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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 **ERIC MATTSON**<sup>1</sup> ) Case No. 510013<sup>2</sup>

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	<u>Year</u>	<u>Proposed Assessment Tax</u>	<u>Penalties</u> <sup>3</sup>
	2007	\$1,580	\$2,222

17 Representing the Parties:

19 For Appellant: Peymon Mottahedeh

20 For Franchise Tax Board: Mary Yee, Tax Counsel

22 **QUESTIONS:** (1) Whether appellant has demonstrated error in the underlying tax assessment.

24 <sup>1</sup> Appellant lists a P.O. Box in Los Angeles County, California.

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

<sup>3</sup> This amount is comprised of a \$395 late filing penalty and a \$1,827 notice and demand (demand) penalty. A \$119 filing enforcement fee was charged.

1 (2) Whether appellant has shown reasonable cause for abatement of penalties.

2 (3) Whether the filing enforcement fee should be abated.

3 (4) Whether the Board should impose a frivolous appeal penalty.<sup>4</sup>

4 HEARING SUMMARY

5 Background

6 Appellant has not filed a 2007 California income tax return. Having received information  
7 from the Employment Development Department (EDD) that appellant received sufficient wages to  
8 trigger the filing requirement,<sup>5</sup> the Franchise Tax Board (FTB or respondent) issued a notice dated  
9 February 3, 2009, demanding that appellant file a return or explain why no return was required. When  
10 appellant neither filed a return nor demonstrated why a return was not required, the FTB issued a Notice  
11 of Proposed Assessment (NPA) on June 2, 2009, based on the EDD wage information. Appellant timely  
12 protested the NPA but failed to attend the November 17, 2009 protest hearing conducted by the FTB.  
13 The FTB later affirmed its assessment in a Notice of Action (NOA) issued on August 10, 2009.  
14 Appellant then filed this timely appeal.

15 Contentions

16 Appellant

17 Appellant sets forth the following contentions:

- 18 • Appellant was denied a protest hearing;
- 19 • A protest hearing was not provided because the FTB did not produce the evidence  
20 it considered against appellant, and appellant was not given an opportunity to test,  
21 explain, or refute such evidence;
- 22 • The assessment is arbitrary and baseless; and
- 23 • The FTB violated the Information Practices Act (IPA) (Cal. Civ. Code, §§ 1798 et  
24 seq.).

25  
26 <sup>4</sup> This is appellant's first appeal of this nature. According to the FTB, its records indicate that "the last valid California  
27 income tax return filed by appellant was for the 2003 tax year."

28 <sup>5</sup> For the 2007 tax year, appellant's estimated income of \$106,710 is based on EDD records, which show that appellant  
received \$90,994 in wages from Olympic Partners, Inc. and \$15,716 in wages from Avalon Visual Corp.

1                    The FTB

2                    The FTB contends that appellant should not prevail here because appellant has failed to  
3 meet his burden of proof in demonstrating any error in the FTB proposed assessment. The FTB also  
4 disputes each individual contention. In response to the claim that appellant was denied a protest hearing,  
5 the FTB contends that it was appellant's failure to appear that resulted in appellant not presenting his  
6 arguments at the protest hearing for this matter. The FTB also rejects appellant's claim that the  
7 proposed assessment is arbitrary and without factual foundation. The FTB asserts that its use of wage  
8 information from the EDD to estimate appellant's taxable income, when appellant failed to file his own  
9 return, is a reasonable and rational method of estimating taxable income. The FTB also rejects the claim  
10 that it violated the IPA by withholding documents from appellant, and the FTB cites to Revenue and  
11 Taxation Code (R&TC) section 19570 for the proposition that the IPA does not apply to the  
12 determination of tax liability under the Personal Income Tax Law. In addition, the FTB asserts that the  
13 Board has an established policy of declining to decide constitutional/due process issues.

14                    Next, the FTB contends that the late filing penalty and demand penalty were properly  
15 imposed and appellant has not presented evidence of reasonable cause to support abatement of those  
16 penalties. In relation to the demand penalty, the FTB states that the demand penalty was properly  
17 imposed under the provisions of California Code of Regulations section 19133, subdivision (b), given  
18 that the FTB previously issued a demand to appellant for the 2006 tax year, and when appellant failed to  
19 respond to the 2006 demand, the FTB issued an NPA for the 2006 tax year.

20                    The FTB also asserts that there is no language in the statutes that will excuse the filing  
21 enforcement fee. Finally, the FTB contends that appellant is maintaining a frivolous appeal and requests  
22 that the Board impose a frivolous appeal penalty.

23                    Discussion

24                    Proposed Assessment

25                    R&TC section 17041 imposes a tax “. . . upon the entire taxable income of every resident  
26 of this state . . .” and upon the entire taxable income of every nonresident or part-year resident which is

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1 derived from sources in this state.<sup>6</sup> R&TC section 18501 requires every individual subject to the  
2 Personal Income Tax to make and file a return with the FTB “stating specifically the items of the  
3 individual’s gross income from all sources and the deductions and credits allowable . . . .” R&TC  
4 section 19087, subdivision (a), provides:

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

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

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

#### 26                   Information Practices Act

27                   IPA arguments are not within the Board’s jurisdiction. In the *Appeals of Fred R.*

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<sup>6</sup> It appears undisputed that appellant resided in California during the 2007 tax year.

<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 *Dauberger* (82-SBE-082), decided on March 31, 1982, the Board stated that “the only power that this  
2 Board has is to determine the correct amount of an appellant’s California personal income tax liability  
3 for the appeal years.” The above-quoted language was a direct response to similar arguments raised by  
4 appellant. (See also *Appeals of Robert E. Wesley, et al.*, 2005-SBE-002, Nov. 15, 2005.)

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

#### 10 Constitutional/Due Process Issues

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

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

#### 18 Late Filing Penalty

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

#### 27 Demand Penalty

28 California imposes a penalty for the failure to file a return or provide information upon

1 the FTB's demand to do so, unless reasonable cause prevented the taxpayer from responding to the  
2 request. (Rev. & Tax. Code, § 19133.) The burden is on the taxpayer to prove that reasonable cause  
3 prevented him from responding to the demand. (*Appeal of Kerry and Cheryl James*, 83-SBE-009,  
4 Jan. 3, 1983.) The FTB will only impose a demand penalty if the taxpayer fails to respond to a current  
5 Demand for Tax Return and the FTB issued an NPA under the authority of R&TC section 19087,  
6 subdivision (a), after the taxpayer failed to timely respond to a Request for Tax Return or a Demand for  
7 Tax Return at any time during the four-taxable-years preceding the year for which the current Demand  
8 for Tax Return is being issued. (Cal. Code Regs., tit. 18, § 19133, subd. (b).)

#### 9 Filing Enforcement Fee

10 R&TC section 19254 authorizes imposition of a filing enforcement fee when the FTB has  
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 Frivolous Appeal Penalty

15 The Board may impose a penalty of up to \$5,000 whenever it appears to the Board that  
16 proceedings before it have been instituted or maintained primarily for delay or that the position is  
17 frivolous or groundless. (Rev. & Tax. Code, § 19714; Cal. Code Regs., tit. 18, § 5454.) The following  
18 factors are considered in determining whether, and in what amount, to impose the penalty: (1) whether  
19 appellant is making arguments that have been previously rejected by the Board in a Formal Opinion or  
20 by courts, (2) whether appellant is repeating arguments that he or she made in prior appeals, (3) whether  
21 appellant filed the appeal with the intent of delaying legitimate tax proceedings or the legitimate  
22 collection of tax owed, and (4) whether appellant has a history of filing frivolous appeals or failing to  
23 comply with California's tax laws. (Cal. Code Regs., tit. 18, § 5454.) The Board may consider other  
24 relevant factors in addition to the factors listed above. (*Id.*)

25 The Board previously considered arguments similar to appellant's arguments and has  
26 rejected each of the arguments as frivolous and without merit. (See *Appeals of Robert E. Wesley, et al.*,  
27 *supra*; *Appeal of Michael E. Myers, supra*; *Appeal of Alfons Castillo*, 92-SBE-020, July 30, 1992;  
28 *Appeals of Walter R. Bailey, supra*; and *Appeals of Fred R. Dauberger, et al., supra.*)

1 STAFF COMMENTS

2           The FTB based its assessment on wage information obtained from the EDD. The Board  
3 previously concluded that this method of estimating income is rational and reasonable. At the oral  
4 hearing, appellant should be prepared to substantiate his contentions. Pursuant to California Code of  
5 Regulations, title 18, section 5523.6, if appellant wishes to provide further evidence, appellant should  
6 provide his evidence to the Board Proceedings Division at least 14 days prior to the oral hearing.<sup>8</sup>

7           As indicated above, the Board does not have the power to remedy any alleged violations  
8 of the IPA, and the Board is precluded from determining the constitutional validity of California statutes  
9 and has an established policy of declining to consider constitutional/due process issues.

10           The parties also should be prepared to discuss whether reasonable cause exists for relief  
11 from the late filing penalty and the demand penalty. We note that the demand for the 2007 tax year  
12 apparently complied with the provisions of California Code of Regulations section 19133, subdivision  
13 (b), given that the FTB previously issued a demand to appellant for the 2006 tax year and, when  
14 appellant failed to respond to the 2006 demand, the FTB issued an NPA for 2006.

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

20           The parties should also be prepared to discuss whether a frivolous appeal penalty should  
21 be imposed. If the frivolous appeal penalty is imposed, the Board will want to consider the amount of  
22 the penalty in light of this being appellant's first appeal of this nature. Appellant was notified that the  
23 Board may impose the frivolous appeal penalty in the NOA dated August 10, 2009, and in a letter from  
24 Board staff dated September 28, 2009.

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28 <sup>8</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.