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10 **BOARD OF EQUALIZATION**
 11 **STATE OF CALIFORNIA**

12 In the Matter of the Appeal of:) **HEARING SUMMARY**
 13) **PERSONAL INCOME TAX APPEAL**
 14 **ELIZABETH MAGNESS**¹) Case No. 508940²

	<u>Year</u>	<u>Proposed</u> <u>Assessment</u>	
	2007	<u>Tax</u>	<u>Penalties</u> ³
		\$4,204.00	\$2,345.75

15 Representing the Parties:

16 For Appellant: Peymon Mottahdeh
 17 For Franchise Tax Board: Jane Perez, Tax Counsel

18 **QUESTIONS:** (1) Whether appellant has demonstrated error in the underlying tax assessment.
 19 (2) Whether appellant has shown reasonable cause for abatement of penalties.
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21 _____
 22 ¹ Appellant resides in Fresno County, California.

23 ² This appeal was originally set for an oral hearing on the October 19-22, 2010 calendar. It was removed from that calendar
 24 and scheduled as a nonappearance item for the November 16-18, 2010 calendar, because appellant failed to timely respond to
 25 the hearing notice. Later, at the request of appellant's representative, this appeal was placed back on the October 19-22, 2010
 26 oral hearing calendar.

27 ³ This amount is comprised of a \$1,051.00 late filing penalty and a \$1,294.75 notice and demand (demand) penalty. A \$119
 28 filing enforcement fee was also charged.

1 (3) Whether the filing enforcement cost recovery fee should be abated.

2 (4) Whether the Board should impose a frivolous appeal penalty.⁴

3 HEARING SUMMARY

4 Background

5 Appellant has not filed a 2007 California income tax return. Having received information
6 from various sources that appellant received sufficient income to trigger the filing requirement,⁵ the
7 Franchise Tax Board (FTB or respondent) issued a notice dated January 23, 2009, demanding that
8 appellant file a return or explain why no return was required. When appellant neither filed a return nor
9 demonstrated why a return was not required, the FTB issued a Notice of Proposed Assessment (NPA) on
10 May 11, 2009. On July 9, 2009, appellant filed a timely protest, and she requested a protest hearing. It
11 appears that a protest hearing was not scheduled or provided at that time. On August 7, 2009, the FTB
12 issued a Notice of Action (NOA) affirming the NPA. On August 26, 2009, respondent acknowledged
13 appellant's protest and request for an oral hearing. On or about September 4, 2009, appellant filed this
14 timely appeal.

15 After appellant filed this timely appeal, by letter dated September 22, 2009, the FTB
16 scheduled a protest hearing for October 21, 2009. On October 8, 2009, appellant's representative
17 requested a postponement of the hearing, and respondent rescheduled the hearing to November 17,
18 2009. It appears that neither Mr. Mottahedeh nor appellant attended the scheduled meeting. The FTB
19 filed its opening brief on March 17, 2010, and the FTB subsequently issued a Notice of Action–
20 Affirmation on May 28, 2010. Correspondence in the appeal file shows that, on July 6, 2010, the FTB
21 issued a memorandum to appellant, which stated that the Notice of Action – Affirmation was issued in
22

23 ⁴ This is appellant's third appeal of this nature; in her first appeal (for 2001, case no. 268509), the Board found against
24 appellant and imposed a frivolous appeal penalty of \$750. She then filed a petition for rehearing, which was denied. In her
25 second appeal (for 2003, case no. 343250), the Board found against appellant and imposed a frivolous appeal penalty of
26 \$2,500. She then filed a petition for rehearing, which was denied. In addition to the appeals listed above, appellant filed an
27 appeal for 2004 (case no. 381472), which was subsequently dismissed at request of appellant before being considered by this
28 Board. According to the FTB, its records indicate that "the last valid California income tax return filed by appellant was for
the 2000 tax year."

⁵ For the 2007 tax year, appellant's estimated income of \$83,797 is based on California Employment Development
Department (EDD) records and/or federal Forms 1099-MISC, which show that appellant received \$18,604 in wages from
Susan A. Krime; \$18,593 in wages from Accredited Surety and Casualty Company; and \$46,600 in income from LPL
Financial.

1 error and to disregard that notice, as the NOA already had been issued on August 7, 2009.

2 Contentions

3 Appellant

4 Appellant sets forth the following contentions:

- 5 • The FTB's assessment is arbitrary and baseless;
- 6 • The NOA was issued before a protest hearing was provided;
- 7 • Appellant was denied a protest hearing;
- 8 • A protest hearing was not provided because the FTB did not produce the evidence
9 it considered against appellant, and appellant was not given an opportunity to test,
10 explain, or refute such evidence;
- 11 • The information the FTB relies upon for its assessment is hearsay and does not
12 provide the addresses of the alleged reporting entities/persons; and
- 13 • The FTB violated the Information Practices Act (IPA) (Cal. Civ. Code, §§ 1798 et
14 seq.).

15 The FTB

16 The FTB contends that appellant should not prevail here because appellant has failed to
17 meet her burden of proof in demonstrating any error in the FTB proposed assessment. The FTB also
18 disputes each individual contention. In response to the claim that appellant was denied a protest hearing,
19 the FTB contends that it was appellant's failure to appear that resulted in appellant not presenting her
20 arguments at the protest hearing for this matter. The FTB also rejects appellant's claim that the
21 proposed assessment is arbitrary and without factual foundation. The FTB asserts that its use of income
22 information from various sources to estimate appellant's taxable income, when appellant failed to file
23 her own return, is a reasonable and rational method of estimating taxable income. The FTB also rejects
24 the claim that it violated the IPA by withholding documents from appellant, and the FTB cites to
25 Revenue & Taxation Code (R&TC) section 19570 for the proposition that the IPA does not apply to the
26 determination of tax liability under the Personal Income Tax Law. In addition, the FTB asserts that the
27 Board has an established policy of declining to decide constitutional/due process issues.

28 Next, the FTB contends that the late filing penalty and demand penalty were properly

1 imposed and appellant has not presented evidence of reasonable cause to support abatement of those
2 penalties. The FTB also asserts that there is no language in the statutes that will excuse the filing
3 enforcement fee. Finally, the FTB contends that appellant is maintaining a frivolous appeal and requests
4 the Board impose a frivolous appeal penalty.

5 Discussion

6 Proposed Assessment

7 R&TC section 17041 imposes a tax “. . . upon the entire taxable income of every resident
8 of this state . . .” and upon the entire taxable income of every nonresident or part-year resident which is
9 derived from sources in this state.⁶ R&TC section 18501 requires every individual subject to the
10 Personal Income Tax to make and file a return with the FTB “stating specifically the items of the
11 individual’s gross income from all sources and the deductions and credits allowable” R&TC
12 section 19087, subdivision (a), provides:

13 If any taxpayer fails to file a return, or files a false or fraudulent return
14 with intent to evade the tax, for any taxable year, the Franchise Tax
15 Board, at any time, may require a return or an amended return under
16 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.

17 If the FTB makes a tax assessment based on an estimate of income, the FTB’s initial
18 burden is to show why its assessment is reasonable and rational. (*Todd v. McColgan* (1949) 89
19 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.)⁷ Federal courts have
20 held that the taxing agency need only introduce some evidence linking the taxpayer with the unreported
21 income. (See *Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932.) The FTB’s use of income
22 information from the EDD and/or federal Forms 1099-MISC to estimate a taxpayer’s taxable income,
23 when a taxpayer failed to file her own return, is a reasonable and rational method of estimating taxable
24 income. (See *Appeals of Walter R. Bailey*, 92-SBE-001, Feb. 20, 1992; *Appeals of R. and Sonja J.*
25 *Tonsberg*, 85-SBE-034, Apr. 9, 1985.)

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27 ⁶ It appears undisputed that appellant resided in California during the 2007 tax year.

28 ⁷ Board of Equalization cases are generally available for viewing on the Board’s website (www.boe.ca.gov).

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

9 Information Practices Act

10 IPA arguments are not within the Board’s jurisdiction. In the *Appeals of Fred R.*
11 *Dauberger (82-SBE-082)*, decided on March 31, 1982, the Board stated that “the only power that this
12 Board has is to determine the correct amount of an appellant’s California personal income tax liability
13 for the appeal years.” The above-quoted language was a direct response to arguments similar to those
14 raised by appellant. (See also *Appeals of Robert E. Wesley, et al., 2005-SBE-002, Nov. 15, 2005.*)

15 In *Bates v. Franchise Tax Board (2004) 124 Cal.App.4th 367*, the court discussed
16 whether alleged IPA violations could be used to defeat a proposed tax assessment. The *Bates* court held
17 that the R&TC provisions governing the estimation of income for persons who do not file tax returns,
18 and the related provisions for the assessment and collection of taxes, are not superseded by the IPA.
19 (See also *Appeals of Robert E. Wesley, et al., supra.*)

20 Constitutional/Due Process Issues

21 The Board is precluded from determining the constitutional validity of California statutes,
22 and has an established policy of declining to consider constitutional issues. (Cal. Const., art III, § 3.5;
23 *Appeal of Aimor Corp., 83-SBE-221, Oct. 26, 1983; Appeals of Walter R. Bailey, supra.*) In *Bailey,*
24 *supra*, the Board stated:

25 [D]ue process is satisfied with respect to tax matters so long as an opportunity
26 is given to question the validity of a tax at some stage of the proceedings. It
27 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.

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1 Late Filing Penalty

2 California imposes a penalty for failure to file a return by its due date, unless the failure
3 to file was due to reasonable cause and not due to willful neglect. (Rev. & Tax. Code, § 19131.) To
4 establish reasonable cause, a taxpayer “must show that the failure to file timely returns occurred despite
5 the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinary
6 intelligent and prudent businessman to have so acted under similar circumstances.” (*Appeal of Howard*
7 *G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) Ignorance of a filing requirement or a misunderstanding
8 of the law generally does not excuse a late filing. (*Appeal of Diebold, Incorporated*, 83-SBE-002,
9 Jan. 3, 1983.)

10 Demand Penalty

11 California imposes a penalty for the failure to file a return or provide information upon
12 the FTB’s demand to do so, unless reasonable cause prevented the taxpayer from responding to the
13 request. (Rev. & Tax. Code, § 19133.) The burden is on the taxpayer to prove that reasonable cause
14 prevented her from responding to the demand. (*Appeal of Kerry and Cheryl James*, 83-SBE-009, Jan. 3,
15 1983.) The FTB will only impose a demand penalty if the taxpayer fails to respond to a current Demand
16 for Tax Return and the FTB issued an NPA under the authority of R&TC section 19087, subdivision (a),
17 after the taxpayer failed to timely respond to a Request for Tax Return or a Demand for Tax Return at
18 any time during the four-taxable-years preceding the year for which the current Demand for Tax Return
19 is being issued. (Cal. Code Regs., tit. 18, § 19133, subd. (b).)

20 Filing Enforcement Fee

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

25 Frivolous Appeal Penalty

26 The Board may impose a penalty of up to \$5,000 whenever it appears to the Board that
27 proceedings before it have been instituted or maintained primarily for delay or that the position is
28 frivolous or groundless. (Rev. & Tax. Code, § 19714; Cal. Code Regs., tit. 18, § 5454.) The following

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1 factors are considered in determining whether, and in what amount, to impose the penalty: (1) whether
2 appellant is making arguments that have been previously rejected by the Board in a Formal Opinion or
3 by courts, (2) whether appellant is repeating arguments that he or she made in prior appeals, (3) whether
4 appellant filed the appeal with the intent of delaying legitimate tax proceedings or the legitimate
5 collection of tax owed, and (4) whether appellant has a history of filing frivolous appeals or failing to
6 comply with California's tax laws. (Cal. Code Regs., title 18, § 5454.) The Board may consider other
7 relevant factors in addition to the factors listed above. (*Id.*)

8 The Board has previously considered arguments similar to appellant's arguments on
9 appeal, and the Board has consistently rejected each of those arguments as frivolous and without merit.
10 (See *Appeals of Robert E. Wesley, et al., supra*; *Appeal of Michael E. Myers, supra*; *Appeal of Alfons*
11 *Castillo, 92-SBE-020, July 30, 1992*; *Appeals of Walter R. Bailey, supra*; and *Appeals of Fred R.*
12 *Dauberger, et al., supra.*)

13 STAFF COMMENTS

14 The FTB based its assessment on income information obtained from the EDD and/or
15 federal Forms 1099-MISC. The Board has previously concluded that this method of estimating income
16 is rational and reasonable. (See *Appeals of Walter R. Bailey, supra*; *Appeals of R. and Sonja J.*
17 *Tonsberg, supra.*) At the hearing, appellant should be prepared to provide evidence demonstrating error
18 in the assessment.

19 As mentioned above, the Board does not have the power to remedy any alleged violations
20 of the IPA, and the Board is precluded from determining the constitutional validity of California statutes
21 and has an established policy of declining to consider constitutional/due process issues. With regard to
22 appellant's argument that he was denied a protest hearing, the Board explained in *Appeals of Fred E.*
23 *Dauberger, et al., supra*, that:

24 [T]he only power that this Board has is to determine the correct amount of
25 an appellant's California personal income tax liability for the appeal years.
26 We have no power to remedy any other real or imagined wrongs that
27 taxpayers believe they may have suffered at the hands of the Franchise
28 Tax Board.

At the oral hearing, the parties should be prepared to discuss whether reasonable cause
exists for relief from the late filing penalty and the demand penalty. In relation to the demand penalty,

1 staff notes that the FTB's demand for the 2007 tax year apparently complied with the provisions of
2 California Code of Regulations section 19133, subdivision (b), given that the FTB previously issued a
3 demand to appellant for the 2004 tax year, and when appellant failed to respond to that demand, the FTB
4 issued an NPA for the 2004 tax year.

5 Staff is not aware of any basis upon which the filing enforcement fee may be relieved.
6 As stated above, R&TC section 19254 authorizes imposition of a filing enforcement cost recovery fee
7 when the FTB mailed notice to a taxpayer that the continued failure to file a return may result in
8 imposition of the fee. Once the fee is properly imposed, there is no language in the statute that would
9 excuse the fee under any circumstances, including for reasonable cause. (See *Michael E. Myers, supra.*)

10 Finally, the parties should be prepared to discuss whether a frivolous appeal penalty
11 should be imposed. If a frivolous appeal penalty is imposed, the Board will want to consider the amount
12 of the penalty in light of this being appellant's third appeal of this nature (see footnote 4 above).

13 According to the FTB, its records indicate that "the last valid California income tax return filed by
14 appellant was for the 2000 tax year." Appellant was notified that the Board may impose a frivolous
15 appeal penalty in the NOA dated August 7, 2009, and in a letter from Board staff dated September 14,
16 2009.

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