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

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10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **IAN JAMES JOHNSTON**¹) Case No. 481263

	<u>Year</u>	<u>Proposed Assessment</u> ²	<u>Late filing Penalty</u>
	2006	\$269	\$100

17 Representing the Parties:

18 For Appellant: Ian James Johnston
19 For Franchise Tax Board: Janet Butler, Legal Analyst

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- 21 **QUESTIONS:** (1) Whether appellant has shown error in respondent's proposed assessment.
22 (2) Whether appellant has shown reasonable cause for the abatement of the late filing
23 penalty.
24 (3) Whether this Board should impose a frivolous appeal penalty.

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27 ¹ Appellant resides in Santa Monica, Los Angeles County, California.

28 ² Respondent should be prepared to provide the amount of interest accrued as of the date of the oral hearing.

1 HEARING SUMMARY

2 Background

3 Appellant has not filed a 2006 California income tax return. Having received information
4 from the Employment Development Department (EDD) and federal Forms 1099 that appellant received
5 sufficient income to trigger the filing requirement,³ respondent issued a notice on February 6, 2008,
6 requesting that appellant file a return or explain why no return was required. (Resp. Op. Br., exhibit C.)
7 Appellant responded on March 21, 2008, asserting that he had no income and that he supported himself
8 with his labor and wits. Appellant indicated that he was not a resident of California and could not be
9 taxed by a "fictional entity." (*Id.* at exhibit D.) Respondent issued a reply letter to appellant on April 9,
10 2008, indicating that it did have the authority to assess a tax on his income and supplied information
11 regarding frivolous tax arguments. (*Id.* at exhibit E.) A separate letter on the same date notified
12 appellant that he was required to file a return by May 9, 2008. (*Id.* at exhibit F.)

13 On September 2, 2008, respondent issued a Notice of Proposed Assessment (NPA) for
14 the 2006 tax year. (Resp. Op. Br., exhibit G.) The NPA proposed a tax of \$269.00 and a late filing
15 penalty of \$100.00, based on income of \$21,923.24. Appellant protested the NPA on November 2,
16 2008. (*Id.* at exhibit H.) Appellant asserted that the NPA was addressed to a "strawman," that certain
17 income on the NPA was actually "gross receipts," no profit was earned during the year, resources and
18 costs were in excess of any taxes owed, and he was not required to file a return. Appellant requested
19 proof that the non-wage income was received and requested a hearing. Respondent acknowledged
20 appellant's letter by mail (*Id.* at exhibit I), and informed appellant that a protest hearing was scheduled
21 (*Id.* at exhibit J). Both parties met at the hearing on January 7, 2009, and respondent subsequently
22 issued a Notice of Action affirming the NPA on January 28, 2009. (Appeal Letter, exhibits.) This
23 timely appeal followed.

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26 ³ During 2006, appellant received \$21,923.24 according to the information gathered by respondent. (Resp. Op. Br., exhibit
27 B.) This income is comprised of: wages of \$7,842.00 from DCM, Inc., and \$711.00 from Pacifica Foundation; interest
28 income of \$107.00 from Charles Schwab & Co., Inc. (Schwab); dividend income of \$588.00 from Schwab and \$98 from AG
Edwards & Sons, Inc.; miscellaneous income of \$11,853 from In Publications, Inc.; and proceeds from stock sales in the
amounts of \$364.10 and \$360.14 from ADP Clearing & Outsourcing. (*Ibid.*)

1 Contentions

2 Appellant contends that he was fraudulently assigned a social security number without
3 his consent, and that he owns the "strawman against whom the proposed actions and assessment(s) have
4 been leveled..." (Appeal Letter, p. 1.) Appellant contends that he is not a United States citizen or a
5 California resident. Appellant asserts that FTB has failed to take into account the cost incurred in doing
6 the work for which he was paid. (*Id.* at p. 2.) Appellant asserts that the United States Supreme Court
7 decided that income meant "corporate profit," and that respondent is unlawfully trying to use "gross
8 receipts" as his taxable "income" without taking into account expenses. Appellant asserts that he had no
9 profits for the 2006 tax year. (*Id.* at pp. 2-3.) Appellant contends that while he has given statements
10 sworn as true, respondent has not given its employees' full names or sworn to any of its statements, and
11 therefore its statements are hearsay since he cannot cross-examine or confront the individuals making
12 these statements. Appellant also incorporates his contentions made at protest, as described above. (*Id.*
13 at p. 3.)

14 Respondent contends that appellant refuses to file a 2006 return for which he is legally
15 obligated by asserting arguments which the courts, the Internal Revenue Service, and the Board have
16 determined are frivolous arguments. (Resp. Op. Br., p. 3.) Respondent refers to the Board's Rules for
17 Tax Appeals which states that the Board does not have jurisdiction over several issues raised in
18 appellant's arguments. (*Id.* at pp. 3-4; See Cal. Code Regs., tit. 18, § 5412, subd. (b).) Respondent
19 asserts that appellant has not met his burden of showing error in the proposed assessment and related
20 penalty. Respondent contends that appellant has a nondelegable duty to file a return, and that it is not
21 required to prepare respondent's tax return for him, but has the power to determine the tax liability of
22 taxpayers who do not file a return. (Resp. Op. Br., p. 5.)

23 Applicable Law

24 Revenue and Taxation Code (R&TC) section 17041 imposes a tax "... upon the entire
25 taxable income of every resident of this state . . ." and "... upon the entire taxable income of every
26 nonresident or part-year resident which is derived from sources in this state . . ." ⁴ R&TC section
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⁴ Appellant disputes that he is a California resident, but it appears undisputed that appellant lived in California during the year at issue.

1 18501 requires every individual subject to the Personal Income Tax to make and file a return with
2 respondent “stating specifically the items of the individual’s gross income from all sources and the
3 deductions and credits allowable” R&TC section 19087, subdivision (a), provides:

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

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

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

23 California imposes a penalty for the failure to file a return on or before the due date,
24 unless it is shown that the failure is due to reasonable cause and not due to willful neglect. (Rev. & Tax.
25 Code, § 19131.) To establish reasonable cause, the taxpayer “must show that the failure to file timely
26 returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as
27 would prompt an ordinary intelligent and prudent businessman to have so acted under similar
28 circumstances.” (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.)

1 Finally, this Board may impose a penalty of up to \$5,000 whenever it appears that
2 proceedings before it have been instituted or maintained primarily for delay or that the position is
3 frivolous or groundless. (Rev. & Tax. Code, § 19714.)

4 STAFF COMMENTS

5 The Board has previously considered and rejected each of appellant’s contentions as
6 frivolous and without merit. (See *Appeals of Robert E. Wesley, et al.*, 2005-SBE-002, Nov. 15, 2005;
7 *Appeal of Michael E. Myers, supra*; *Appeal of Alfons Castillo*, 92-SBE-020, July 20, 1992; *Appeal of*
8 *Walter R. Bailey, supra*; and *Appeals of Fred R. Dauberger, et al.*, 82-SBE-082, Mar. 31, 1982.)

9 Appellant was notified of the frivolous appeal penalty in the Notice of Action dated
10 January 28, 2009, and in a letter from Board staff dated March 25, 2009. This is appellant’s first appeal
11 of this nature.⁵

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28 ⁵ Appellant filed another appeal with the Board for the 2007 tax year (Case ID No. 511811). This appeal was dismissed, reversing FTB's position, during the briefing process on December 30, 2009.