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

10 In the Matter of the Appeal of:) **HEARING SUMMARY²**
11) **PERSONAL INCOME TAX APPEAL**
12 **MICHAEL O. GUALCO AND**) Case No. 640336
13 **REX-ANN S. GUALCO¹**)

	<u>Year</u>	<u>Claims for Refund</u>
	2008	\$ 8,587 ³
	2009	\$10,829 ⁴

18 Representing the Parties:

19 For Appellants: Michael O. Gualco and Rex-Ann S. Gualco
20 For Franchise Tax Board: Mary Yee, Tax Counsel III

22 **QUESTIONS:** (1) Whether appellants have shown reasonable cause for an abatement of the late

24 ¹ Appellants reside in Sacramento County.

25 ² This appeal was originally scheduled for an oral hearing on June 11, 2013. Appellants failed to timely respond to the
26 hearing notice and the matter was rescheduled for the July 17-19, 2013 nonappearance consent calendar. Appellants
27 subsequently contacted the Board Proceedings Division to request an oral hearing and the matter was rescheduled as an oral
28 hearing on the August 13, 2013 calendar.

³ This amount includes a late filing penalty of \$1,168.50 and a demand penalty of \$7,418.50.

⁴ This amount includes a late filing penalty of \$2,727.00 and a demand penalty of \$8,102.00.

1 filing penalties; and

2 (2) Whether appellants have shown reasonable cause for an abatement of the notice
3 and demand (demand) penalties.

4 HEARING SUMMARY

5 Background

6 2008 Tax Year

7 The Franchise Tax Board (respondent or FTB) received information indicating that
8 appellant-husband resided in California and received sufficient income to require him to file a 2008
9 California tax return. When appellant-husband did not file a tax return, on March 16, 2010, respondent
10 mailed a Demand for Tax Return (Demand) to his Sacramento, California address, requiring him to
11 respond by April 21, 2010, either by filing a 2008 return or by explaining why a return was not required.
12 He did not respond by the due date in the Demand, and respondent issued a Notice of Proposed
13 Assessment (NPA) to appellant-husband on June 1, 2010. On the NPA, respondent proposed a tax
14 liability of \$42,369.00, a late filing penalty of \$10,592.25, a demand penalty of \$10,592.25, a filing
15 enforcement fee of \$113.00, and applicable interest. (Resp. Op. Br., pp. 1-2, Exhs. A & B.)

16 Respondent's records reflect that appellants made the following estimated tax payments:
17 \$5,000 on June 15, 2008; \$10,000 on September 15, 2008; and \$8,000 on January 15, 2009.

18 Respondent's records also reflect appellants' April 15, 2009 extension payment of \$2,000.00 and the
19 following bill payments: \$12,583.43 on April 15, 2011; \$2,464.07 on May 15, 2011; \$4,928.14 on
20 June 15, 2011; \$10,686.06 on July 15, 2011; and \$4,428.75 on August 4, 2011. These payments totaled
21 \$60,090.45. (Resp. Op. Br., p. 2, Exh. C.)

22 According to respondent's records, appellants' 2008 tax return was filed on
23 December 27, 2011, with an addendum stating that the return was prepared using various schedules
24 from Turbo Tax and information provided by an FTB employee. On the return, appellants self-assessed
25 a total tax liability of \$30,624⁵ and reported estimated tax payments of \$60,090.⁶ Respondent processed
26

27 ⁵ Appellants reported the incorrect tax from the tax rate schedule. Respondent corrected the total tax liability to \$29,674.

28 ⁶ Respondent's records only reflect \$25,000 in estimated and extension payments. The \$60,090 reported amount appears to include the estimated and extension payments totaling \$25,000 and the bill payments totaling \$35,090.

1 appellants' 2008 tax return and, based on appellants' self-assessed tax, reduced the late filing penalty to
2 \$1,168.50 and the demand penalty to \$7,418.50. Respondent also imposed an underpayment of
3 estimated tax penalty of \$398.41, a collection cost recovery fee of \$170.00, and a lien fee of \$16.00.
4 Respondent issued a Return Information Notice (RIN) on March 19, 2012, to appellants, explaining
5 these adjustments. As requested by appellants, respondent applied the overpayment for the 2008 tax
6 year to appellants' 2009 tax year, with an effective date of March 12, 2012. (Resp. Op. Br., Exhs. C &
7 D; Appeal Letter, Exh. 2.)

8 2009 Tax Year

9 Respondent received information indicating that appellant-husband resided in California
10 and received sufficient income to require him to file a 2009 California tax return. When appellant-
11 husband did not file a 2009 income tax return, on January 19, 2011, respondent mailed a Demand to his
12 Sacramento, California address, requiring him to respond by February 23, 2011, either by filing a 2009
13 return or by explaining why a return was not required. He did not respond by the due date in the
14 Demand, and respondent issued an NPA to appellant-husband on March 21, 2011. On the NPA,
15 respondent proposed a tax liability of \$43,286.00, a late filing penalty of \$10,821.50, a demand penalty
16 of \$10,821.50, a filing enforcement fee of \$100.00, and applicable interest. (Resp. Op. Br., pp. 2-3,
17 Exhs. E & F.)

18 Respondent's records reflect that appellants made the following estimated tax payments:
19 \$1,500 on April 15, 2009; \$4,000 on June 15, 2009; \$5,000 on September 15, 2009; and \$6,000 on
20 January 15, 2010. Respondent's records also reflect that appellants made an extension payment of
21 \$5,000 on April 15, 2010. These payments totaled \$21,500. (Resp. Op. Br., p. 3, Exh. G.)

22 According to respondent's records, appellants' 2009 tax return was filed on January 6,
23 2012, with an addendum stating that the return was prepared using various schedules from Turbo Tax
24 and information provided by an FTB employee. Appellants self-assessed a total tax liability of \$32,367⁷
25 and reported estimated tax payments of \$50,966.⁸ Respondent processed appellants' 2009 tax return
26

27 ⁷ Appellants appear to have reported the wrong amount of tax. Respondent corrected the total tax liability to \$32,408.

28 ⁸ Respondent's records only reflect \$21,500 in estimated and extension tax payments. It is unclear how appellants calculated this \$50,966 amount.

1 and, based on the self-assessed tax, reduced the late filing penalty to \$2,727 and the demand penalty to
2 \$8,102. Respondent issued a RIN on March 19, 2012, to appellants in which it explained these
3 adjustments. On March 12, 2012, appellants' 2009 tax liability was paid in full with a \$20,499.65 credit
4 transferred from the 2008 tax year and a \$2,625.97 credit transferred from the 2010 tax year. (Resp. Op.
5 Br., p. 3, Exhs. H & G; Appeal Letter, Exh. 3.)

6 Both Years

7 Appellants requested by letter dated April 25, 2012, an abatement of the late filing and
8 demand penalties for both years. Respondent treated the letter as a claim for refund. Respondent denied
9 appellants' claims for refund on July 12, 2012. (Appeal Letter, Exhs. 2-5.)

10 Respondent reviewed appellants' Internal Revenue Service (IRS) Account Transcripts for
11 the 2008 and 2009 tax years to determine whether appellants paid their 2008 and 2009 federal tax
12 liabilities on time and whether the IRS assessed and abated penalties for reasonable cause. Respondent
13 notes that appellants' federal Account Transcripts reflect that appellants also filed untimely federal
14 returns for the 2008 and 2009 tax years, which were both received by the IRS on June 16, 2011. For the
15 2008 tax year, the IRS imposed an underpayment of estimated tax penalty, a late filing penalty, and an
16 underpayment of tax penalty, which have not been abated. For the 2009 tax year, the IRS imposed a bad
17 check penalty, an underpayment of estimated tax penalty, and a late filing penalty, which have not been
18 abated. (Resp. Op. Br., p. 3, Exhs. I & J.)

19 This timely appeal then followed.

20 Contentions

21 Appellants' Appeal Letter

22 Appellants contest the late filing and demand penalties imposed for the 2008 and 2009
23 tax years. Appellants contend that reasonable cause exists to support an abatement of the penalties
24 based on their April 25, 2012 letter. In that letter, appellants contend that they reasonably believed that
25 they filed their 2008 and 2009 returns timely. Appellants contend that, for the 2008 tax year, appellant-
26 wife decided to file their tax return electronically, rather than by mail. Appellants state that they were
27 on extension for the 2008 tax year and appellant-wife timely filed their 2008 return electronically in
28 August 2009. Appellants further state that they were similarly on extension for the 2009 tax year and

1 appellant-wife timely filed their 2009 return electronically in August 2010. Appellants contend that they
2 learned for the first time on November 18, 2011, that their 2008 and 2009 tax returns had not been
3 received by the FTB when an FTB employee contacted them by telephone. Appellants state that they
4 did not receive any mailed correspondence from the FTB regarding the apparent failure to file their 2008
5 and 2009 tax returns prior to November 2011. (Appeal Letter, Exh. 1.)

6 Appellants state that they worked to immediately correct the situation by “refiling” their
7 tax returns once they discovered the unfiled returns. Appellants contend that their situation was further
8 complicated by a February 2011 computer crash. Appellants contend that their tax information stored
9 on the computer was lost. Appellants state that they did not maintain a copy of their digital records on a
10 backup hard drive and had to gather data to prepare the returns again. Appellants state that, although
11 they attempted to access the 2008 and 2009 records on a new computer, they were unable to do so.
12 Appellants state that they even contacted a computer technician in an attempt to retrieve the lost
13 information to no avail. Despite the lost records, appellants were able to file their returns within a
14 month of being contacted by the FTB employee. Appellants contend that there was no additional tax for
15 either the 2008 and 2009 tax years due at that time. (Appeal Letter, Exh. 1.)

16 Appellants contend that they exercised ordinary business care and prudence in their
17 original efforts to file the tax returns and in their response to discovering that their returns had not been
18 received by the FTB, citing the *Appeal of Stephen C. Bieneman*, 82-SBE-148, decided by the Board on
19 July 26, 1982, and the *Appeal of Howard G. and Mary Tons*, 79-SBE-027, decided by the Board on
20 January 9, 1979.⁹ Appellants assert that appellant-wife previously filed all of their returns on a timely
21 basis and she believed that she timely filed the 2008 and 2009 tax returns electronically. Appellants
22 contend that, once appellants discovered that the FTB had not received the returns, they made every
23 effort to become compliant as quickly as possible, including contacting a computer technician. As such,
24 appellants contend that they have shown reasonable cause to abate the penalties as they acted promptly
25 and filed their tax returns after being notified that their returns had not been received by the FTB, citing
26 the *Appeal of Joseph W. and Elsie M. Cumming*, 60-SBE-040, decided by the Board on December 13,
27

28 ⁹ Board of Equalization cases may be found on the Board’s website: www.boe.ca.gov.

1 1960, and *the Appeal of J.B. Ferguson*, 58-SBE-024, decided by the Board on September 15, 1958.
2 (Appeal Letter, Exh. 1.)

3 Appellants further contend that they did not receive a notice from the FTB notifying them
4 that their 2008 and 2009 returns had not been filed. Appellants argue that, given their previous
5 compliance history, no reasonable person would have anticipated any further communication regarding
6 those tax years. In addition, appellants contend that they have had their mail misdelivered or possibly
7 stolen on occasion. Appellants also state that they often receive mail directed at other people who live
8 in the neighborhood. Appellants state that appellant-wife previously notified the local United States
9 Post Office (USPO) regarding these problems. Appellants contend that, had they received any FTB
10 notice, they would have responded in as timely a manner as when they responded to the telephone call
11 from the FTB employee. Appellants contend that they never intended to disregard the tax filing
12 obligation. Appellants state that they have not been able to determine why the electronically-filed tax
13 returns were not received by the FTB. (Appeal Letter, Exh. 1.)

14 Appellants also state that they have always made a good faith effort to comply with the
15 law and pay taxes timely. They state that appellant-husband is essentially self-employed and, since he
16 obtained that status, appellants always made quarterly estimated payments as required. Appellants assert
17 that, when they were notified of a tax lien and appellant-husband's draw was attached, they did not fight
18 the attachment. Appellants state that they worked with respondent's employee to provide all the
19 information requested by the FTB. Appellants contend that they never tried to hide income or seek
20 deductions to which they were not entitled. Along with their appeal letter and protest letter, appellants
21 submit copies of the RINs and the FTB's denial of refund notices. (Appeal Letter, Exhs. 2-5.)

22 Respondent's Opening Brief

23 Respondent contends that it properly imposed the late filing penalty for both years
24 pursuant to R&TC section 19131 because appellants did not file their 2008 and 2009 tax returns by the
25 due dates. For 2008, respondent computed the \$1,168.50 late filing penalty based on the self-assessed
26 unpaid tax of \$4,674.00¹⁰ (i.e., \$4,674.00 x 25% = \$1,168.50). For 2009, respondent computed the
27

28 ¹⁰ This amount is calculated by subtracting the estimated and extension payments of \$25,000 from appellant's tax of \$29,674.

1 \$2,727 late filing penalty based on the self-assessed unpaid tax of \$10,908¹¹ (i.e., \$10,908 x 25% =
2 \$2,727). Respondent contends that, when it imposed a late filing penalty, the law presumes that the
3 penalty is correct. Respondent further contends that appellants have not shown that reasonable cause
4 exists to support an abatement of the late filing penalties. Respondent contends that, although appellants
5 state they believed their 2008 and 2009 tax returns were timely electronically filed, respondent has no
6 record of any electronic filing attempts or paper returns filed by appellants corresponding to the August
7 2009 and August 2010 time frames. Respondent also contends that, while appellants had a balance due
8 for both the 2008 and 2009 tax years at the time appellants state that they e-filed their tax returns,¹² there
9 are no records of payments made during those time frames to indicate that a payment was sent in with
10 the returns.¹³ Respondent asserts that, if appellants exercised ordinary business care and prudence,
11 appellants would have reviewed their bank accounts from which the payment of the tax liability was
12 expected to ensure that their tax balance was paid. Respondent contends that it was appellants'
13 obligation and responsibility to ensure that they timely filed their returns and, even if appellants used tax
14 preparation software such as TurboTax, appellants needed to take the necessary steps to ensure that a
15 timely submission occurred. (Resp. Op. Br., pp. 4-5.)

16 With regard to the demand penalties, respondent contends that it properly imposed the
17 demand penalty pursuant to R&TC section 19133, and appellants have not shown that reasonable cause
18 existed for their failure to respond to the Demands. Respondent contends that appellants' assertions that
19 they did not receive the March 16, 2010 Demand for 2008 and the January 19, 2011 Demand for 2009
20 do not demonstrate reasonable cause. Respondent contends that the mailing of the Demand to
21 taxpayers' current address provided by the taxpayers is adequate notice whether or not the taxpayers
22 actually receive the notice. Respondent contends that, to be valid under the law, respondent's Demand
23

24 ¹¹ This amount is calculated by subtracting the estimated and extension payments of \$21,500 from appellant's tax of \$32,408.

25 ¹² For 2008, appellants had a balance due of \$4,674 in August 2009 (i.e., \$29,674 (tax) - \$23,000 (estimate payments) -
26 \$2,000 (extension payment)). For 2009, appellants had a balance due of \$10,908 in August 2010 (i.e., \$32,408 (tax) -
27 \$16,500 (estimate payments) - \$5,000 (extension payment)).

28 ¹³ Respondent contends that, even if the Board determined that appellants timely filed their 2008 and 2009 tax returns,
appellants did not pay their tax in full by the original due dates and would be subject to late payment penalties for both tax
years.

1 need only to be mailed to a taxpayer's last-known address and there is no requirement for respondent to
2 prove that a taxpayer actually received the demand, citing the *Appeal of W.L. Bryant*, 83-SBE-180,
3 decided by the Board on August 17, 1983 and the *Appeal of Jon W. and Antoinette O. Johnston*, 83-
4 SBE-238, decided on October 26, 1983. Respondent contends that it mailed the Demands to appellants'
5 address used in the current appeal and listed on appellants' 2008 and 2009 untimely-filed tax returns.
6 As such, respondent contends that it sent the Demands to appellants' current address, as well as their
7 last-known address. In addition, respondent contends that it met the requirements of California Code of
8 Regulations, title 18, section (Regulation) 19133, subdivision (b), as respondent issued a Demand on
9 January 23, 2006, to appellant-husband for the 2004 tax year and, when he failed to respond to the
10 Demand, respondent issued an NPA on March 27, 2006, for the 2004 tax year. (Resp. Op. Br., pp. 5-6,
11 Exh. L.)

12 Appellants' Reply Brief

13 Appellants repeat some of the contentions made in their appeal letter. In addition,
14 appellants contest certain factual statements made by respondent. First, appellants maintain that they did
15 not receive all mailed notifications from the FTB. Appellants state that they had problems with the mail
16 delivery which was reported to the USPO. Second, with regard to the bad check penalty imposed by the
17 IRS on the 2009 tax year, appellants explain that the \$20,000 check to the U.S. Treasury was not
18 honored because the bank placed a hold on a deposit and appellants did not receive notice of the hold
19 until after the bank denied the payment of the check. Third, their unintentional failure to file their tax
20 returns was due to a misunderstanding of the electronic filing procedures. Appellants contend that the
21 most important fact is that appellants have consistently paid substantial taxes to California throughout
22 the years. Appellants reiterate that there was never any intent to not file the tax returns and note that
23 they consistently paid quarterly estimated payments. (App. Reply Br., pp. 1-2.)

24 Applicable Law

25 Burden of Proof

26 The FTB's determination is presumed correct and an appellant has the burden of proving
27 it to be wrong. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*,
28 2001-SBE-001, May 31, 2001.) In the absence of uncontradicted, credible, competent, and relevant

1 evidence showing an error in the FTB's determinations, respondent's determinations will be upheld.
2 (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.)

3 Late Filing Penalty

4 R&TC section 19131 provides that a late filing penalty shall be imposed when a taxpayer
5 fails to file a tax return on or before its due date, unless the taxpayer establishes that the late filing was
6 due to reasonable cause and was not due to willful neglect. The penalty is specified as 5 percent of the
7 tax due for each month that a valid tax return is not filed after it is due, not to exceed 25 percent of the
8 tax. (Rev. & Tax. Code, § 19131, subd. (a).) To establish reasonable cause, the taxpayer "must show
9 that the failure to file timely returns occurred despite the exercise of ordinary business care and
10 prudence, or that cause existed as would prompt an ordinary intelligent and prudent businessman to have
11 so acted under similar circumstances." (*Appeal of Howard G. and Mary Tons, supra.*) The burden is on
12 the taxpayer to prove that the difficulties experienced prevented him from filing a timely return. (*Appeal*
13 *of David and Marilee Duff*, 2001-SBE-007, Dec. 20, 2001.) Where the only proof offered to show that a
14 taxpayer filed a timely return is the taxpayer's self-serving allegation that the return was timely filed,
15 and the tax authority's records indicate that no such return was ever received, there is insufficient
16 evidence to show reasonable cause. (*Appeal of Jon W. and Antoinette O. Johnston, supra.*)

17 Demand Penalty

18 R&TC section 19133 provides that, if any taxpayer fails or refuses to furnish any
19 information requested in writing by the FTB or fails or refuses to make and file a return upon notice and
20 demand by the FTB, then, unless the failure is due to reasonable cause and not willful neglect, the FTB
21 may add a penalty of 25 percent of the amount of tax determined pursuant to R&TC section 19087 or of
22 any deficiency tax assessed by the FTB concerning the assessment of which the information or return
23 was required. The FTB will only impose a demand penalty if the taxpayer fails to respond to a current
24 Demand for Tax Return and the FTB issued an NPA under the authority of R&TC section 19087,
25 subdivision (a), after the taxpayer failed to timely respond to a Request for Tax Return or a Demand for
26 Tax Return at any time during the four taxable years preceding the year for which the current Demand
27 for Tax Return is being issued. (Cal. Code Regs., tit. 18, § 19133, subd. (b).)

28 When the FTB imposes a demand penalty, the law presumes that the penalty was

1 imposed correctly. (*Todd v. McColgan, supra.*) The burden of proof is on the taxpayer to show that
2 reasonable cause exists to support an abatement of the penalty. (*Appeal of Eugene C. Findley, 86-SBE-*
3 *091, May 6, 1986.*) To establish reasonable cause, a taxpayer must show that the failure to reply to the
4 notice and demand or to the request for information occurred despite the exercise of ordinary business
5 care and prudence. (*Appeal of Stephen C. Bieneman, supra.*) The taxpayer's reason for failing to
6 respond to the notice and demand or to the request for information must be such that an ordinarily-
7 intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of*
8 *Eugene C. Findley, supra.*) The demand penalty is designed to penalize the failure of a taxpayer to
9 respond to a notice and demand, and not a taxpayer's failure to pay the proper tax. (*Appeal of W. L.*
10 *Bryant, supra; Appeal of Frank E. and Lilia Z. Hublou, 77-SBE-102, July 26, 1977.*)

11 R&TC section 18416 sets out the statutory mailing guidelines that the FTB is required to
12 follow. The statute first provides that any notice may be given if sent by first class prepaid postage.
13 (Rev. & Tax. Code, § 18416, subd. (a).) Second, any notice mailed to a taxpayer's last-known address
14 is sufficient. (Rev. & Tax. Code, § 18416, subd. (b).) Third, the statute provides that the last-known
15 address shall be the address that appears on the taxpayer's last return filed with the FTB, unless the
16 taxpayer has provided to the FTB clear and concise written or electronic notification of a different
17 address, or the FTB has an address it has reason to believe is the most current address for the taxpayer.
18 (Rev. & Tax. Code, § 18416, subd. (c).)

19 It is well settled that respondent's mailing of a notice to the taxpayers' last-known
20 address is considered sufficient notification even if the notice never actually reaches the taxpayers.
21 (*Appeal of Yvonne M. Goodwin, 97-SBE-003, Mar. 19, 1997; Appeal of Jon W. and Antoinette*
22 *O. Johnston, supra.*) This "last-known address rule" protects the taxing agency and the statutory scheme
23 of assessment and appeal from the taxpayers' failure to inform the taxing agency of a change in address.
24 (*Delman v. Comm'r (3rd Cir. 1967) 384 F.2d 929 at 933.*) For the FTB's notice to be proper, the law
25 provides that it is not necessary for the FTB to prove that the notice was received by the taxpayer. (See
26 *United States v. Zolla (9th Cir. 1984) 724 F.2d 808, 810, cert. denied, 469 U.S. 830.*) It is sufficient that
27 the notice was mailed to the taxpayers' last-known address and it was not returned to the FTB as
28 undelivered. (*Id.*) As a general rule, a taxpayer's last-known address is the address that appears on the

1 taxpayer's most recently-filed tax return, unless the FTB is given clear and concise notice of a different
2 address. (*Appeal of W. L. Bryant, supra.*)

3 STAFF COMMENTS

4 In General

5 Regarding appellants' 2008 return, appellants assert that the return was filed
6 electronically in August 2009. Other relevant dates for that year include the following:

7 The 2008 Demand – mailed March 16, 2010

8 The 2008 NPA – mailed June 1, 2010

9 Contact by the FTB employee – November 18, 2011

10 2008 return filed – December 27, 2011

11 Regarding appellants' 2009 return, appellants assert that the return was filed
12 electronically in August 2010. Other relevant dates for that year include the following:

13 The 2009 Demand – mailed January 19, 2011

14 The 2009 NPA – mailed March 21, 2011

15 Contact by the FTB employee – November 18, 2011

16 2009 return filed – January 6, 2012

17 Based upon these facts, appellants were on notice in the spring of 2010 (i.e., the 2008
18 Demand and the 2008 NPA) that their 2008 return had not been received by FTB. (This correspondence
19 from the FTB should also have acted as notice to appellants that the FTB may not have received
20 appellants' 2009 return that had likewise been filed electronically.) However, appellants appear to argue
21 that they did not receive mail on any of the following four separate occasions: on March 16, 2010 (the
22 2008 Demand); on June 1, 2010 (the 2008 NPA); on January 19, 2011 (the 2009 Demand); and, on
23 March 21, 2011 (the 2009 NPA). As such, appellants appear to assert that they had mail delivery issues
24 and did not receive any of these four notices, such that they had no notice of their alleged return filing
25 issue until they were contacted by FTB on November 18, 2011.

26 Late Filing Penalty

27 Appellants contend that they first attempted at filing their returns electronically for the
28 2008 tax year. Appellants contend that their 2008 and 2009 returns were filed late due to their

1 misunderstanding of the electronic filing procedures. Appellants further contend that, as they filed their
2 returns electronically and, given their past compliance history, they had no reason to anticipate any
3 further communication from the taxing authorities regarding these tax years. Appellants should be
4 prepared to discuss the circumstances surrounding their attempts to electronically file their returns in
5 August 2009 and August 2010. If possible, appellants should provide evidence showing their attempts
6 to file their returns, such as a confirmation email from their preparation service provider or a copy of the
7 purported electronically-filed returns. Appellants should also be prepared to discuss, and provide
8 evidence of, what steps they took to verify that their electronic returns were accepted by the FTB. In
9 addition, appellants may wish to discuss whether they disputed the federal late filing penalties imposed
10 by the IRS. Respondent should be prepared to discuss its procedures for processing electronically-filed
11 tax returns and for informing taxpayers of its acceptance of electronically-filed returns.

12 Respondent notes that appellants had a balance due for both the 2008 and 2009 tax years
13 at the time that appellants allegedly e-filed the returns in August 2009 and August 2010, respectively.
14 Specifically, appellants had a balance due of \$4,674 in August 2009 for the 2008 tax year and a balance
15 due of \$10,908 in August 2010 for the 2009 tax year.¹⁴ Despite these amounts due, appellants have
16 provided no evidence of payments made with the filing of the returns at that time. Instead, appellants
17 made “bill payments” starting in April 2011 for the 2008 tax year. Appellants should be prepared to
18 discuss, and provide evidence of, the payments that they made, for the balances due, at the time that they
19 e-filed their 2008 and 2009 returns.

20 Appellants contend that their quick response, after being contacted by an FTB employee,
21 should be a mitigating factor, in that such actions demonstrate their good faith efforts to rectify the
22 situation. In addition, appellants contend that their substantial payments of tax to California and their
23 timely quarterly estimated tax payments should be mitigating factors. These contentions, however, do
24 not address the issue of whether their returns were timely filed.

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26 _____
27 ¹⁴ For 2008, appellants had a balance due of \$4,674 in August 2009 (i.e., \$29,674 (tax) - \$23,000 (estimate payments) -
28 \$2,000 (extension payment)). For 2009, appellants had a balance due of \$10,908 in August 2010 (i.e., \$32,408 (tax) -
\$16,500 (estimate payments) - \$5,000 (extension payment)).

1 Demand Penalty

2 It appears that respondent satisfied the regulatory prerequisite that it had previously
3 issued a Demand within the preceding four tax years, resulting in the issuance of a prior NPA. For the
4 2008 tax year, respondent issued a Demand and an NPA for the 2004 tax year. For the 2009 tax year,
5 respondent issued a Demand and an NPA for the 2008 tax year.

6 It appears that the Demands were sent to appellants' current, and last-known, address in
7 Sacramento. It also appears that appellants listed this same address on their 2008 and 2009 tax returns
8 and used this same address for their current appeal. Respondent should be prepared to discuss whether
9 any correspondence mailed to appellants at this address was returned as undelivered.

10 Appellants contend that they never received the 2008 and 2009 Demands. Appellants
11 should be prepared to discuss, and provide evidence of their mail delivery issues. Specifically,
12 appellants should provide evidence to substantiate the claim that appellants had their mail misdelivered
13 to other addresses or stolen during the time period at issue (i.e., on or about March 16, 2010 and
14 January 19, 2011). Appellants should also be prepared to provide evidence of appellant-wife's alleged
15 communications with their local post office about misdelivered mail issues.

16 Appellants' remaining contentions regarding their good compliance history prior to the
17 years at issue, their timely substantial tax payments to California, and how they corrected the situation
18 after receiving the phone call from the FTB employee in November 2011, do not appear to address why
19 they were unable to respond by the due dates of the 2008 and 2009 Demands.

20 Additional Evidence

21 If either party has any additional evidence to present, they should provide their evidence
22 to the Board Proceedings Division at least 14 days prior to the oral hearing pursuant to California Code
23 of Regulations, title 18, section 5523.6.¹⁵

24 ///

25 ///

26 Gualco_mt

27 _____

28 ¹⁵ Evidence exhibits should be sent to: Claudia Madrigal, Staff Services Manager, Board Proceedings Division, State Board of Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.