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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**²
12 **LAWRENCE A. GRUBER, JR.**¹) Case No. 598287

14 Year Claim
15 2009 For Refund
16 \$1,313.25³

16 Representing the Parties:

17 For Appellant: Lawrence A. Gruber, Jr.
18 For Franchise Tax Board: Q. Samantha Nguyen, Legal Assistant

20 QUESTION: Whether appellant has shown reasonable cause for a refund of the notice and demand
21 (demand) penalty.

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24 ¹ Appellant lists a Post Office Box in Plumas County, California, as his mailing address.

25 ² This appeal was originally set for oral hearing on September 12, 2012. It was removed from that calendar and scheduled as
26 a nonappearance item for the Board's October 23-25, 2012 meeting, because appellant failed to respond to the hearing notice.
27 Later, at appellant's request, this appeal was set for oral hearing on November 13, 2012. Appellant then requested a
28 postponement of the matter, due a scheduling conflict. The appeal was then rescheduled to the Board's January 15-17, 2013
meeting.

³ The claim for refund is for a notice and demand (demand) penalty. Although appellant references a \$1,333.00 charge, the record shows that the penalty, after revision is \$1,313.25.

1 HEARING SUMMARY

2 Background

3 Appellant failed to file a 2009 California tax return by the original due date of April 15,
4 2010, or the extended due date of October 15, 2010. (FTB opening brief (FTB OB), p. 1.) Having
5 received information from various reporting sources that appellant received sufficient income to trigger
6 the 2009 filing requirement,⁴ the FTB issued a notice dated January 25, 2011, demanding that, by
7 March 2, 2011, appellant file a return or explain why no return was required. (*Id.* & Ex. B.) The
8 demand notice specifically stated that (i) if appellant did not respond to the demand notice by March 2,
9 2011, the FTB would impose a demand penalty, which would be assessed at 25 percent of the tax owed
10 without regard to payments, and (ii) appellant must file a response to the FTB's demand notice even if
11 appellant was due a refund. (*Id.*) The demand notice was mailed to the same address that appellant is
12 currently using on appeal, the appeal file has no record indicating that the United States Postal Service
13 (Post Office) returned the demand notice as undelivered, and appellant has not alleged such on appeal.
14 (*Id.*)

15 When appellant neither filed a return nor demonstrated why a return was not required by
16 the deadline of March 2, 2011, the FTB issued a Notice of Proposed Assessment (NPA) on March 28,
17 2011, based on the income information it received from the various reporting sources. (FTB OB,
18 Ex. C.) The NPA set forth a proposed assessment of \$8,633.57, which consisted of a proposed
19 additional tax of \$6,686.00, a late filing penalty of \$147.50, a demand penalty of \$1,671.50, a filing
20 enforcement fee of \$100.00, and interest of \$28.57.⁵ The NPA was mailed to the same address that
21 appellant is currently using on appeal, and the appeal file has no record indicating that the Post Office
22 returned the NPA as undelivered. (*Id.*)

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25 ⁴ For 2009, the Franchise Tax Board (FTB or respondent) estimated that appellant had income of \$98,461, based on
26 Employment Development Department (EDD) records and/or Form 1099s, which showed that appellant received the
27 following: (i) \$93,783 in wages from Union Pacific Railroad Co., (ii) \$155 in wages from the Plumas County Board of
28 Education, (iii) \$23 in interest from Bank of America, N.A., and (iv) \$4,500 in income from TD Ameritrade Clearing Inc.

⁵ The NPA issued by the FTB also reflected appellant's withholding credits totaling \$6,096.00. As a result, the NPA
proposed additional tax of \$6,686.00 and identified (a) a proposed tax liability of \$590.00 (i.e., \$6,686.00 of tax - \$6,096.00
of withholding credits) and (b) a total of tax, penalties, interest, and fees due of \$2,537.57 (i.e., \$8,633.57 total proposed
assessment - \$6,096.00 of withholding credits).

1 Appellant filed his 2009 California return on or about July 26, 2011,⁶ reporting (i) a
2 taxable income of \$79,765, (ii) a total tax liability of \$5,253, (iii) withholdings of \$6,547, and (iv) an
3 overpayment of \$1,294. (FTB OB, p. 2 & Ex. D.)

4 The FTB processed appellant's return and abated the late filing penalty and the filing
5 enforcement fee. (FTB OB, p. 2.) In addition, based on the tax that appellant reported on his 2009
6 return, the FTB reduced the demand penalty to \$1,313.25. After applying payments and/or credits,
7 appellant had a balance due, which he later paid in full. (*Id.*)

8 On September 2, 2011, appellant mailed a letter to the FTB, requesting that the demand
9 penalty be abated. (*Id.*) Afterwards, on September 28, 2011, appellant telephoned the FTB, again
10 requesting that the demand penalty be abated. (*Id.*) The FTB treated appellant's correspondence as a
11 claim for refund, which the FTB denied on November 8, 2011. (*Id.*) Appellant then filed this timely
12 appeal.

13 Contentions

14 Appellant's Appeal Letter

15 Appellant makes four arguments. First, appellant asserts that (a) the general timeframe
16 for filing a claim for refund under federal law is three years, and (b) federal law trumps state law. Based
17 on the foregoing assertions, appellant argues that his claim for refund should be granted.

18 Second, appellant argues that the State of California has "failed to put its financial house
19 in order" and, in comparison, appellant is a "financially responsible person." Based on the foregoing,
20 appellant asserts that he is entitled to a refund.

21 Third, appellant argues that he timely made payments (through withholdings) and, thus,
22 should not be penalized by the imposition of a demand penalty.

23 Finally, appellant argues that in 2009 and 2010, he was a "responsible person" and "put
24 many things on hold" to care for his son's legal problems in Nevada, which benefited society at large.
25 Because of these actions, appellant argues that he is entitled to a refund of the demand penalty.

26 FTB's Opening Brief

27 The FTB contends that the demand penalty was properly imposed and appellant has not
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⁶ Appellant's return is dated July 19, 2011; the FTB states a filing date of July 26, 2011.

1 shown reasonable cause for an abatement of that penalty. (FTB OB, p. 3.) The FTB also contends that
2 the demand notice complied with the provisions of California Code of Regulations, title 18, section
3 (Regulation) 19133, subdivision (b), given that the FTB previously issued an NPA for the 2005 tax year,
4 after appellant failed to timely respond to a 2005 Demand for Tax Return. (*Id.*)

5 As for appellant's first argument that the applicable time for filing a claim for refund is
6 determined under federal law, the FTB asserts that the applicable law for determining the timeliness of a
7 refund of California income tax is based on R&TC section 19306 (not federal law). (*Id.*) The FTB
8 concedes that appellant's claim for refund was timely filed under R&TC section 19306. The FTB
9 argues, however, that just because appellant filed a timely claim for refund under R&TC section 19306
10 does not serve as reasonable cause for an abatement of the demand penalty. (*Id.*)

11 As for appellant's second argument that appellant is fiscally responsible and California is
12 not fiscally responsible, the FTB asserts that appellant's financial status, as opposed to his perceived
13 financial status of the State of California, is not reasonable cause to abate the demand penalty. (*Id.* p. 4)

14 Next, in relation to appellant's third argument that he timely paid his taxes (through
15 withholdings) and, thus, should not be penalized, the FTB asserts that "[a]ppellant's tax withholding
16 practice is not reasonable cause for failing to timely respond to a Demand." (*Id.*)

17 Finally, as for appellant's argument that he is entitled to a refund because he took care of
18 his son in 2009 and 2010, the FTB states that personal difficulties that prevent a taxpayer from timely
19 filing a return (or from responding to a demand) may be considered reasonable cause for relief from the
20 demand penalty in some circumstances. (*Id.*) The FTB asserts, however, that if a taxpayer's difficulties
21 simply cause the taxpayer to sacrifice the timeliness of one aspect of his affairs to pursue other aspects,
22 the taxpayer must bear the consequences of that choice. (*Id.*) As to the facts at hand, the FTB contends
23 that, by appellant's own admission, he spent all available time tending to his son, and consequently put
24 "many things on hold" to be a responsible parent. The FTB argues that although appellant's actions may
25 be admirable, appellant must bear the consequences of his choice to put "many things on hold", which
26 includes the imposition of the demand penalty.

27 Appellant's Reply Brief

28 Appellant makes the following five arguments:

- 1 1. The State of California has not been harmed.
- 2 2. Appellant asserts that he has paid, re-paid, and over-paid his taxes to the State of California.
- 3 3. The employment position which appellant holds is one that requires him to be out-of-town or
- 4 out-of-state several times a week. Appellant states that he is on-call and given short notice to
- 5 be at his place of employment, sometimes over fifty miles distant from his residence.
- 6 Appellant asserts that he has no “schedule”, with no paid holidays and that it is extremely
- 7 difficult to maintain a “normal, balanced” lifestyle when it is not uncommon for him to arrive
- 8 home at 2:00 a.m., and subsequently go to work before noon.
- 9 4. Appellant argues that it is extremely demanding and punishing to have the same life that a
- 10 Monday through Friday, 9:00 a.m. to 5:00 p.m., employee has and that sleep deprivation is a
- 11 significant problem.
- 12 5. On the basis of equity, particularly given that the State of California has not been harmed,
- 13 appellant contends that he is clearly entitled to his overpayment to the State of California and
- 14 that the payment is overdue.

15 Applicable Law

16 California imposes a penalty for the failure to file a return or provide information upon
17 the FTB’s demand to do so, unless reasonable cause prevented the taxpayer from responding to the
18 demand. (Rev. & Tax. Code, § 19133.) The demand penalty is computed at 25 percent of the amount of
19 the taxpayer’s total tax liability, *which is determined without regard to payments or credits.* (*Appeal of*
20 *Elmer R. and Barbara Malakoff*, 83-SBE-140, June 21, 1983.)⁷ The burden is on the taxpayer to prove
21 that reasonable cause prevented him/her from responding to the demand. (*Appeal of Kerry and Cheryl*
22 *James*, 83-SBE-009, Jan. 3, 1983.) Unsupported assertions are not sufficient to carry a taxpayer’s
23 burden of proof. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) A taxpayer’s
24 illness or incapacity generally does not prevent the taxpayer from filing returns where the taxpayer is
25 able to continue his or her business affairs. (*Wright v. Commissioner*, T.C. Memo 1998-224.) Ignorance
26 or a misunderstanding of the law generally does not excuse a taxpayer’s noncompliance with California
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28 ⁷ Board of Equalization cases are generally available for viewing on the Board’s website (www.boe.ca.gov).

1 tax laws. (*Appeal of Diebold, Incorporated*, 83-SBE-002, Jan. 3, 1983.)

2 The FTB will only impose a demand penalty if the taxpayer fails to respond to a current
3 Demand for Tax Return and the FTB issued an NPA under the authority of R&TC section 19087,
4 subdivision (a), after the taxpayer failed to timely respond to a Request for Tax Return or a Demand for
5 Tax Return at any time during the four taxable years preceding the year for which the current Demand
6 for Tax Return is being issued. (Cal. Code Regs., tit. 18, § 19133, subd. (b).)

7 STAFF COMMENTS

8 At the hearing, appellant should be prepared to explain any other circumstances that he
9 believes may constitute reasonable cause for his failure to respond to the demand notice. If appellant
10 has any further evidence that he wishes to submit, pursuant to (the Rules for Tax Appeals) Regulation
11 5523.6, appellant should provide his evidence to this Board’s Board Proceedings Division at least 14
12 days prior to the oral hearing.⁸

13 The Appeals Division staff notes that the FTB’s demand notice appears to comply with
14 the requirements of Regulation 19133, subdivision (b), given that the FTB previously issued an NPA for
15 the 2005 tax year, after appellant failed to timely respond to a 2005 Demand for Tax Return.

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⁸ 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.