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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 **PLURIA W. MARSHALL JR.**<sup>1</sup> ) Case No. 533146

	<u>Year</u>	Claim for
	2007	Refund
		\$5,582.25

16 Representing the Parties:

18 For Appellant: Clyde A. Young III, Representative  
19 For Franchise Tax Board: Nathan Hodges, Graduate Legal Assistant

21 QUESTION: Whether appellant has shown reasonable cause for the abatement of the demand  
22 penalty.

23 HEARING SUMMARY

24 Background

25 Appellant did not file a timely 2007 return. The Franchise Tax Board (FTB or respondent)  
26 obtained information indicating appellant received enough income to prompt filing a return. Specifically,

28 <sup>1</sup> Although appellant was married during the appeal year, appellant's spouse did not participate in this appeal. In addition, this appeal was originally scheduled for June 22, 2011, but was rescheduled due to appellant's unavailability on that day.

1 Employment Development Department (EDD) records indicated that appellant-husband received wages  
2 from New Wave Community Newspapers, Inc. in the amount of \$386,180 for the 2007 tax year. On  
3 January 26, 2009, respondent mailed a Demand for Tax Return (Demand) to appellant, demanding that he  
4 either file a 2007 tax return or explain why a 2007 return was not required. (Resp. Open. Br., Exh. A.)  
5 The Demand was mailed to appellant at a Manhattan Beach, California address. Appellant did not reply to  
6 the Demand for his 2007 return by the February 25, 2009 due date indicated on the Demand letter. (Resp.  
7 Open. Br., p. 1.)

8 Subsequently, on March 30, 2009, respondent issued a Notice of Proposed Assessment  
9 (NPA) to appellant for the 2007 tax year. The NPA was sent to appellant at the same Manhattan Beach,  
10 California address listed on the Demand. The NPA estimated appellant's taxable income at \$382,664.00  
11 and imposed penalties for late filing of \$751.75, failure to file upon demand of \$8,348.25, a filing  
12 enforcement fee of \$119.00 plus applicable interest. (Resp. Open. Br., Exh. B.)

13 On April 15, 2009, appellant filed his 2007 California tax return, claiming the married  
14 filing joint filing status. Appellant reported taxable income of \$289,617, a tax liability of \$22,329 and  
15 claimed withholding credits and estimated tax payments totaling \$30,386. Appellant claimed an overpaid  
16 tax amount of \$8,057 of which he requested a refund. The California return also listed the same  
17 Manhattan Beach, California address listed on the Demand and the NPA. (Resp. Open. Br., Exh. C.)

18 Upon review, respondent accepted appellant's filing status and self-assessed tax liability  
19 and adjusted its records to reflect the \$22,329 of self-assessed tax liability. Respondent abated the late  
20 filing penalty and the filing enforcement fee. In addition, respondent reduced the demand penalty from  
21 \$8,348.25 to \$5,582.25. A Notice of Tax Change was sent to appellant on May 28, 2009, informing him  
22 of the changes to his account based on his 2007 return. (Resp. Open. Br., Exh. D.)

23 Appellant's representative sent respondent a letter dated July 16, 2009, requesting  
24 abatement of the demand penalty because appellant never received the demand notice. (Resp. Open. Br.,  
25 Exh. E.) Respondent treated the letter as a claim for refund. On February 19, 2010, respondent issued a  
26 Notice of Action (NOA) which informed appellant that, based on the facts presented by appellant, there  
27 was no reasonable cause to abate the demand penalty. (Resp. Open. Br., Exh. F.) Appellant then filed this  
28 timely appeal.

1           Contentions

2                   Appellant

3           Appellant initially contends he never received the demand notice dated January 26, 2009.  
4 Appellant questions respondent's reliance on the last known address rule. Appellant questions why  
5 respondent, "with all of its massive financial resources, [could] not afford to send Appellant a second  
6 notice, costing a mere 44 cents..." and cites Kentucky Code section 12.145 for the proposition that certain  
7 state agencies are required to use certified mail. Accordingly, appellant contends his right of due process  
8 has been violated because respondent did not take the usual and customary approach to notify appellant  
9 using certified or registered mail. Appellant asserts that respondent's contention regarding the burden of  
10 proof effectively deprives appellant of ever being able to prove non-receipt of a notice from respondent.  
11 Appellant asserts the requirement that appellant prove the non-delivery of the demand notice is an  
12 impossible standard. Appellant contends, "[t]o deprive Appellant of \$5,582.25 based on such a standard is  
13 unnecessarily punitive, in direct contravention of the purpose of state and federal income tax laws, and  
14 amounts to a taking of Appellant's property in violation of his due process rights." (App. Reply Br., pp.  
15 1-2.)

16           Appellant further contends that reasonable cause existed for the lack of response to the  
17 demand letter. Appellant asserts he had reasonable cause for the late filing penalty and that same  
18 justification applies as reasonable cause to waive the demand penalty. Appellant contends that he is  
19 affiliated with business interests located in four states and over a dozen different jurisdictions. As such,  
20 his tax obligations are increasingly complex every year and require a longer preparation and review  
21 process by appellant's staff and outside professional advisors. Appellant contends he filed returns as  
22 quickly as he could, given the extensive review required by his situation. (App. Reply Br., p. 3.)

23           Next, appellant contends he has no record of any FTB request for information for the 2007  
24 tax year. Accordingly, appellant contends that reasonable cause existed because the penalty was asserted  
25 for his apparent failure to do something he was never requested to do. (App. Reply Br., p. 3.)

26           Lastly, appellant contends that the tax for the 2007 tax year was paid timely. Appellant  
27 notes that the tax liability and withholding amounts according to the FTB are exactly the same as those  
28 shown on the tax return as filed. Appellant asserts that since there are no differences in income and tax

1 data, it is unclear what information he failed to furnish. (Appeal Letter, p. 2.)

2 Accordingly, appellant requests that the failure to file upon demand penalty of \$5,582.25  
3 be abated in full. (App. Reply Br., p. 4.)

4 Respondent

5 Respondent contends that the demand penalty was properly imposed pursuant to R&TC  
6 section 19133. Respondent notes that it also issued a Request for Tax Return for the 2006 tax year on  
7 January 14, 2008 and an NPA issued for that year on April 1, 2008. Accordingly, respondent contends  
8 that when appellant did not respond to the Demand for the 2007 tax year, respondent imposed the demand  
9 penalty on the 2007 tax year. Respondent asserts the law presumes the penalty was imposed correctly and  
10 may be abated only if appellant can show his failure to respond to the demand letter is due to reasonable  
11 cause and not willful neglect. Respondent contends that appellant has the burden of proof to show the  
12 failure to reply occurred despite the exercise of ordinary business care and prudence. (Resp. Open. Br.,  
13 pp. 2-3.)

14 With respect to appellant's contention that he never received the Demand, respondent  
15 contends it mailed the Demand consistent with R&TC section 18416, subdivision (b), to appellant's  
16 address as provided in his last tax return and the United States Post Office (USPS) did not return the  
17 Demand notice back to respondent as undeliverable mail. To prevail, respondent asserts that appellant  
18 must show the Demand was not mailed to his last known address in Manhattan Beach, California.  
19 Respondent notes that its records indicate appellant failed to file timely returns for the 2004, 2005, 2006  
20 and 2008 tax years. Respondent contends appellant has failed to show reasonable cause existed for his  
21 failure to respond to the Demand notice and thus, respondent's denial of abatement of the demand penalty  
22 is proper. (Resp. Open. Br., pp. 3.)

23 In respondent's reply brief dated October 22, 2010, respondent notes that appellant filed his  
24 return 79 days after respondent mailed the Demand to appellant's last known address. Respondent notes  
25 that the Demand was sent to the same address that was listed on appellant's 2007 return, as well as the  
26 address used by respondent to issue the NPA. Respondent contends that appellant bears the burden of  
27 showing the notice and demand or request for information was not mailed to the last known address.  
28 Respondent notes appellant had not provided respondent with a new address and therefore, because

1 respondent issued the notice to the address last provided by appellant, respondent followed the proper  
2 procedures. Respondent also clarifies that “the penalty for failure to furnish information” is the same as  
3 the demand penalty for failure to furnish information requested in writing, or to file a return upon notice  
4 and demand. (Resp. Reply Br., pp. 1-2.)

5 In response to appellant’s due process claim, respondent notes that appellant relied on  
6 Kentucky Code section 12.145 which is not authoritative in California. Respondent contends that no such  
7 provision exists for purposes of California tax administration, and the law provides that any notice may be  
8 given by first class postage and is valid if mailed to a taxpayer’s last known address. Citing the Board’s  
9 decision in *Appeals of Walter R. Bailey*, 92-SBE-001, Feb. 20, 1992,<sup>2</sup> respondent contends that appellant’s  
10 due process rights are being satisfied by this appeal of respondent’s denial of appellant’s claim for refund.  
11 Respondent notes that appellant has the ability to submit evidence as well as the opportunity to question  
12 the validity of the demand penalty at a hearing before the Board. (Resp. Reply Br., pp. 2-3.)

13 In response to appellant’s contention that reasonable cause existed because the changes in  
14 the tax law require a longer preparation and review process, respondent argues that an unsupported claim  
15 of intense work pressure is insufficient to constitute reasonable cause, citing the Board’s decision in  
16 *Appeal of Elmer R. and Barbara Malakoff*, 83-SBE-140, June 21, 1983. Respondent notes that the penalty  
17 at issue here is not for appellant’s late filing of his return, but rather, his failure to file his return after  
18 respondent issued a demand for that return. Respondent contends that the same standard of compliance  
19 would be equally applicable. Respondent asserts the fact that an individual taxpayer’s circumstances may  
20 make compliance more difficult than for the average person does not excuse each taxpayer’s duty to file a  
21 timely return or to respond to a demand for such return. Respondent argues taxpayers are required to file  
22 returns and to make payments of tax without regard to their individual convenience. (Resp. Reply Br., p.  
23 3.)

#### 24 Applicable Law

##### 25 Demand Penalty

26 California imposes a penalty for the failure to file a return or provide information upon the  
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28 <sup>2</sup> Board of Equalization cases may be viewed on the Board’s website ([www.boe.ca.gov](http://www.boe.ca.gov)).

1 FTB's demand to do so, unless reasonable cause prevented the taxpayer from responding to the demand.  
2 (Rev. & Tax. Code, § 19133.) The FTB will only impose a demand penalty if the taxpayer fails to  
3 respond to a current Demand for Tax Return and the FTB issued an NPA under the authority of R&TC  
4 section 19087, subdivision (a), after the taxpayer failed to timely respond to a Request for Tax Return or a  
5 Demand for Tax Return at any time during the four-taxable-years preceding the year for which the current  
6 Demand for Tax Return is being issued. (Cal. Code Regs., tit. 18, § 19133, subd. (b).)

7           When the FTB imposes a late filing or notice and demand/failure to furnish information  
8 penalty, the law presumes that the penalty was imposed correctly. (*Todd v. McColgan* (1949)  
9 89 Cal.App.2d 509.) To overcome the presumption of correctness of the penalties, the taxpayer must  
10 provide credible and competent evidence to support the claim of reasonable cause; otherwise the penalties  
11 will not be abated. (*Appeal of James C. and Monablance A. Walshe*, 75-SBE-073, Oct. 20, 1975.) The  
12 burden of proof is on the taxpayer to show reasonable cause exists to support abatement of the penalty.  
13 (*Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982.)

14           To establish reasonable cause, a taxpayer must show the failure to reply to the notice and  
15 demand or request for information occurred despite the exercise of ordinary business care and prudence.  
16 (*Appeal of Stephen C. Bieneman, supra.*) The taxpayer's reason for failing to respond to the notice and  
17 demand or request for information must be such that an ordinarily intelligent and prudent businessperson  
18 would have acted similarly under the circumstances. (*Appeal of Elmer R. and Barbara Malakoff, supra.*)  
19 Generally, a taxpayer's inability to provide a timely response to a notice and demand, or furnish requested  
20 information because of lack of necessary information or documents, is not considered reasonable cause.  
21 (*Appeal of Robert E. and Argentina Sorenson*, 81-SBE-005, Jan. 6, 1981; *Appeal of Stephen C. Bieneman,*  
22 *supra.*) Within the context of the late payment penalty, the Board has determined that complexity of the  
23 tax law or difficulties in accumulating the information necessary to calculate a tax liability which leads to  
24 a delay in computing tax liability is not reasonable cause. (*Appeal of Philip C. and Anne Berolzheimer,*  
25 86-SBE-172, Nov. 19, 1986 [complexities of federal law and new computer system which led to the  
26 taxpayers' agent miscalculation of tax is not reasonable cause]; *Appeal of Roger W. Sleight*, 83-SBE-244,  
27 Oct. 26, 1983 [inability to determine whether gain from disposition of real property must be recognized  
28 due to the complexity of the tax law is not reasonable cause]; *Appeal of J.B. and P.R. Campbell*, 85-SBE-

1 112, Oct. 9, 1985 [merely stating that taxpayers lacked information from partnerships where someone  
2 other than taxpayers were responsible for the financial records is not reasonable cause].)

3 In addition, a taxpayer's failure to respond to a notice and demand because of a taxpayer's  
4 unsubstantiated intense work pressures is not considered reasonable cause. (*Appeal of Elmer R. and*  
5 *Barbara Malakoff, supra.*) Furthermore, the Board held that a taxpayer's unfamiliarity of California tax  
6 law which leads to a delay in responding to a notice and demand or request for information is not  
7 reasonable cause. (See *Appeal of Ronald A. Floria*, 83-SBE-003, Jan. 3, 1983.) Moreover, a taxpayer's  
8 claim that he did not receive the demand is not considered reasonable cause where the FTB has mailed the  
9 demand to a taxpayer's last known address and the demand has not been returned by the USPS as  
10 undelivered. (See *Appeal of Eugene C. Findley*, 86-SBE-091, May 6, 1986; *Appeal of Terry R. Lash*, 86-  
11 SBE-021, Feb. 4, 1986; *Appeal of A.J. Bima*, 82-SBE-185, Aug. 17, 1982.)

#### 12 Last Known Address Rule

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

20 It is well settled that respondent's mailing of a notice to the taxpayer's last-known address  
21 is considered sufficient even if the notice never actually reaches the taxpayer. (*Appeal of Yvonne M.*  
22 *Goodwin*, 97-SBE-003, Mar. 19, 1997; *Appeal of Jon W. and Antoinette O. Johnston*, 83-SBE-238, Oct.  
23 26, 1983.) This "last-known address rule" protects the taxing agency and the statutory scheme of  
24 assessment and appeal from a failure by the taxpayer to inform the taxing agency of a change in address.  
25 (*Delman v. Comm'r* (3rd Cir. 1967) 384 F.2d 929, 933.)

#### 26 Due Process

27 The Board previously held that "due process is satisfied with respect to tax matters so long  
28 as an opportunity is given to question the validity of a tax at some stage of the proceedings." (*Appeals of*

1 *Walter R. Bailey, supra.*)

2 STAFF COMMENTS

3 Appellant appears to assert that, based on the extensive review required by his complex tax  
4 situation, there is reasonable cause for waiver of the demand penalty. At the oral hearing, appellant  
5 should explain how his complex tax situation and corresponding extensive review prevented him from  
6 responding to the Demand and distinguish the cases and authorities set forth above. Appellant should be  
7 prepared to explain why a timely response to a Demand or request for information could not have been  
8 provided without the extensive review. Appellant should be prepared to establish his efforts made to  
9 obtain the information in time to respond to the Demand or request for information. In addition, appellant  
10 should explain why he did not respond to the Demand and file the return based on information that was  
11 available to him at that time he received the Demand.

12 Appellant contends that he did not receive the Demand dated January 26, 2009.  
13 Respondent states that it mailed the Demand to appellant's last known address which was the address on  
14 appellant's last filed return and the United States Post Office did not return it to respondent as  
15 undeliverable mail. As appellant filed his 2007 return using the same Manhattan Beach address that  
16 respondent issued the Demand and the NPA to, it also appears that the Manhattan Beach address is  
17 appellant's current address. It appears that respondent properly followed R&TC section 18416 in mailing  
18 the Demand to appellant.

19 Pursuant to California Code of Regulations, title 18, section 5523.6, if either party has any  
20 additional evidence to present, it should provide the evidence to Board Proceedings at least 14 days prior  
21 to the oral hearing.<sup>3</sup>

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25 Marshall Jr\_mt

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<sup>3</sup> Evidence exhibits should be sent to: Claudia Madrigal, Appeals Analyst, Board Proceedings Division, State Board of Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.