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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**  
12 **THE HARRY J. & MARGARET L. HEIMER** ) Case No. 519706  
13 **COMMUNITY PROPERTY MARITAL** )  
14 **TRUST<sup>1</sup>** )

<u>Years</u>	<u>Late Filing Penalties</u>	<u>Interest</u>
2005	\$12.00 <sup>2</sup>	\$5.67
2006	\$13.00	\$3.93
2007	\$15,794.00	\$4,714.82

21 Representing the Parties:

22 For Appellant: Pamela Tahim & Mark C. Doyle, Attorneys<sup>3</sup>  
23 Tredway, Lumsdaine & Doyle LLP

24 For Franchise Tax Board: Mary Yee, Tax Counsel

26 <sup>1</sup> Appellant, a trust, lists on its power of attorney form an address located in Newport Beach, Orange County, California.

27 <sup>2</sup> The penalty and interest amounts have been paid by appellant, and this is an appeal from denials of claims for refund.

28 <sup>3</sup> Appellant's appeal letter was filed by Cheryl J. Schaffer, C.P.A., M.S.T., a tax partner with Wright Ford Young & Co.

1 QUESTIONS: (1) Whether appellant has shown respondent erred in not abating the penalties and  
2 associated interest by proving it had reasonable cause for filing late returns.

3 (2) Whether appellant has shown respondent abused its discretion by not abating  
4 interest.

5 HEARING SUMMARY

6 Background

7 Appellant (“the trust”) is a trust with Margaret Heimer (Margaret) and Paul Hill as co-  
8 trustees. Appellant and Margaret filed late original and amended tax returns, respectively, for the years  
9 at issue between January 15 and 28, 2009.<sup>4</sup> (Resp. Op. Br., exhibits A, B, D, & F; App. Supp. Br.,  
10 attachment: Declaration of Kevin Wiest.<sup>5</sup>) For 2005, appellant reported a total taxable income of  
11 \$196,370, an income distribution deduction of \$195,091, taxable fiduciary income of \$1,279, claimed a  
12 \$1 exemption credit, self-assessed a tax due of \$12, and remitted \$14 as payment with the return. (Resp.  
13 Op. Br., exhibit B.) On March 17, 2009, respondent mailed a Return Information Notice (RIN) to  
14 appellant, imposing a late filing penalty of \$12.00 and interest of \$5.67. (*Id.* at exhibit C.) Appellant  
15 satisfied the remaining liability with a payment of \$15.67 on April 23, 2009. (*Ibid.*)

16 For 2006, appellant reported a total taxable income of \$479,511, an income distribution  
17 deduction of \$478,115, taxable fiduciary income of \$1,396, and claimed a \$1 exemption credit.  
18 Appellant self-assessed a tax due of \$13, and remitted \$14 as payment with the return. (Resp. Op. Br.,  
19 exhibit D.) On March 17, 2009, respondent mailed a RIN to appellant, imposing a late filing penalty of  
20 \$13.00 and interest of \$3.93. (*Id.* at exhibit E.) Appellant satisfied the remaining liability with a  
21 payment of \$15.93 on April 23, 2009. (*Ibid.*)

22 For 2007, appellant reported a total taxable income of \$702,921, without any distribution  
23 deduction for taxable fiduciary income, claimed a \$1 exemption credit, and self-assessed a tax due of  
24 \$63,176. (Resp. Op. Br., exhibit F.) Appellant submitted \$66,671 as payment with the late return. (*Id.*

25  
26  
27 <sup>4</sup> Appellant’s returns all appear to be dated January 20, 2009. Respondent records the filing date of the 2005 and 2006  
28 returns as being January 15, 2009, and the filing date of the 2007 return as January 28, 2009. For purposes of this appeal, it  
does not appear that this discrepancy affects the outcome of this appeal.

<sup>5</sup> Appellant provided, in addition to its appeal letter, an opening brief filed June 4, 2010, and a supplemental brief filed  
September 10, 2010.

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1 at exhibit G.) On February 26, 2009, respondent mailed a RIN to appellant, imposing a late filing  
2 penalty of \$15,794.00 and interest of \$4,714.82. Appellant satisfied the remaining liability with a  
3 payment of \$17,013.82 on April 23, 2009. (*Ibid.*)

4 On March, 19, 2009, appellant sent respondent a letter requesting abatement of the late  
5 filing penalties for all three tax years based on reasonable cause. (Appeal Letter, attachments.)  
6 Respondent reviewed the request and issued Penalty Waiver Denial letters for each year, and appellant  
7 then filed claims for refund of the penalties and related interest. Respondent denied appellant's claims  
8 for refund by letter dated September 22, 2009. (*Ibid.*) This timely appeal followed.

### 9 Contentions

#### 10 Appellant's Contentions

11 Appellant states that after the death of Harry J. Heimer in 2001, Margaret contacted  
12 TaxResources, Inc., (TaxResources) for income tax services including the tax treatment of the trust.  
13 (Appeal Letter, pp. 2-3.) Appellant states Margaret subscribed to TaxResources for a period including  
14 the tax years at issue and concluding on May 8, 2009. (*Id.* at pp. 2-3.) Appellant states that it did not  
15 file timely separate tax returns for the years at issue because its income was reported on Margaret's  
16 individual tax return, since she was the sole income beneficiary of the trust. Subsequently, appellant's  
17 trustees engaged the CPA firm of Wright, Ford, Young & Co. ("the CPA") to determine the proper filing  
18 status of the trust and to file amended returns if necessary. (*Id.* at p. 3.)

19 Appellant contends it reasonably relied on TaxResources as tax experts to determine its  
20 filing obligation and was told it did not need to file, which was incorrect advice, and therefore the late  
21 filing penalties should be abated for reasonable cause. Appellant contends reasonable cause is found  
22 when a taxpayer relies on the advice of a "competent tax expert," but does not require the advice to  
23 come from a specialist with competency in a particular subject of tax law (e.g., a specialist in trust tax  
24 law). (App. Reply Br., p. 6; see also App. Supp Br., p. 2.) Appellant asserts its trustees are not  
25 accountants, have no trustee training, and relied upon TaxResources' advice after providing it with all  
26 the facts and circumstances necessary to determine its filing obligation. (App. Reply Br., pp. 1, 3; App.  
27 Supp. Br., p. 3 and attachments.)

28 Appellant asserts it has provided the evidence required by law to establish reasonable

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1 cause. (App. Supp. Br., p. 1.) Among the supporting evidence, appellant provided declarations from  
2 Margaret and the CPA who assisted her during the years at issue. (*Id.*; App. Reply Br., attachments.)  
3 Accompanying Margaret's declarations are attestations to the claims made by TaxResources regarding  
4 their tax expertise. Contrary to the company's current website listing of four distinct packages of tax  
5 services offered, Margaret states the company advertised itself as "skilled tax professionals" who offered  
6 tax services on a variety of tax matters without limitation to specific subject matters or forms. (App.  
7 Supp. Br., p. 3 & attachment; App. Reply Br., pp. 5-6.) Appellant contends TaxResources met the  
8 standard required by law to be considered a competent tax expert, and that appellant acted reasonably by  
9 relying on its advice. (App. Reply Br., 6-7.)

10           Alternatively, appellant asserts the penalties should be abated because the actual tax  
11 amount due was paid, even though appellant did not file returns or remit tax payments by the due dates  
12 for the years at issue. Appellant contends the tax amount that it was obligated to pay was instead paid  
13 by Margaret, as she reported the income on her return instead of appellant's (and even over-paid the  
14 amount rightfully due). (App. Reply Br., p. 4.) Since all the income was reported timely, but just on the  
15 wrong form, appellant contends there should be no late filing penalties. (*Id.* at p. 3.) Appellant also  
16 indicates it provided copies of tax returns and trustee statements, and the Internal Revenue Service (IRS)  
17 is currently reviewing these tax years on appeal.<sup>6</sup> (App. Supp. Br., p. 4.) Appellant contends interest  
18 should be abated because there was no error on its part, all the tax owed between itself and Mrs. Heimer  
19 was paid timely, and the interest on the penalties should be abated when the penalties are abated. (App.  
20 Reply Br., p. 7.)

#### 21           Respondent's Contentions

22           Respondent contends the late filing penalties were properly imposed and appellant has  
23 failed to show reasonable cause necessary to abate the penalties. Respondent asserts appellant had a  
24 filing requirement, failed to file a return by the appropriate deadline, and therefore the late filing  
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26  
27 <sup>6</sup> Appellant should provide any evidence that the current tax years are under appeal with the IRS and the current status of  
28 any such appeal. All exhibits should be submitted, with a copy sent to opposing party, at least 14 days prior to the oral  
hearing pursuant to California Code of Regulations, title 18, section 5523.6. Evidence exhibits should be sent to: Claudia  
Madrigal, Board of Equalization, Board Proceedings Division, P. O. Box 942879 MIC: 80, Sacramento, CA 94279-  
0080.

1 penalties are properly imposed. (Resp. Op. Br., p. 3.) Respondent recognizes the IRS abated the 2005  
2 penalty as a “one-time” consideration, but asserts that California does not have a parallel abatement  
3 provision and that none of the federal penalties have been abated for reasonable cause by the IRS. (*Id.*  
4 at p. 4 & exhibits K-N.) Respondent addresses appellant’s contention that all of the income was  
5 reported originally, but by the wrong person, and the final liability is actually less than originally  
6 reported. Specifically, respondent states there are discrepancies between the amounts reported on  
7 Margaret’s original return, her amended return and appellant’s return. (*Id.* at p. 4.) Respondent has  
8 requested documents from appellant to help verify facts surrounding the first filing process in order to  
9 evaluate this and other reasonable cause claims asserted by appellant, but that appellant represented that  
10 those documents would not be available until May 2010. (*Id.* at p. 4 & fn. 2; Resp. Reply Br., p. 2 &  
11 attachment 2.)

12 Respondent contends appellant has failed to show how its use of TaxResources  
13 constitutes a reasonable cause exception to the late filing penalty. Respondent concedes reliance on  
14 incorrect advice from a tax professional, apprised of all the facts and circumstances, may constitute  
15 reasonable cause in some situations. However, respondent asserts appellant has not shown that  
16 TaxResources is a tax professional competent in dealing with matters of trusts’ tax return filing  
17 obligations. (Resp. Op. Br., p. 4.) Respondent notes TaxResources lists offered packages on their  
18 website, none of which indicates trust-related expertise. (*Id.* at p. 4 & exhibits I-J; Resp. Reply Br., pp.  
19 1-2 & attachment 1.) Respondent asserts appellant must verify the qualifications of TaxResources and  
20 the individuals that assisted appellant to determine its filing obligation, as well as show it provided all  
21 the facts and circumstances relevant to the tax years at issue, in order to establish reliance on a tax  
22 professional as constituting reasonable cause for the abatement of the penalties. (Resp. Reply Br., pp. 1-  
23 2.) Respondent also contends appellant has not shown that respondent abused its discretion by not  
24 abating interest. (Resp. Op. Br., p. 5.)

#### 25 Applicable Law

##### 26 Late Filing Penalty

27 R&TC section 18505, subdivision (f), provides that a fiduciary must file a return for  
28 any trust having a gross income in excess of \$10,000. R&TC section 19131 imposes a penalty when a

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1 taxpayer fails to file a return on or before the due date, unless it is shown that the failure is due to  
2 reasonable cause and not due to willful neglect. To establish reasonable cause, the taxpayer “must  
3 show that the failure to file timely returns occurred despite the exercise of ordinary business care and  
4 prudence, or that cause existed as would prompt an ordinary intelligent and prudent businessman to  
5 have so acted under similar circumstances.” (*Appeal of Howard G. and Mary Tons*, 79-SBE-027,  
6 Jan. 9, 1979.)

7 Respondent’s determinations with respect to tax and penalties are presumed to be correct  
8 and the taxpayer has the burden of proving them erroneous. (*Appeal of Robert Scott*, 83-SBE-009,  
9 Jan. 3, 1983; *Appeal of David A. and Barbara L. Beadling*, 77-SBE-21, Feb. 3, 1977.) The burden is on  
10 the taxpayer to prove the circumstances that prevented it from filing a timely return. (*Appeal of Kerry  
11 and Cheryl James*, 83-SBE-009, Jan. 3, 1983.) To establish reasonable cause, a taxpayer must  
12 demonstrate that it exercised ordinary business care and prudence. (*Appeal of Stephen C. Bieneman*, 82-  
13 SBE-148, July 26, 1982.)

14 Taxpayers cannot delegate filing requirements, but this restriction does not extend to  
15 situations where a taxpayer reasonably relies on expert advice concerning substantive questions of law,  
16 such as whether a tax liability exists in the first instance. (*United States v. Boyle* (1985) 469 U.S. 241,  
17 249-251.) “Courts have frequently held that ‘reasonable cause’ is established when a taxpayer shows  
18 that he reasonably relied on the advice of an accountant or attorney that it was unnecessary to file a  
19 return, even when such advice turned out to have been mistaken . . . [The United States Supreme Court]  
20 also has implied that, in such a situation, reliance on the opinion of a tax adviser may constitute  
21 reasonable cause for failure to file a return.” (*Id.* at p. 250.) To ask a taxpayer to challenge its attorney,  
22 seek a second opinion, or monitor counsel on the provisions of code goes beyond “ordinary business  
23 care and prudence.” (*Id.* at p. 251.) If the taxpayer consulted a lawyer or accountant and upon the  
24 presentation of the full information in its possession was advised that no return was necessary, a  
25 sufficient showing of reasonable cause for the delinquency has been made. (*Girard Investment Co. v.  
26 Commissioner* (3d Cir. 1941) 122 F.2d 843, 848.)

#### 27 Interest Abatement

28 The assessment of interest is mandatory on unpaid tax, including the minimum franchise

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1 tax. (*Appeal of Amy M. Yamachi*, 77-SBE-095, June 28, 1977; *Appeal of Audrey C. Jaegle*, 76-SBE-  
2 070, June 22, 1976.) Interest is also mandatory with respect to the imposition of a failure to file penalty  
3 pursuant to R&TC section 19131. (Rev. & Tax. Code, § 19101, subd. (c)(2)(B).) The Board has held  
4 interest is not a penalty, but is simply compensation for a taxpayer's use of money after the due date of  
5 the tax, and there is no reasonable cause exception to the imposition of interest. (*Appeal of Audrey C.*  
6 *Jaegle, supra.*)

7           Respondent may abate interest accrued on a deficiency when the taxpayer identifies an  
8 unreasonable error or delay which (1) occurred after respondent contacted the taxpayer in writing about  
9 the particular deficiency or overpayment underlying the disputed interest; (2) is not significantly  
10 attributable to the taxpayer; and (3) is attributable to a ministerial<sup>7</sup> act performed by  
11 respondent. (*Appeal of Michael and Sonia Kishner*, 99-SBE-007, Sept. 29, 1999; see also Rev. & Tax.  
12 Code, § 19104, subds. (a)(1) & (b)(1).) An error or delay will only be taken into account if it occurred  
13 after the FTB contacted the taxpayer in writing with respect to the deficiency from which the interest  
14 accrued. (Rev. & Tax. Code, § 19104, subd. (b)(1).) Respondent's determination not to abate interest is  
15 presumed correct, and the burden is on appellant to prove error. (*Appeal of Michael E. Myers*, 2001-  
16 SBE-001, May 31, 2001.) Subdivision (b)(2)(B) of R&TC section 19104 states that the Board shall  
17 have jurisdiction to determine whether respondent's failure to abate interest "under this section" was an  
18 abuse of discretion and to order an abatement of interest if it determines that such an abuse occurred.

19 \_\_\_\_\_  
20 <sup>7</sup> In the *Appeal of Michael and Sonia Kishner* (99-SBE-007), decided September 29, 1999, the Board adopted the language  
21 from Treasury Regulation section 301.6404-2 (b)(2), which defines a "ministerial act" as:

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

26 For acts performed in tax years beginning on or after January 1, 1998, respondent may also abate interest for "managerial  
27 acts" as well. (Rev. Tax. Code, § 19104(c)(1)(C)(iii).) In *Appeal of Michael and Sonia Kishner*, the Board noted that  
28 Treasury Regulation section 301.6404-2 (b)(1) defines a "managerial" act as:

[A]n administrative act that occurs during the processing of a taxpayer's case involving the temporary or  
permanent loss of records or the exercise of judgment or discretion relating to management of personnel. A  
decision concerning the proper application of federal tax law (or other federal or state law) is not a  
managerial act. Further, a general administrative decision, such as the IRS's decision on how to organize  
the processing of tax returns or its delay in implementing an improved computer system, is not a  
managerial act for which interest can be abated . . . .

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1 (*Appeal of Ernest J. Teichert*, 99-SBE-006, Sept. 29, 1999.) In order to show an abuse of discretion,  
2 appellant must establish that the FTB exercised its discretion arbitrarily, capriciously, or without sound  
3 basis in fact or law by refusing to abate interest. (See *Woodral v. Commissioner* (1999) 112 T.C. 19,  
4 23.)

5 STAFF COMMENTS

6 In order to establish reasonable cause for the abatement of the penalties based on reliance  
7 on a tax professional's advice, the taxpayer must show that the tax professional giving advice is  
8 qualified to do so and he or she provided all the necessary facts and circumstances to the tax  
9 professional for the advice to be based upon. In this case, the parties disagree about the professional's  
10 level of expertise in the area of tax law in issue. Respondent asserts that TaxResources did not advertise  
11 or offer services related to the taxation of trusts and that appellant has the burden of showing that  
12 TaxResources represented that it had such specific expertise as well as showing that appellant provided  
13 full information in order to demonstrate reasonable reliance on the advice. Appellant asserts that it is  
14 sufficient to show that TaxResources advertised as a firm of "skilled tax professionals" who offered tax  
15 services on a variety of tax matters without limitation to specific subject matters or forms. Thus, the  
16 parties disagree as to whether appellant's reliance was reasonable because the tax professional is shown  
17 to be merely competent in tax law or whether appellant must show that he or she believed the tax  
18 professional was an expert in trust tax law. The parties should be prepared to discuss their positions at  
19 the hearing, with legal references to support their position. Specifically, respondent should be prepared  
20 to show, with reference to case law, where it is required that the tax professional needs to be an expert in  
21 the specific field of tax law in order for a taxpayer's reliance to be reasonable for purposes of showing  
22 reasonable cause for not filing based on a professional's advice. In this regard, the parties should  
23 discuss the representations of TaxResources in regard to the field of tax and the specific field of trust tax  
24 law to determine whether it was reasonable for appellant to rely on the company's advice when  
25 determining it did not need to file a return.

26 The interest imposed was based on the penalty amounts. Appellant asserts this interest  
27 should be abated, since the penalties should also be abated. Should the Board determine the penalties  
28 need to be abated, the interest shall likewise be abated. However, appellant should clarify at the hearing

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1 whether it also contends the interest should be abated if the penalties are not abated. If so, appellant  
2 should be prepared to provide evidence of a ministerial or managerial act by respondent which caused an  
3 unreasonable error or delay, according to the requirements for interest abatement outlined above.

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