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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 **TITO J. GUERRERO**<sup>1</sup> ) Case No. 526822  
13

14 Year Claim  
1995 For Refund  
15 \$1,946.80<sup>2</sup>

16 Representing the Parties:

17 For Appellant: Jeff Johnston, J.D.  
Tax Appeals Assistance Program  
18

19 For Franchise Tax Board: Marguerite Mosnier, Tax Counsel III  
20

21 **QUESTIONS:** (1) Whether respondent properly notified appellant of the proposed assessment by  
22 sending the notice to his last known address after appellant was incarcerated.  
23 (2) Whether appellant has shown reasonable cause for abatement of the late filing  
24 penalty.  
25

26 <sup>1</sup> Appellant currently resides in Alameda County, California.

27 <sup>2</sup> As discussed below, this amount includes the following: (i) an overpayment from appellant's 1997 tax year of \$57.28, and  
28 (ii) a payment made on September 14, 2009, of \$1,889.52. A Franchise Tax Board (FTB or respondent) letter dated December 10, 2009, states that appellant's original claim amount was \$1,241.54.

1 (3) Whether appellant has shown that interest should be abated.

2 (4) Whether the collection cost recovery fee and/or lien fee can be abated.

3 (5) Whether the amnesty penalty can be abated.

4 (6) Whether the Board has jurisdiction to consider appellant's constitutional/due  
5 process arguments.

6 HEARING SUMMARY

7 Background

8 Having received information that appellant earned sufficient income to trigger the 1995  
9 filing requirement,<sup>3</sup> the FTB issued a notice (the demand letter) dated August 25, 1997, demanding that  
10 appellant file a return or explain why no return was required. The demand letter was mailed to  
11 appellant's last known address at an address on Bancroft Way in Berkeley, California. The record  
12 contains no evidence that the request was returned by the United States Postal Service (Post Office) as  
13 undelivered. When appellant neither filed a return nor demonstrated why a return was not required, the  
14 Franchise Tax Board (FTB or respondent) issued a Notice of Proposed Assessment (NPA) on  
15 October 17, 1997. The NPA proposed a tax liability of \$393.00, a late filing penalty of \$100.00, a  
16 notice and demand (demand) penalty of \$98.25<sup>4</sup>, and a filing enforcement cost recovery fee of \$71.00,  
17 plus interest. The NPA was mailed to appellant at an address on Bancroft Way in Berkeley, California,  
18 and the record contains no evidence that the NPA was returned by the Post Office as undelivered.  
19 Appellant did not timely protest the NPA within the 60 day protest period, and thus, the proposed  
20 assessment became final.

21 Later, the FTB undertook collection activity, and appellant's FTB account was charged a  
22 collection fee of \$103 and a lien fee of \$11. Subsequently, the FTB transferred a credit of \$57.28 from  
23 appellant's 1997 FTB account to appellant's 1995 FTB account. Afterwards, on September 14, 2005,  
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25 \_\_\_\_\_  
26 <sup>3</sup> The FTB does not identify in its brief the information it received prompting it to request a tax return from appellant. The  
27 federal account information from the IRS (appellant's account transcript for 1995) indicates a federal adjusted gross income  
28 (AGI) of \$20,795 (FTB used roughly the same figure, \$20,796, for appellant's "total income" on the Notice of Proposed  
Assessment; appellant also used the \$20,796 amount for his federal AGI on line 12 of his California income tax return form  
540EZ).

<sup>4</sup> FTB abated and refunded the demand penalty, plus interest, to appellant in December 2009.

1 the FTB imposed an amnesty penalty of \$248.71. The amnesty penalty was imposed because appellant  
2 had an unpaid tax liability on March 31, 2005, which was the final date appellant could have filed his  
3 return and paid the tax liability under California's tax amnesty program.

4           Approximately four years later, on August 18, 2009, the FTB received a copy of  
5 appellant's 1995 return. The FTB accepted appellant's return as filed and made the following  
6 adjustments to appellant's account: (a) the FTB reduced the tax owed from \$393.00 to \$349.00, (b) the  
7 FTB reduced the demand penalty from \$98.25 to \$87.25, and (c) the FTB reduced the amnesty penalty  
8 from \$248.71 to \$193.82. Later, the FTB billed appellant for the unpaid balance then owed. On  
9 September 14, 2009, appellant paid the balance then owed in full (i.e., \$1,889.52), and the next day,  
10 appellant mailed the FTB a letter (dated September 15, 2009), objecting to the payment of the late fees  
11 and interest because he had been incarcerated from March 18, 1997 to February 25, 2009. The FTB  
12 treated appellant's letter as a claim for refund.<sup>5</sup>

13           Subsequently, on December 10, 2009, the FTB sent appellant a Notice of Action,  
14 indicating that the FTB abated the demand penalty but appellant's claim for refund was otherwise  
15 denied. In response, appellant filed this timely appeal.

#### 16           Contentions

17           On appeal, appellant makes five arguments: First, appellant argues that the FTB's notices  
18 (i.e., the demand letter and the NPA) were mailed to an old address (after his incarceration began).  
19 Accordingly, appellant argues that he did not receive proper notice of the demand for a return or the  
20 proposed assessment. Likewise, appellant argues that the FTB "knew of appellant's incarceration. . . ."  
21 As proof, appellant cites to a court's reporter's transcript (attached as the first two pages of appellant's  
22 appeal letter), in which appellant was originally sentenced to prison.

23           Second, although appellant initially did not make this argument on appeal, he now argues  
24 that he filed his 1995 California return in a timely manner. In support, appellant's representative states  
25 that appellant "declares under penalty of perjury" that appellant filed his 1995 California return  
26 simultaneously with his 1995 federal return on April 8, 1996. However, appellant has not yet provided a  
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28 <sup>5</sup> The claim for refund includes the following amounts: (i) the overpayment from appellant's 1997 tax year of \$57.28, and (ii) the payment made on September 14, 2009, of \$1,889.52.

1 declaration signed under penalty of perjury.

2 Third, appellant argues that (i) his incarceration constitutes reasonable cause for his  
3 failure to respond to the FTB's notices, and (ii) he was under an extreme financial hardship caused by a  
4 significant disability or other catastrophic circumstances as a consequence of his incarceration.  
5 Accordingly, appellant argues that penalties and interest should be abated. Appellant does not  
6 specifically discuss the fees assessed (i.e., the collection fee, the lien fee, and filing enforcement fee).<sup>6</sup>

7 Fourth, appellant argues that it is inequitable to hold him responsible for filing a timely  
8 response to the FTB's notices, given that he was earning only \$0.30 per hour during his incarceration.  
9 Appellant states that "[a]llowing such a burden to accrue throughout such an extensive period of a 12  
10 year incarceration creates an inequitable result . . ."

11 Finally, appellant argues that the amnesty penalty should not be applied to him because  
12 the penalty violates his constitutional rights. However, appellant acknowledges that the Board does not  
13 have jurisdiction to consider constitutional issues, and appellant states that he is making this  
14 constitutional argument to preserve his rights.

#### 15 The FTB

16 The FTB makes eight arguments: First, the FTB argues that its notices (i.e., the demand  
17 letter and the NPA) were mailed to appellant's last known address of record, and therefore, the FTB  
18 asserts that appellant received proper notice. In addition, the FTB notes that the address listed in the  
19 demand letter and the NPA is the same address listed on a Berkeley Police Department report dated  
20 March 19, 1997. Furthermore, the FTB notes that in appellant's claim for refund, appellant states that  
21 he received several notices from the FTB during his incarceration. Accordingly, based on the foregoing,  
22 the FTB argues that appellant received proper notice.

23 Second, the FTB argues that other than appellant's unsupported assertions, appellant has  
24 provided no evidence (declarations, postage receipts, etc.) showing he filed his 1995 California return  
25 simultaneously with his 1995 federal return on April 8, 1996, as he alleges. FTB also notes that the 1995  
26 return appellant signed, dated, and filed on August 18, 2009, was an original return, not an amended  
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28 <sup>6</sup> As noted below, the FTB has agreed to abate the filing enforcement fee upon conclusion of this appeal.

1 return, as would be expected if you had previously filed an original return; further, FTB's records of its  
2 correspondence with appellant while he was incarcerated from 1997 through 2009 do not indicate  
3 appellant ever asserted he had timely filed his 1995 return.

4 Third, the FTB argues that appellant has not shown reasonable cause for abatement of the  
5 late filing penalty. In this respect, the FTB notes that appellant's 1995 California return was due on  
6 April 15, 1996, and appellant was not incarcerated until March of 1997.

7 Fourth, the FTB argues that appellant has not shown interest should be abated due to an  
8 unreasonable error or delay in its performance of a ministerial act, and therefore, the FTB asserts there is  
9 no legal basis to abate interest.

10 Fifth, the FTB argues there is no legal basis to abate the collection and/or lien fees.  
11 Furthermore, the FTB notes that appellant does not argue the FTB made a computational error in  
12 calculating those fees.

13 Sixth, the FTB states that it will abate the filing enforcement fee upon conclusion of this  
14 appeal.

15 Seventh, the FTB states that the Board's jurisdiction to review the amnesty penalty is  
16 limited to situations where the penalty is assessed and paid, the taxpayer files a timely appeal from a  
17 denial of a refund claim, and the taxpayer attempts to show a computational error in the penalty. In this  
18 respect, the FTB argues that appellant has not alleged (or shown) the FTB made a computational error in  
19 calculating the amnesty penalty.

20 Finally, the FTB argues that the Board does not have jurisdiction to consider appellant's  
21 constitutional/due process arguments.

## 22 Applicable Law

### 23 Proper Notice

24 In general, notices sent by the FTB to a taxpayer's last known address are presumed to  
25 have been received. (*Appeal of Ronald A. Floria*, 83-SBE-003, Jan. 3, 1983.)<sup>7</sup> If a taxpayer claims that  
26 he or she did not receive the notice, the taxpayer bears the burden of proving the notice was not mailed  
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28 <sup>7</sup> Board of Equalization cases are generally available for viewing on the Board's website ([www.boe.ca.gov](http://www.boe.ca.gov)).

1 to the taxpayer's last known address. (See *Grenciewicz v. Commissioner*, T.C. Memo. 1990-597.) What  
2 is relevant is the FTB's knowledge of the taxpayer's last known address, rather than the taxpayer's  
3 actual most current address. (See *Reding v. Commissioner*, T.C. Memo. 1990-278, aff. T.C. Memo.  
4 1990-536.) If the taxpayer moves after filing his or her return, the taxpayer must take the necessary  
5 steps to ensure receipt of his or her mail. (*Appeal of Winston R. Schwyhart*, 75-SBE-035, Apr. 22,  
6 1975.)

7 For a notice to be proper, the law provides that it is not necessary for the FTB to prove  
8 the notice was received by the taxpayer. (See *United States v. Zolla* (9th Cir. 1984) 724 F.2d 808, 810,  
9 cert. denied, 469 U.S. 830.) It is sufficient that the notice was mailed to the taxpayer's last known  
10 address and it was not returned to the FTB as undelivered. (*Ibid.*) As a general rule, a taxpayer's last  
11 known address is the address that appears on the taxpayer's most recently filed tax return, unless the  
12 FTB is given clear and concise notice of a different address. (*Appeal of W. L. Bryant*, 83-SBE-180,  
13 Aug. 17, 1983.)

#### 14 Late Filing Penalty

15 California imposes a penalty for failure to file a return by its due date, unless the failure  
16 to file was due to reasonable cause and not due to willful neglect. (Rev. & Tax. Code, § 19131.) To  
17 establish reasonable cause, a taxpayer "must show that the failure to file timely returns occurred despite  
18 the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinary  
19 intelligent and prudent businessman to have so acted under similar circumstances." (*Appeal of Howard*  
20 *G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) Ignorance of a filing requirement or a misunderstanding  
21 of the law generally does not excuse a late filing. (*Appeal of Diebold, Incorporated*, 83-SBE-002,  
22 Jan. 3, 1983.) The FTB's determination is presumed to be correct, and a taxpayer has the burden of  
23 proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509;

#### 24 Collection Cost Recovery Fee

25 When a taxpayer fails to pay a tax after proper notice, Revenue and Taxation Code  
26 (R&TC) section 19254 directs the FTB to impose a recovery fee on the taxpayer for the actual cost of  
27 collecting the tax. Once the fee is properly imposed, there is no language in the statute that will excuse  
28 the fee under any circumstances, including for reasonable cause. (See *Appeal of Michael E. Myers*,

1 2001-SBE-001, May 31, 2001.)

2 Lien Fee

3 R&TC section 19221 provides for the imposition of a lien fee on a taxpayer. R&TC  
4 section 19221, subdivision (a), provides that any amount due from a taxpayer shall become an  
5 enforceable state tax lien if the taxpayer fails to pay the amount due at the time it become due and  
6 payable. Government Code section 7174 allows the FTB to collect the various fees associated with  
7 recording and releasing the state tax lien. Once the fee is properly imposed, there is no language in the  
8 statute that will excuse the fee under any circumstances, including for reasonable cause.

9 Filing Enforcement Fee

10 R&TC section 19254 authorizes imposition of a filing enforcement fee when the FTB  
11 mailed notice to a taxpayer that the continued failure to file a return may result in imposition of the fee.  
12 Once the fee is properly imposed, there is no language in the statute that would excuse the fee under any  
13 circumstances, including for reasonable cause. (See *Appeal of Michael E. Myers, supra.*)

14 Amnesty Penalty

15 In 2004, the Legislature enacted the income tax amnesty program. (Rev. & Tax. Code,  
16 §§ 19730-19738.) Eligible taxpayers could participate by filing an amnesty application and paying their  
17 outstanding liabilities of tax and interest, or entering into an installment plan, during the period of  
18 February 1, 2005, through March 31, 2005, inclusive. (Rev. & Tax. Code, §§ 19730 & 19731.) For  
19 liabilities that remained outstanding after the last day of the amnesty period, a penalty was imposed  
20 equal to 50 percent of the accrued interest payable. (Rev. & Tax. Code, § 19777.5, subd. (a).)

21 The Board's jurisdiction to review the amnesty penalty is limited. For example, a  
22 taxpayer has no right to appeal an unpaid amnesty penalty. (*Id.*, subd. (d).) A taxpayer also has no right  
23 to file an administrative claim for refund of a paid amnesty penalty, except upon the basis that the  
24 penalty was not properly computed. (*Id.*, subd. (e).) Therefore, the Board's jurisdiction to review the  
25 amnesty penalty is limited to situations where the penalty is assessed and paid, the taxpayer files a  
26 timely appeal from a denial of a refund claim, and the taxpayer attempts to show a computational error  
27 in the penalty.

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1                   Constitutional/Due Process Issues

2                   The Board is precluded from determining the constitutional validity of California statutes,  
3 and has an established policy of declining to consider constitutional issues. (Cal. Const., art III, § 3.5;  
4 *Appeal of Aimor Corp.*, 83-SBE-221, Oct. 26, 1983; *Appeals of Walter Bailey*, 92-SBE-001, Feb. 20,  
5 1992.) In *Bailey, supra*, the Board stated:

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

9                   Relief of Interest

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

15                  To obtain relief from interest, appellant must qualify under one of three statutes: R&TC  
16 sections 19104, 19112 or 21012. R&TC section 21012 is apparently not applicable in this appeal,  
17 because there has been no reliance on any written advice requested of the FTB. R&TC section 19112  
18 requires a showing of extreme financial hardship caused by significant disability or other catastrophic  
19 circumstance—however; there is no provision in R&TC section 19112 or other law that gives the Board  
20 jurisdiction to determine whether R&TC section 19112 applies in this instance. But the Legislature did  
21 provide the Board jurisdiction over appeals of denied interest abatement requests under R&TC section  
22 19104, as discussed below.

23                  For income years beginning before January 1, 1998 (as is applicable in this appeal),  
24 interest may only be abated on appeal when it is attributable to an error or delay by the FTB in the  
25 performance of a “ministerial act.” In the *Appeal of Michael and Sonia Kishner* (99-SBE-007), decided  
26 on September 29, 1999, the Board adopted the language from Treasury Regulation section 301.6404-2  
27 (b)(2), defining a “ministerial act” as:

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

6 Further, the error or delay can be taken into account only if no significant aspect is  
7 attributable to the taxpayer, and the error or delay occurred after the FTB contacted the taxpayer in  
8 writing about the underlying deficiency. (Rev. & Tax. Code, § 19104, subd. (b)(1), formerly Rev. &  
9 Tax. Code, § 19104, subd. (c)(1)(B), renumbered operative Jan. 1, 2001].)

#### 10 STAFF COMMENTS

##### 11 Additional Evidence

12 If appellant has any further evidence that he wishes to submit, pursuant to California  
13 Code of Regulations, title 18, section 5523.6, appellant should provide his evidence to the Board  
14 Proceedings Division at least 14 days prior to the oral hearing.<sup>8</sup>

##### 15 Proper Notice

16 Appellant states that (i) he was incarcerated from March 18, 1997 to February 25, 2009,  
17 and (ii) the FTB sent the applicable notices (e.g., the demand letter and the NPA) to his old address.  
18 Thus, appellant claims that he never received proper notice of those notices.

19 Here, the demand letter and the NPA were mailed to appellant at an address on Bancroft  
20 Way in Berkeley, California (the last address of record per the FTB's database), and the appeal file  
21 contains no evidence that the demand letter and the NPA were returned by the Post Office as  
22 undelivered. On appeal, appellant provided no evidence showing that he provided the FTB with a  
23 different mailing address before the demand letter and/or the NPA were issued. Furthermore, staff notes  
24 that in appellant's claim for refund, appellant admits that he received several notices from the FTB  
25 during his incarceration (all of which were apparently mailed to the address on Bancroft Way in  
26 Berkeley, California.)

27 Based on the foregoing facts, it appears that appellant was provided with proper notice of  
28 the demand letter and the NPA. For purposes of clarification, staff notes the FTB deleted the demand

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<sup>8</sup> Evidence exhibits should be sent to: Claudia Madrigal, Appeals Analyst, Board Proceedings Division, State Board of Equalization, P.O. Box 942879, Sacramento, California, 94279-0080.

1 penalty in the NOA; thus the demand penalty is not an issue in this appeal.

2 Late Filing Penalty

3 At the oral hearing, appellant should present arguments that there was reasonable cause  
4 for his failure to file his 1995 California return on or before April 15, 1996. Here, appellant was not  
5 incarcerated until March 18, 1997; thus, it appears to staff that appellant had sufficient time to file his  
6 1995 return.

7 Relief of Interest

8 At the oral hearing, appellant should be prepared to show that the interest at issue is  
9 attributable in whole or in part to an unreasonable error or delay by an officer or employee of the FTB in  
10 performing a ministerial act. Staff notes that an error or delay can be taken into account only if no  
11 significant aspect is attributable to appellant, and the error or delay occurred after the FTB contacted  
12 appellant in writing about the underlying deficiency. (Rev. & Tax. Code, § 19104, subd. (b)(1).)

13 Collection Cost Recovery Fee and the Lien Fee

14 As indicated above, once the fees are properly imposed, there is no language in the  
15 statute that will excuse the fees under any circumstances, including for reasonable cause. (See *Appeal of*  
16 *Michael E. Myers, supra.*) Here, appellant does not argue that the FTB made computational errors when  
17 assessing the applicable fees. Accordingly, it appears to staff that the fees were properly imposed and  
18 cannot be refunded.

19 Filing Enforcement Fee

20 As indicated above, on appeal, the FTB has agreed to abate the filing enforcement fee  
21 upon conclusion of this appeal.

22 Amnesty Penalty

23 Here, appellant does not argue that the FTB made a computational error when assessing  
24 the amnesty penalty. Accordingly, it appears to staff that the amnesty penalty was properly imposed and  
25 cannot be refunded.

26 Constitutional/Due Process Issues

27 As indicated above, the Board is precluded from determining the constitutional validity  
28 of California statutes, and has an established policy of declining to consider constitutional/due process

1 issues. (Cal. Const., art III, § 3.5; *Appeal of Aimor Corp., supra*; *Appeals of Walter Bailey, supra*.)

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