op. Br., p. 5.)

4 In addition, respondent notes that the Board may impose a frivolous appeal penalty
5 pursuant to R&TC section 19714 where an appeal before the Board is instituted or maintained
6 primarily for delay, an appellant's position on appeal is frivolous or groundless, or an appellant
7 unreasonably failed to pursue administrative remedies. Respondent also contends that an appellant's
8 prior pattern and practice of conduct is relevant in determining whether to apply the frivolous appeal
9 penalty, citing the *Appeal of Alfons Castillo*, 92-SBE-020, decided by the Board on July 20, 1992.⁴ In
10 this matter, respondent notes that appellant has not filed a California income tax return for any tax year
11 and respondent has issued filing enforcement NPAs for 2008, 2009, and 2010. Respondent further
12 notes that the 2009 and 2010 tax years have been protested by appellant. (Resp. Op. Br., p. 5.)

13 Appellant's Reply Brief

14 Appellant contends that respondent failed to provide evidence showing that appellant is
15 a taxpayer or "positive law" that he has a tax liability. Appellant contends that respondent failed to
16 demonstrate that appellant is "DAXIUS GREGORY". Appellant further contends that respondent
17 failed to demonstrate that the Internal Revenue Code is positive law. Appellant contends that
18 respondent failed to demonstrate that appellant resides in the District of Columbia. Appellant also
19 contends that respondent failed to provide any evidence that appellant is an "alien" which he alleges is
20 the only type of "resident" or "taxpayer" subject to federal income taxes. Appellant further contends
21 that respondent did not provide an itemized bill signed under penalty of perjury and under commercial
22 liability affirming that the debt purportedly owed is true and lawful. In addition, appellant contends
23 that respondent failed to address appellant's legal arguments or to provide legal authority for
24 respondent's position. (App. Reply Br., pp. 1-4, Exhs. 1-5.)

25 ///

26 ///

27 _____
28 ⁴ State Board of Equalization ("SBE") decisions generally may be viewed on the Board's website (www.boe.ca.gov).

1 Applicable Law

2 Proposed Assessment

3 R&TC section 17041 imposes a tax “. . . upon the entire taxable income of every
4 resident of this state . . .” and upon the entire taxable income of every nonresident or part-year resident
5 which is derived from sources in this state. R&TC section 18501 requires every individual subject to
6 the Personal Income Tax to make and file a return with respondent “stating specifically the items of the
7 individual’s gross income from all sources and the deductions and credits allowable . . .” R&TC
8 section 19087, subdivision (a), provides:

9 If any taxpayer fails to file a return, or files a false or fraudulent return with intent to
10 evade the tax, for any taxable year, the Franchise Tax Board, at any time, may require a
11 return or an amended return under penalties of perjury or may make an estimate of the net
12 income, from any available information, and may propose to assess the amount of tax,
13 interest, and penalties due.

14 If respondent makes a tax assessment based on an estimate of income, respondent’s
15 initial burden is to show why its assessment is reasonable and rational. (*Todd v. McColgan* (1949)
16 89 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.) Federal courts have
17 held that the taxing agency need only introduce some evidence linking the taxpayer with the unreported
18 income. (See *Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932.) Respondent’s use of information
19 from the EDD to estimate an appellant’s taxable income when an appellant failed to file his own return
20 is a reasonable and rational method of estimating taxable income. (See *Appeals of Walter R. Bailey*,
21 92-SBE-001, Feb. 20, 1992; *Appeals of R. and Sonja J. Tonsberg*, 85-SBE-034, Apr. 9, 1985.)

22 Once respondent has met its initial burden, the assessment is presumed correct and an
23 appellant has the burden of proving it to be wrong. (*Todd v. McColgan, supra*; *Appeal of Michael E.*
24 *Myers, supra*.) Unsupported assertions are not sufficient to satisfy an appellant’s burden of proof.
25 (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence of uncontradicted,
26 credible, competent, and relevant evidence showing error in respondent’s determinations, such
27 proposed assessments must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov.
28 18, 1980.) An appellant’s failure to produce evidence that is within his control gives rise to a
presumption that such evidence is unfavorable to his case. (*Appeal of Don A. Cookston*, 83-SBE-048,
Jan. 3, 1983.)

1 Constitutional/Due Process Issues

2 The Board is precluded from determining the constitutional validity of California
3 statutes, and has an established policy of declining to consider constitutional issues. (Cal. Const., art
4 III, § 3.5; *Appeal of Aimor Corp.*, 83-SBE-221, Oct. 26, 1983; *Appeals of Walter R. Bailey, supra.*) In
5 *Bailey, supra*, the Board stated:

6 [D]ue process is satisfied with respect to tax matters so long as an opportunity is given to
7 question the validity of a tax at some stage of the proceedings. It has long been held that
8 more summary proceedings are permitted in the field of taxation because taxes are the
9 lifeblood of government and their prompt collection is critical.

9 Late Filing Penalty

10 R&TC section 19131 provides that a late filing penalty shall be imposed when a
11 taxpayer fails to file a tax return on or before its due date, unless the taxpayer establishes that the late
12 filing was due to reasonable cause and was not due to willful neglect. The penalty is calculated as
13 5 percent of the tax due for each month that a valid tax return is not filed after it is due, not to exceed
14 25 percent of the tax. (Rev. & Tax. Code, § 19131, subd. (a).) In the case of the failure to file a return
15 within 60 days of the due date, determined with regard to extensions, the amount of the penalty is the
16 lessor of \$100 or 100 percent of the outstanding tax liability. (Rev. & Tax. Code, § 19131, subd. (b).)
17 To establish reasonable cause, the taxpayer “must show that the failure to file timely returns occurred
18 despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an
19 ordinary intelligent and prudent businessman to have so acted under similar circumstances.” (*Appeal of*
20 *Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.)

21 Frivolous Appeal Penalty

22 The Board may impose a penalty of up to \$5,000 whenever it appears to the Board that
23 proceedings before it have been instituted or maintained primarily for delay or that the position is
24 frivolous or groundless. (Rev. & Tax. Code, § 19714; Cal. Code Regs., tit. 18, § 5454.) The following
25 factors are considered in determining whether, and in what amount, to impose the penalty: (1) whether
26 an appellant is making arguments that have been previously rejected by the Board in a Formal Opinion
27 or by courts, (2) whether an appellant is repeating arguments that he or she made in prior appeals,
28 (3) whether an appellant filed the appeal with the intent of delaying legitimate tax proceedings or the

1 legitimate collection of tax owed, and (4) whether an appellant has a history of filing frivolous appeals
2 or failing to comply with California’s tax laws. (Cal. Code Regs., tit. 18, § 5454.) The Board may
3 consider other relevant factors in addition to the factors listed above. (*Id.*)

4 The Board previously considered arguments similar to appellant’s arguments and has
5 rejected each of the arguments as frivolous and without merit. (See *Appeals of Robert E. Wesley, et al.,*
6 *supra*; *Appeal of Michael E. Myers, supra*; *Appeal of Alfons Castillo, supra*; *Appeals of Walter R.*
7 *Bailey, supra*; and *Appeals of Fred R. Dauberger, et al., 82-SBE-082, Mar. 31, 1982.*)

8 STAFF COMMENTS

9 Respondent has provided a reasonable foundation for the proposed assessment, based on
10 wage information from the EDD. Appellant has not provided any evidence demonstrating error in
11 respondent’s determination or any basis for abatement of the late filing penalty.

12 If either party has any additional evidence to present, they should provide their evidence
13 to the Board Proceedings Division at least 14 days prior to the oral hearing pursuant to Regulation
14 section 5523.6.⁵

15 Based on the facts and circumstances, including the apparent frivolous nature of the
16 arguments presented by appellant, and the appeal and compliance history of appellant, the Board may
17 wish to consider whether the imposition of a frivolous appeal penalty of \$750 is appropriate.

18 ///

19 ///

20 ///

21 Gregory_mt

22
23
24
25
26
27
28

⁵ Evidence exhibits should be sent to: Claudia Madrigal, Appeals Analyst, Board Proceedings Division, State Board of Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.