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7 **BOARD OF EQUALIZATION**

8 **STATE OF CALIFORNIA**

9  
 10 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
 11 ) **LIMITED LIABILITY COMPANY**  
 12 **OSAGE GARDEN APARTMENTS, LLC<sup>1</sup>** ) **TAX APPEAL**  
 13 ) Case No. 462197

14 **Claim for Refund**

<u>Year</u>	<u>Late Payment Penalty</u>	<u>Late Filing Penalty</u>	<u>Collection Fee</u>	<u>Lien Fee</u>	<u>Interest</u>
2004 <sup>2</sup>	\$200.00		\$126.00	\$13.00	\$202.72 <sup>3</sup>
2005	\$112.00				\$71.27
2006	\$88.00	\$100.00			\$60.92
2007	\$76.00				\$46.91

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 19 **Representing the Parties:**

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 21 **For Appellant:** Richard T. Smith, CEO

22 **For Respondent:** Anne Mazur, Specialist  
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24 <sup>1</sup> Appellant's representative is located in the city and county of Los Angeles.

25 <sup>2</sup> Appellant listed the 2003 tax year in its appeal letter, but specifically indicated that it was not appealing any amounts from  
 26 2003. For this reason, Board staff omitted contentions regarding the 2003 tax year, but included factual events occurring in  
 27 2003 to explain the background for the years on appeal.

28 <sup>3</sup> Appellant's appeal request indicated the interest amount was \$202.72 (Appellant's Appeal Letter (App. Appeal Letter),  
 p. 1.) This is the amount shown on a Compliance Requirements Notice from respondent dated December 20, 2007 (App.  
 Appeal Letter, unnumbered exhibit). Respondent indicated the amount of interest paid was \$202.95. (Resp. Opening Br., fn.  
 2.)

- 1 QUESTIONS: (1) Whether appellant has established that late payment penalties and interest can be  
2 abated for the 2004 through 2007 tax years;  
3 (2) Whether appellant has established that the collection fee and lien fee can be  
4 abated for 2004; and  
5 (3) Whether appellant has established that the late filing penalty can be abated for  
6 2006.

7 HEARING SUMMARY

8 Background

9 Appellant is a limited liability company (LLC) that commenced on November 18, 2003,  
10 filing its tax return on a calendar year basis. (Resp. Opening Br., p. 2.) On December 20, 2003,  
11 respondent sent appellant an Address Verification Notice in order to verify appellant's address. (*Id.*)  
12 Respondent sent this notice to appellant's Los Angeles address on Venice Boulevard (the Venice  
13 address), which respondent obtained from the Secretary of State. (*Id.*) Appellant acknowledges that it  
14 received this notice. (App. Reply Br., p. 1.) On February 25, 2004, respondent sent appellant a  
15 Requirements for Limited Liability Companies notice, to appellant's Venice address, informing  
16 appellant of its obligation to file returns and pay taxes. (Resp. Opening Br., p. 2; Resp. Opening Br., p.  
17 2, fn. 4.)

18 *2003 Tax Year*

19 On April 15, 2004, respondent received an \$800 check payment with a payor name of  
20 "Osage Garden Apartments," noting the Venice address, a suite number of 139, and a telephone number.  
21 (*Id.*) The tax return for 2003 was not filed until 2008. (*Id.*)

22 *2004 Tax Year*

23 Appellant timely filed a 2004 California partnership return on April 15, 2005, and  
24 reported self-assessed tax of \$800. (*Id.*) Appellant did not submit a payment with this return<sup>4</sup> and  
25 indicated its name was Osage Garden Apartments, LLP (i.e., limited liability partnership). (*Id.*) In  
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28 <sup>4</sup> In a letter apparently attached to the 2004 return, appellant indicated that it hired a company called We the People to help it form its LLC, which required appellant to provide a check for \$800 made out to the Franchise Tax Board. (See Resp. Opening Br., exhibit F, p. 14). Appellant indicated in this letter that since the check was received cancelled, appellant believed its taxes had already been paid for 2004. As such, appellant did not enclose a payment with the return. (*Id.*)

1 processing the return, respondent converted the partnership tax filing to an LLC filing, since appellant  
2 was an LLC, not a partnership. (Resp. Opening Br., p. 2.) This return was filed with an Inglewood,  
3 California address, including a street location of S. Osage Avenue (the Osage address). Respondent  
4 mailed a letter to the Osage address on or about November 28, 2005, advising appellant to use the LLC  
5 return form (Form 568) in the future. (*Id.*) Because appellant did not make a timely payment of the tax,  
6 respondent subsequently imposed a late payment penalty of 25 percent of the tax, plus interest. (*Id.*) On  
7 February 24, 2006, respondent mailed an LLC Notice of Balance Due for the \$800 LLC tax and late  
8 payment of tax penalty, plus interest. (*Id.*) This notice was sent to the Osage address shown on the  
9 2004 return and was returned as undeliverable. (*Id.*) On June 1, 2006, respondent sent appellant an  
10 LLC Past Due Notice for the 2004 tax year to the Osage address. (Resp. Opening Br., p. 3.) On July 12,  
11 2006, respondent sent an LLC Final Notice Before Levy for the 2004 tax year to the Osage address  
12 stating that a failure to pay the balance immediately would result in collection action, the imposition of a  
13 \$126 collection fee and the filing of liens against appellant's property. (*Id.*) When respondent did not  
14 receive a response, it initiated collection activity including the issuance of a Notice of State Tax Lien on  
15 September 15, 2006, and the recording of a lien on October 6, 2006. (*Id.*)

16 *2005 Tax Year*

17 Appellant timely filed a 2005 return, without any payment of tax, on October 15, 2005.<sup>5</sup>  
18 Respondent imposed a late payment penalty, plus interest. (*Id.*) On November 1, 2006, respondent  
19 received a check payment of \$800, using the same payor information (Venice address) as on the 2003  
20 tax year check. (*Id.*) On February 23, 2007, respondent issued a Notice of Balance Due for the late  
21 payment penalty, plus interest, and mailed it to the Osage address shown on the 2005 tax return. (*Id.*)  
22 This notice was returned undeliverable. (*Id.*) Respondent then mailed appellant a Limited Partnership  
23 Past Due Notice dated June 4, 2007, to the Osage address and followed this up with a Limited  
24 Partnership Formal Demand on September 11, 2007.<sup>6</sup> (*Id.*)

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27 <sup>5</sup> Respondent no longer has a copy of this return. (*Id.*)

28 <sup>6</sup> Respondent claims it mistakenly sent notices applicable to limited partnerships because appellant mistakenly filed as an  
LLP rather than an LLC for 2004 and 2005. (Resp. Opening Br., p. 3, fn. 8.)

1                   2006 Tax Year

2                   Appellant did not file a 2006 tax return until on or about December 21, 2007. However,  
3 on April 15, 2007, respondent received a check payment of \$800, using the Venice address but a  
4 different telephone number than the prior checks. (*Id.*)<sup>7</sup>

5                   2007 Tax Year

6                   Appellant timely filed a 2007 tax return on June 30, 2008, using the Venice address and  
7 showing self-assessed tax of \$800. Appellant did not submit a payment with this return. (Resp.  
8 Opening Br., p. 4.)

9                   *Facts Applicable to all Tax Years*

10                  In December 2007, appellant contacted respondent regarding a lien on its property.  
11 (Resp. Opening Br., p. 4.) On December 20, 2007, respondent mailed a notice titled Compliance  
12 Requirements regarding the 2003, 2004, 2005, 2006, and 2007 tax years to appellant, at a new address  
13 on Walnut Avenue in Venice, California, apparently provided by appellant when it contacted respondent  
14 regarding the lien. (*Id.*) This notice showed the following amounts due for 2004 through 2007:

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<u>Year</u>	<u>Tax</u>	<u>Penalties</u>	<u>Fees</u>	<u>Interest</u>	<u>Balance Due</u>
2004	\$800.00	\$200.00	\$139.00	\$202.72	\$1,341.72
2005		\$112.00		\$71.27	\$183.27
2006		\$188.00		\$60.92	\$248.92
2007	\$800.00	\$76.00		\$46.91	\$922.91
Total	\$1,600.00	\$576.00	\$139.00	\$381.82	\$2,696.82

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20 (App. Appeal Letter, unnumbered exhibit.)<sup>8</sup> This notice explained that failure to comply could result in  
21 further involuntary collection action for these tax years and that returns were required for the 2003 and  
22 2006 tax years. (*Id.*) Appellant received this notice, submitted a payment as required and filed returns  
23 for the 2003, 2005, and 2006 tax years on or about December 21, 2007. (*Id.*) The address listed on the  
24 2003 return was the Venice address. The address listed on the 2005 amended return<sup>9</sup> was the Osage  
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27 <sup>7</sup> See Appellant's Appeal Letter, unnumbered exhibit, check # 486.

28 <sup>8</sup> This notice also contained information regarding the 2003 tax year, which is not included in this appeal.

<sup>9</sup> Respondent indicates there were no substantive changes on the 2005 amended return, other than a change in form from Form 565 (Partnership return) to Form 568 (LLC return). (Resp. Opening Br., p. 4.)

1 address. And, finally, the address listed on the 2006 return was the Venice address. (Resp. Opening Br.,  
2 p. 4.) Respondent subsequently issued a Notice of Release of State Tax Lien dated January 8, 2008.  
3 (*Id.*)

4 By a fax letter dated January 8, 2008, appellant requested “at least a partial refund of the  
5 tax penalties and/or interest” contending that respondent had some responsibility in the situation. (Resp.  
6 Opening Br., exhibit W.) In this letter, appellant stated that “We ultimately are responsible for filling  
7 out the taxes properly, and paying the owed taxes on time. We accept that responsibility.” (*Id.*)  
8 Appellant also stated that its professional accountant (1) filed the wrong forms; (2) erroneously told  
9 appellant to pay taxes at the end of the tax year, “when you know the entire balance due;” and (3) put the  
10 address of the apartment on the returns instead of appellant’s mailing address, “making it more difficult  
11 for you to get in touch with us.” (Resp. Opening Br., exhibit W.) Appellant, however, contended that  
12 respondent shared some responsibility, that respondent mailed letters which were returned, and that  
13 since the returns “require our phone number,” respondent should have called years ago “when the  
14 problems first popped up.” (*Id.*) Appellant stated that the interest and penalties would have been  
15 avoided and “we might have gotten a better accountant!!” (*Id.*)

16 The January 8, 2008 fax refund claim filed with respondent did not identify the years for  
17 which a refund claim was being sought. (Resp. Opening Br., exhibit W.) However, approximately three  
18 months later, on March 11, 2008, respondent formally denied the refund, but the notice only identified  
19 the 2004 tax year. (App. Appeal Letter, unnumbered exhibit; Resp. Opening Br, p. 5.) Appellant  
20 subsequently appealed the 2004 through 2007 tax years on June 8, 2008. (App. Appeal Letter.)  
21 Respondent subsequently sought to limit this appeal to the 2004 tax year, because its notice of denial  
22 only included the 2004 tax year. (Resp. Opening Br., fn. 1.) However, upon further review, respondent  
23 conceded appellant’s January 8, 2008 refund claim was a claim for refund for all of the years currently

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1 before the Board.<sup>10</sup> This timely appeal followed.

2 Contentions

3 *Appellant's Contentions*

4 Appellant claims it never received notice from the FTB that there were problems with its  
5 taxes. (App. Appeal Letter, p. 2.) Appellant claims its address and phone number were correctly printed  
6 on each payment check and on its original return, so the FTB "could have called or written to us." (*Id.*;  
7 App. Reply Br., p. 2.) Appellant claims it learned about its tax issues from its title company and that,  
8 had the FTB notified it of any errors in the 2003 tax statement, those errors would not have been  
9 repeated in the 2004 through 2007 tax years. (App. Appeal Letter, p. 2.) Appellant claims the FTB's  
10 action is wrong in this case "because they failed to notify us even though they could have written or  
11 called." (*Id.*)

12 Appellant claims its ex-CPA will not discuss this matter with it and so they are on their  
13 own in making this appeal. (App. Reply Br., p. 1.) Appellant contends it received respondent's  
14 December 2003 address verification form, filled it out and sent it back to respondent. (*Id.*) Appellant  
15 claims respondent at this time had appellant's correct address,<sup>11</sup> but that subsequent mailings from  
16 respondent were made to the wrong address. (*Id.*) Appellant contends it handed the tax forms initially  
17 provided by respondent to its CPA, which appellant thought would know what to do with them. (*Id.*)

18 Appellant concedes its accountant erroneously filed an LLP form when an LLC form  
19 should have been filed. (*Id.*) Appellant claims it even showed the accountant the LLC documentation,  
20 but that the accountant insisted that appellant was an LLP. (*Id.*) Appellant's claim they "bowed" to the  
21 accountant's 30 plus years of experience on this issue. (*Id.*)

22 \_\_\_\_\_  
23 <sup>10</sup> Respondent contended: (1) since six months had not elapsed between the January 8, 2008 refund claim and the filing of  
24 this appeal in June 8, 2008; and (2) since the 2005, 2006, and 2007 tax years were not identified in respondents refund denial  
25 notice of March 11, 2008, the 2005, 2006, and 2007 tax years are not properly before this Board. (Resp. Opening Br., fn. 1.)  
26 Respondent suggested that appellant re-file its refund claim to show that it deems the 2005, 2006, and 2007 refunds as  
27 disallowed. (*Id.*) It appears to Board staff that appellant's reply brief of February 23, 2009 could be construed as appellant  
continuing its appeal of all of the tax years at issue, and as demonstrating: (1) appellant deems all of the tax years at issue  
were denied; and (2) appellant perfected its appeal for the 2005, 2006, and 2007 tax years, by making a continued appeal of  
those years, six months after January 8, 2008 (i.e., after the end of the six-month mandatory deemed denial period).

28 <sup>11</sup> It appears to Board staff that appellant is referring to the Venice address as its "correct" address. If this is incorrect,  
appellant should clarify the "correct" and "wrong" addresses at the oral hearing.

1 With respect to the late filings, appellant claims the accountant: (1) was filing for  
2 extensions electronically, but “apparently did it wrong”; (2) filed one return electronically, “which  
3 apparently did not get through either”; (3) did not provide appellant proof that the extensions went  
4 through; (4) charged appellant \$400 to “fix his mistakes!” (*Id.*) Appellant also claims the accountant  
5 failed appellant by not putting the correct address on the returns, when he fixed his mistakes. (App.  
6 Reply Br., p. 4.) Appellant contends that since respondent’s procedures did not work, back-up  
7 procedures should be implemented in the event mail is returned undeliverable, and that a failure to  
8 implement such procedures is unreasonable. (*Id.*)

9 Appellant contends that it relied on its professional accountant to fill out its taxes  
10 properly, guide it when needed, and to ask for extensions properly. Thus, appellant believes its reliance  
11 on the CPA constituted reasonable cause. (*Id.*) Appellant contends that because respondent required its  
12 address and phone number “on each year[’]s taxes and because they did attempt[] to notify us by mail,  
13 they have clearly taken on the responsibility of properly informing us of any tax problems. What other  
14 conclusions can you draw by their requirement of a phone number?” (*Id.*) Appellant contends this  
15 comes down to two questions: “did respondent take on the responsibility of informing us of a problem,  
16 and if so, did they do their job adequately.” (App. Reply Br., p. 3.)

17 Appellant contends that by requiring a current phone number on the tax return,  
18 respondent took on the responsibility of contacting appellant and informing it of tax problems, and by  
19 not doing so, respondent “committed an error in ministerial or managerial performance.” (*Id.*)  
20 Appellant disagrees that mailing a notice to the taxpayer’s last know address is adequate, in light of the  
21 other methods of contacting appellant. (*Id.*) Appellant claims respondent did have a better address and  
22 a telephone number, but neglected to use either of them. (*Id.*) Appellant also claims that since  
23 respondent’s procedures did not work, it was up to respondent to change its procedures so that such  
24 procedures would work. (App. Reply Br., p. 4.) Appellant also contends that its correct address was  
25 also available through the internet under LLC searches. (*Id.*)

26 *Respondent’s Contentions*

27 Respondent contends the late payment penalty was imposed correctly under R&TC  
28 section 19132, which imposes a penalty of 5 percent of the unpaid tax, plus 0.5 percent of the unpaid tax

1 for each additional month thereafter, up to 25 percent of the amount of tax as shown on the return.  
2 (Resp. Opening Br., p. 5.) Respondent claims the tax is due for limited liability companies by the four  
3 month of the taxable year (i.e., April 15) (*Id.*) Respondent claims the late payment penalty is proper  
4 unless the taxpayer can show its failure to pay was due to reasonable cause and not willful neglect and  
5 that the burden is on the taxpayer to make this showing. (*Id.*) To do so, respondent claims appellant  
6 must show its failure occurred despite the existence of ordinary business care and prudence. (Resp.  
7 Opening Br., p. 6.) Respondent contends that whether a taxpayer has exercised reasonable cause in  
8 failing to timely pay tax, is the same analysis used in determined whether reasonable cause has been  
9 demonstrated for a late tax return filing. (*Id.*) Respondent, citing *U.S. v. Boyle* (1985) 469 U.S. 241,  
10 contends that reasonable reliance upon a tax professional to file a return, does not constitute reasonable  
11 cause. (*Id.*) Thus, respondent contends that reliance upon a tax professional to pay tax timely does not  
12 constitute reasonable cause. (*Id.*) Respondent contends that appellant's sole argument here is that  
13 respondent should have contacted appellant sooner regarding its failure to timely pay. (*Id.*) Respondent  
14 contends it is not obliged to inform appellant of payment due dates and such is the responsibility and  
15 obligation of appellant. (*Id.*) Moreover, respondent claims it did inform appellant of its filing and  
16 payment responsibilities in early 2004, shortly after appellant commenced as an LLC and before its first  
17 tax return was due. (*Id.*)

18           Respondent contends that R&TC section 19172 provides that a late filing penalty is  
19 imposed when a partnership (including LLCs that file as a partnership) fails to timely file a return,  
20 unless it can be shown that the failure was due to reasonable cause. (*Id.*) Respondent contends the 2006  
21 return was due on April 15, 2007, was not filed until December 15, 2007, and therefore the late filing  
22 penalty property applied. (*Id.*) Respondent, citing *U.S v. Boyle, supra*, contends that reliance upon a tax  
23 professional to file a return, does not constitute reasonable cause. (Resp. Opening Br., p. 7.)  
24 Respondent contends appellant's sole argument is that respondent should have contacted appellant  
25 earlier of problems with its filings. (*Id.*) Respondent contends it is not obliged to inform appellant of  
26 tax return due dates, which is appellant's responsibility to ascertain and comply with. (*Id.*) However,  
27 respondent repeated its assertion that it did inform appellant of its filing and payment responsibilities in  
28 early 2004, shortly after appellant commenced as an LLC and before its first tax return was due. (*Id.*)

1 With respect to interest, appellant contends interest is mandatory and cannot be abated  
2 except where authorized by law. (*Id.*) Respondent contends that it has discretion to abate certain  
3 interest on deficiencies attributable to an unreasonable error or delay related to a ministerial or  
4 managerial act by an officer of respondent. (Resp. Opening Br., p. 8.) Respondent contends that the  
5 alleged error or delay shall be only taken into account only if no significant aspect of that error or delay  
6 can be attributed to the taxpayer. (*Id.*) Respondent contends that interest abatement cannot be granted  
7 for periods before respondent's first written contact. (*Id.*) In this case, respondent listed the first written  
8 contact periods as follows:

- 9 ➤ 2004 – Notice of Balance Due on February 24, 2006
- 10 ➤ 2005 – Notice of Balance Due on February 23, 2007
- 11 ➤ 2006 & 2007 – Notice of Compliance Requirements on December 20, 2007

12 Thus, respondent contends that interest for 2004 that accrued prior to February 24, 2006, or prior to  
13 February 23, 2007, for 2005 cannot be abated. As for 2006 and 2007, appellant immediately paid the  
14 balance due so respondent claims no interest can be abated for those years. (*Id.*)

15 As for the alleged error or delay in respondent's notice to appellant of the tax problems  
16 earlier, respondent (citing Treasury Regulation section 301.6404-2(b)(2)) contends that a ministerial act  
17 means a procedural or mechanical act that does not involve the exercise of judgment and that occurs  
18 during the processing of a taxpayer's case after all prerequisites to the act, such as conferences and  
19 review by supervisors have taken place. (*Id.*) Respondent, citing *Appeal of Michael and Sonia Kishner*,  
20 99-SBE-007, Sept. 29, 1999, contends that a managerial act is an administrative act that occurs during  
21 the processing of a taxpayer's case involving the temporary or permanent loss of records or the exercise  
22 of judgment or discretion relating to the management of personnel, and that respondent's decision on  
23 how to organize the processing of tax returns or its delay in implementing an improved computer  
24 system, is not a managerial act for which interest can be abated. (Resp. Opening Br., p. 9.) Respondent  
25 contends it did not commit an error or delay in the performance of a ministerial or managerial act. (*Id.*)  
26 In response to appellant's argument that it would not have been charged interest if it knew of the  
27 problems with its first return and payments shortly after its initial 2003 tax year, respondent states that it  
28 did contact appellant regarding its filing and payment responsibilities shortly after it commenced as an

1 LLC and contacted appellant regarding its 2004 and 2005 tax years using its last known address. (Resp.  
2 Opening Br., p. 9.)

3           Respondent, citing *Brown v. Comm’r* (1982) 78 T.C. 215, 218, contends a taxpayer’s last  
4 known address is the taxpayer’s last legal address known by respondent or the last known temporary  
5 address of a definite duration to which the taxpayer has directed respondent to send all communication  
6 during such period. (*Id.*) Respondent, citing *Taylor v. Comm’r* (1990) T.C. Memo. 1990-559 and  
7 *Monge v. Comm’r* (1989) 83 T.C. 22, contends that the address the taxing agency uses must be the one  
8 to which the agency reasonably believed the taxpayer wanted the document to be sent in light of all of  
9 the surrounding facts and circumstances. (*Id.*) Respondent citing *Appeal of W. L. Bryant*, 83-SBE-180,  
10 Aug. 17, 1983, *Taylor v. Comm’r, supra*, and *King v. Comm’r*, (9th Cir. 1988) 857 F. 2d. 676, contends  
11 that as a general rule, the taxpayer’s last known address is the address that appears on the taxpayer’s  
12 most recently-filed tax return, unless respondent is given clear and concise notice of a different address.  
13 (*Id.*) Respondent, citing *Grancewicz v. Comm’r*, T.C. Memo. 1990-597, contends the taxpayer has the  
14 burden of showing a notice was not mailed to its last known address and that what is relevant is  
15 respondent’s knowledge of the taxpayer’s last known address, rather than the taxpayer’s actual most  
16 current address. (*Id.*) Respondent, citing *Appeal of Winston R. Schwyhart*, 75-SBE-035, April 22, 1975,  
17 states it is the taxpayer who must take the necessary steps to insure the receipt of his or her mail, and  
18 that appellant has not shown this it took such steps. (*Id.*)

19           *For the 2004 Tax Year*

20           Respondent contends that until appellant filed its 2004 return on April 15, 2005,  
21 appellant’s last known address was the Venice address, consistent with the Secretary of State records  
22 and the address shown on the address verification returned by appellant. (Resp. Opening Br., p. 10.)  
23 However, respondent contends that when appellant filed its 2004 return using the Osage address, the  
24 Osage address became appellant’s last known address. (*Id.*) Respondent states its November 28, 2005  
25 letter to appellant, advising appellant to file a Form 568 was mailed to the Osage address and was not  
26 returned as undeliverable. (*Id.*) Respondent claims its February 24, 2006 LLC Notice of Balance due  
27 was sent to the Osage address and was returned as undeliverable. Respondent contends that “apparently  
28 unable to locate a better address for appellant” it subsequently mailed notices to the Osage address on

1 June 1, 2006, July 12, 2006, and September 15, 2006. (*Id.*) Respondent contends the Notice of State  
2 Tax Lien of September 15, 2006, was returned as undeliverable. (*Id.*) Respondent contends that since it  
3 used appellant's last known address, no error or delay occurred with respect to the 2004 tax year. (*Id.*)

4 *For the 2005 Tax Year*

5 Respondent contends appellant timely filed its 2005 return on October 15, 2006 showing  
6 the Osage address. (*Id.*) Respondent contends it does not have a copy of this return, but that the 2005  
7 amended return, filed on January 15, 2008, appears identical in content to the originally-filed return and  
8 also shows the Osage Address. (*Id.*; see exhibit U.) Respondent contends it sent a Notice of Balance  
9 due on February 23, 2007, and that, although it does not have a copy of this notice, it would have been  
10 sent to the Osage address. (Resp. Opening Br., p. 11.) Respondent indicates this notice was returned as  
11 undeliverable. (*Id.*) Respondent contends that "apparently unable to locate a better address for  
12 appellant" respondent mailed subsequent notices to the Osage address on June 4, 2007, and September  
13 11, 2007. (*Id.*)

14 Respondent, citing *Adams v. Comm'r*, T.C. Memo. 1994-365, contends that the address  
15 on the checks did not constitute clear and concise notice of a change of address, and that absent such  
16 notice, the address used on the taxpayer's most recently-filed return is his or her "last known address."  
17 (*Id.*) Finally, respondent contends that the 2004 and 2005 returns both showed the Osage address and  
18 both were signed by Mr. Smith, a 50 percent owner of the LLC.<sup>12</sup> (*Id.*) Thus, respondent contends Mr.  
19 Smith should have known whether the address shown was accurate or not and could have corrected it or  
20 provided respondent with clear and concise written notification of the correct address. (*Id.*) Thus, under  
21 these facts, respondent contends interest cannot be abated. (*Id.*)

22 With respect to the collection fee and lien fee, respondent claims that once properly  
23 imposed, there is no reasonable cause abatement provision for these fees. (Resp. Opening Br., p. 12.)  
24 Thus, respondent contends these fees cannot be abated in this case. (*Id.*)

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28 <sup>12</sup> It appears to Board staff that Mr. Smith is the tax representative for appellant.

1           Applicable Law

2                   *Late Payment Penalty*

3                   R&TC section 19132, subdivision (a)(1)(A), provides that respondent may impose a late  
4 payment penalty when the amount shown on any tax return is not timely paid. This payment is  
5 mandatory, unless it can be shown that the failure was due to reasonable cause and not willful neglect.  
6 In the late payment penalty context, reasonable cause exists if it can be shown that the taxpayer acted as  
7 an ordinary, intelligent, and prudent businessperson would have acted under similar circumstances.  
8 (*Appeal of Robert T. Curry and M. R. Curry*, 86-SBE-048, Mar. 4, 1986.) A taxpayer's  
9 misunderstanding of the law (such as its obligation to file a return) will generally not constitute  
10 reasonable cause. (*Appeal of Diebold, Inc.*, 83-SBE-002, Jan. 3, 1983.) In addition, the taxpayer bears  
11 the burden of proving reasonable cause exists. (*Appeal of M.B. Scott and G.M. Scott*, 82-SBE-249 Oct.  
12 14, 1982.)

13                   In *United States v. Boyle* (1985) 469 U.S. 241, a taxpayer relied on its attorney to file an  
14 estate tax return by the required deadline. When the attorney failed to do so, the taxpayer argued that his  
15 (the taxpayer's) failure to file the return was due to reasonable cause since he relied on his attorney. The  
16 Supreme Court acknowledged that attorney reliance was traditionally allowed to demonstrate the  
17 existence of reasonable cause, and indicated that engaging an attorney to assist in the probate  
18 proceedings is plainly an exercise of "ordinary business care and prudence." (*Boyle* at 250.) However,  
19 the Supreme Court in *Boyle* found the filing deadline statute was unambiguous and the taxpayer's  
20 attorney-based reliance in that matter did not concern advice on a question of law. (*Id.*) The Supreme  
21 Court explained this distinction as follows:

22                   When an accountant or attorney advises a taxpayer on a matter of tax law, such as  
23 whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most  
24 taxpayers are not competent to discern error in the substantive advice of an accountant or  
25 attorney. To require the taxpayer to challenge the attorney, to seek a "second opinion," or  
26 to try to monitor counsel on the provisions of the Code himself would nullify the very  
27 purpose of seeking the advice of a presumed expert in the first place. 'Ordinary business  
28 care and prudence' do not demand such actions.

29                   By contrast, one does not have to be a tax expert to know that tax returns have fixed  
30 filing dates and that taxes must be paid when they are due.

31 (*Boyle* at 251 (citations omitted).)

1           In *Appeal of Philip C. and Anne Berolzheimer*, 86-SBE-172, decided November 19,  
2 1986, the Board extended the holding in *Boyle* (which involved a late filing penalty) to the late payment  
3 penalty context, and determined that where there is no question of law and where the issue involves a  
4 simple calculation of tax due, reliance on an expert does not constitute reasonable cause for purposes of  
5 determining whether the late payment penalty should be abated.

6           *Late Filing Penalty*

7           R&TC section 19172 imposes a penalty on a partnership for failing to timely file a  
8 partnership return. This penalty will not apply if the taxpayer can show its failure was due to reasonable  
9 cause. Although the Board has not specifically ruled on the exception provided by this statute, the  
10 Board has ruled on the reasonable cause exception provided by R&TC section 19131 for the failure to  
11 timely file a return, under the Personal Income Tax Law. To establish reasonable cause, appellant must  
12 establish that its failure to file timely returns occurred despite the exercise of ordinary business care and  
13 prudence, or that cause existed that would prompt an ordinary, intelligent, and prudent businessperson to  
14 have so acted under similar circumstances. (*Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26,  
15 1982; *Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) Moreover, it is well established  
16 that a taxpayer cannot be relieved of a penalty for failing to file, or timely file, a return by claiming  
17 reliance on any agent, such as a tax preparer. (*United States v. Boyle, supra.*)

18           *Last Known Address Rule*

19           It is well settled that respondent's mailing of a notice to the taxpayer's last-known  
20 address is considered sufficient even if the notice never actually reaches the taxpayer. (*Appeal of*  
21 *Yvonne M. Goodwin*, 97-SBE-003, Mar. 19, 1997; *Appeal of Jon W. and Antoinette O. Johnston*, 83-  
22 SBE-238, Oct. 26, 1983.) This "last-known address rule" protects the taxing agency and the statutory  
23 scheme of assessment and appeal from a failure by the taxpayer to inform the taxing agency of a change  
24 in address. (*Delman v. Comm'r* (3rd Cir. 1967) 384 F.2d 929, 933.) For federal tax purposes, the  
25 United State Tax Court held that the Internal Revenue Service (IRS) is entitled to rely on the address  
26 shown on a taxpayer's most recent tax return unless the taxpayer satisfies its burden to provide clear and  
27 concise notice of his most current address. (*Adams v. Comm'r, T.C. Memo* 1994-365.) Absent a clear  
28 and concise notification from the taxpayer to use a different address, the taxpayer's address shown on its

1 most recent return is its “last-known” address. (*Id.*)

2 *Collection Fee*

3 R&TC section 19254 requires respondent to impose a collection cost recovery fee in  
4 situations where respondent has mailed notice to the taxpayer for payment which advises that continued  
5 failure to pay the amount due may result in collection action, including the imposition of a collection  
6 cost recovery fee. There is no reasonable cause abatement provision for the collection fee.

7 *The Lien Fee*

8 If a taxpayer fails to pay any liability at the time that it becomes due and payable,  
9 respondent is authorized by R&TC section 19221 to secure and release liens and to charge the taxpayer  
10 for the lien fee. Once properly imposed, the Revenue and Taxation Code does not include a provision  
11 which excuses respondent from imposing the lien fee for any circumstances, including reasonable cause.

12 *Interest Abatement*

13 The Board has determined that interest is mandatory and that respondent is not allowed to  
14 abate interest except where authorized by law. (*Appeal of Amy M. Yamachi*, 77-SBE-095, June 28,  
15 1977.) The imposition of interest is not a penalty, but is merely intended to compensate California for  
16 appellant’s use of money that should have been turned over earlier to California. (*Appeal of Audrey C.*  
17 *Jaegle*, 76-SBE-070, June 22, 1976.) Under R&TC section 19104, respondent is authorized to abate  
18 interest if there has been an unreasonable error or delay in the performance of a ministerial or  
19 managerial act by an employee of respondent. Such abatement can only occur if no significant aspect of  
20 the error or delay can be attributed to the taxpayer and after respondent has contacted the taxpayer in  
21 writing. (Rev. & Tax. Code, § 19104, subd. (b)(1).) There is no reasonable cause exception to the  
22 imposition of interest. (*Appeal of Audrey C. Jaegle, supra.*)

23 In the *Appeal of Michael and Sonia Kishner*, 99-SBE-007, decided on September 29,  
24 1999, this Board adopted the language from Treasury Regulation section 301.6404-2(b)(2), defining a  
25 “ministerial act” as:

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

1 This Board has not adopted a definition for the term “managerial act.” However, when a  
2 California statute is substantially identical to a federal statute, such as with the interest abatement statute  
3 in this case,<sup>13</sup> federal law interpreting the federal statute is highly persuasive. (*Appeal of Michael and*  
4 *Sonia Kishner, supra* (citing *Douglas v. State of California* (1942) 48 Cal.App.2d 835.)) In this regard,  
5 Treasury Regulation section 301.6404-2(b)(1) defines a “managerial act” as:

6 [A]n administrative act that occurs during the processing of a taxpayer’s case involving  
7 the temporary or permanent loss of records or the exercise of judgment or discretion  
8 relating to management of personnel. A decision concerning the proper application of  
9 federal tax law (or other federal or state law) is not a managerial act.

9 Respondent’s general administrative decisions, such as those relating to how to organize  
10 the processing of tax returns, are not managerial acts. (Treas. Reg., § 301.6404-2(b).) However, an IRS  
11 employee accessing a taxpayer’s most recent data for purposes of determining how much tax is a due,  
12 constitutes a ministerial act. (Treas. Reg. § 301.6404-2(c), example 11.) Moreover, decisions regarding  
13 personnel and case assignments, in addition to the misplacing of files, can be considered managerial  
14 acts, which can also provide a basis for interest abatement. For example:

15 A revenue agent is sent to a training course for an extended period of time, and the  
16 agent’s supervisor decides not to reassign the agent’s cases. During the training course,  
17 no work is done on the cases assigned to the agent. The decision to send the revenue  
18 agent to the training course and the decision not to reassign the agent’s cases are not  
19 ministerial acts; however, both decisions are managerial acts.

20 (Treas. Reg. § 301.6404-2(c), example 3.)

21 The Board’s jurisdiction in an interest abatement case is limited by statute to a review of  
22 respondent’s determination for an abuse of discretion. (Rev. & Tax. Code, § 19104, subd. (b)(2)(B).)  
23 To show an abuse of discretion, appellant must establish that, in refusing to abate interest, respondent  
24 exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Woodral v.*  
25 *Comm’r* (1999) 112 T.C. 19, 23.) Interest abatement provisions are not intended to be routinely used to  
26 avoid the payment of interest, thus abatement should be ordered only “where failure to abate interest  
27 would be widely perceived as grossly unfair.” (*Lee v. Comm’r* (1999) 113 T.C. 145, 149.) The mere  
28 passage of time does not establish error or delay that can be the basis of an abatement of interest. (*Id.* at

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<sup>13</sup> R&TC section 19104, subdivisions (a) and (b)(2)(B), are substantially identical to Internal Revenue Code section 6404 (e) and (h).

1 p. 150.)

2 STAFF COMMENTS

3 Late Payment Penalties

4 *Reliance on the Accountant*

5 Since appellant's tax liability for all of the years at issue appears to have been \$800, the  
6 calculation and payment of this amount on a timely basis does not appear to constitute a question of law.  
7 Rather, it appears that appellant relied on his accountant to simply forward known tax payments of \$800.  
8 Under *Appeal of Philip C. and Anne Berolzheimer, supra*, the Board held that such reliance does not  
9 constitute reasonable cause for failing to timely pay tax.

10 *Respondent's Alleged Error*

11 To show reasonable cause for failing to timely pay tax, appellant must show that it acted  
12 like an ordinary, intelligent, and prudent businessperson would have acted under similar circumstances.  
13 It appears that any alleged errors on the part of respondent, with respect to appellant's correct address,  
14 would be irrelevant to appellant's original responsibility to satisfy the responsible business person test in  
15 timely paying its taxes due. It also appears that in 2004 respondent provided appellant with a copy of  
16 the Requirements for Limited Liability Companies to appellant's Venice address, informing appellant of  
17 its obligation to file returns and pay taxes. Therefore, at the hearing, appellant should be prepared to  
18 demonstrate how reasonable cause existed for the late payment of tax. In doing so, appellant should also  
19 be prepared to discuss whether payment failures could have been discovered earlier by appellant's bank  
20 statement reconciliation efforts. In sum, if the Board does not find that appellant's actions were those of  
21 an ordinary, intelligent, and prudent businessperson, then the late payment penalties cannot be abated.

22 Late Filing Penalty

23 Appellant appears to have relied on his accountant to file the 2006 return, a return that  
24 was not timely filed. In *Boyle, supra*, the U.S. Supreme Court held that reliance on an expert to timely  
25 file a return does not constitute reasonable cause sufficient to abate the federal late filing penalty.  
26 Moreover, any alleged errors on the part of respondent, with respect to appellant's correct address, are  
27 irrelevant to appellant's ability to timely file returns. At the hearing, appellant should be prepared to  
28 demonstrate how reasonable cause existed for the late filing of the 2006 return. If the Board does not

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find that reasonable cause existed, the late filing penalty cannot be abated.

Interest Abatement

With respect to 2006 and 2007, the parties should be prepared to discuss whether the first written contact for those years occurred on December 20, 2007 (with respondent’s sending of the Notice of Compliance Requirements), and since interest was immediately paid for those years, whether there is any potential for interest abatement for 2006 and 2007. With respect to 2004 and 2005, the parties should be prepared to discuss whether respondent’s alleged failure to call appellant when mail was returned undeliverable (but where respondent apparently used the address shown on appellant’s 2004 and 2005 tax returns) constituted an unreasonable error by respondent in the performance of a ministerial or managerial act. The parties should also be prepared to discuss whether any aspect of the alleged error or delay was attributable to appellant and whether, on the facts of this case, respondent’s determination not to abate interest would be widely perceived as “grossly unfair.” (See *Lee v. Comm’r*, *supra*, 113 T.C. at 149.)

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