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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 **MAX D. PRICE**) Case No. 552608

	<u>Year</u>	<u>Proposed</u> <u>Assessment</u> ¹	
	2008	<u>Tax</u>	<u>Penalties</u> ²
		\$523.00	\$973.75

16 Representing the Parties:

18 For Appellant: Max D. Price
19 For Franchise Tax Board: Mary Yee, Tax Counsel

- 21 **QUESTIONS:** (1) Whether appellant has demonstrated error in the underlying tax assessment.
22 (2) Whether appellant has shown reasonable cause for the abatement of the late filing
23 penalty and/or the demand penalty.
24 (3) Whether the Board should impose a frivolous appeal penalty.³

26 ¹ In his appeal letter, appellant lists an “[a]mount over withheld” of \$3,376.

27 ² The penalties consist of a \$130.75 late filing penalty and a \$843.00 notice and demand (demand) penalty.

28 ³ This is appellant’s first appeal of this nature. According to the Franchise Tax Board (FTB or respondent), the FTB issued a Notice of Proposed Assessment (NPA) for the 2007 tax year.

1 HEARING SUMMARY

2 Background

3 On or about May 15, 2009, appellant filed a California resident income tax return—
4 listing zeros in the fields reserved for reporting of income, and claiming withholding of \$2,850, an
5 “excess SDI” of \$526, and a refund due of \$3,376.⁴ (FTB OB p 2 & Ex A.) In addition, appellant
6 provided a substitute Form W-2, listing, among other things, zero wages and state income tax withheld
7 of \$2,849.28. (*Id.* Ex A.) Appellant also provided a federal return, listing, among other things, zero
8 federal wages. (*Id.*)

9 Having received information from various sources that appellant received sufficient
10 income to trigger the filing requirement,⁵ the FTB issued a notice dated July 22, 2009, stating that
11 appellant’s purported return was frivolous and demanding that appellant file a valid return or explain
12 why no return was required. The FTB states that appellant did not file a valid return in response to its
13 demand, and it issued an NPA on February 5, 2010. Appellant timely protested the NPA and attended
14 an August 19, 2010 protest hearing. During protest, appellant argued that serious due process violations
15 had been committed, that he was born in “one of the several non-federal states,” and that statutes and
16 contracts that apply to “U.S. Taxpayers, and ‘U.S. Individuals’ and ‘persons’” do not apply to him. (See
17 Ltr. dated 4/6/10, attached as exhibit to App. Ltr.) The FTB affirmed its assessment in a Notice of
18 Action (NOA) issued on September 20, 2010. Appellant then filed this timely appeal.

19 Contentions

20 Appellant

21 Appellant’s contentions include the following:

- 22 • The protest hearing officer should have provided a copy of the audio recording of the
23 hearing. (App. Ltr. p 1.)

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26 ⁴ Appellant’s California return is dated April 27, 2009. The return lists an address in Los Osos, which is in San Luis Obispo
County, California.

27 ⁵ The FTB states that, in 2008, appellant earned \$65,745 from JDJ Services Inc. and provides a copy of appellant’s Internal
28 Revenue Service (IRS) Wage and Income Transcript in support. The FTB states that the NPA inadvertently lists JDJ
Services as JDL Services Inc. Appellant’s appeal letter lists the name as “JDJ Services.” Hereinafter, we shall refer to JDJ
Services.

- 1 • Appellant made an objection to the protest officer that conducting the hearing because the
2 FTB did not promptly provide needed documents. (*Id.* p. 2.)
- 3 • The FTB has refused to tell appellant “what laws they are basing their ‘assessments’
4 on[,]” and based on the records he has he “can only conclude . . . that SOME unknown
5 individual is making an ‘Assessment’ based on an unknown ‘Method’ and not a known
6 law.” (*Id.*)
- 7 • He is being subjected to the will of people at the FTB and “[b]ased only on your will over
8 your fellow man, your desire to enslave them and live the good life off the sweat of their
9 backs just because YOU CAN.” (*Id.*)
- 10 • His filings were made to correct the JDJ Services’ misfiling. “JDJ Services understands
11 [appellant’s] position, but continues to withhold, because they have been threatened if
12 they attempt to do otherwise.” (App. Ltr., p.3.)
- 13 • “You should also know that I have never earned a dollar in my life as The U.S. Coinage
14 Act of 1792 established the United States Mint” and defined the dollar as a portion of
15 silver. (*Id.*)
- 16 • “I am not a resident, nor do I have ‘income’ as the courts have defined it.” (*Id.* [citing
17 *U.S. v. Ballard*, 553 F.2d 400, 404 (1976) and other decisions])
- 18 • Appellant filed a valid 2008 return and the FTB has failed to provide a factual basis for
19 its position that the return was not valid. The information provided by JDJ Services was
20 incorrect and appellant corrected that information on the 2008 return. Appellant is
21 knowledgeable of the law and his financial circumstances and the FTB is not in a position
22 to reject his return. Thus, appellant has no duty to file another 2008 return and the FTB
23 had no cause or legal authority for issuing the NPA. (App. Reply Br., p 1.)
- 24 • “APPELLANT’S POSITION is not that ‘his ‘wages’ are not ‘income’ but that he did not
25 have ‘wages’ or ‘income’ as defined by law” In support of this argument, appellant
26 cites *Conner v. U.S.* (1969) 303 F.Supp. 1187 and various U.S. Supreme Court decisions.
27 (*Id.* p. 2 and fn. 3.)
- 28 • The FTB’s statement that appellant has not met his burden of proof is “not in accordance

1 with the laws of ‘due process’” and the FTB apparently does not consider the U.S.
2 Constitution, Supreme Court decisions, California statutes and other authorities as
3 credible or relevant. (App. Reply Br. p 2.)

- 4 • He is not asserting the FTB violated the Information Practices Act (IPA) (Cal. Civ. Code,
5 §§ 1798 et seq.). (*Id.*)
- 6 • R&TC section 19180 provides that the burden of proof regarding the imposition of a
7 penalty under R&TC sections 19177, 19178 or 19179⁶ shall be on the FTB. Under 5
8 USC § 556(d) “[e]xcept as provided by statute, the proponent of the rule or order has the
9 burden of proof [emphasis supplied by appellant]” Under Internal Revenue Code
10 (IRC) section 7491, the burden of proof shifts where the taxpayer produces credible
11 evidence.⁷ (*Id.* pp. 2-3.)
- 12 • What he received was not income. (*Id.* p 3.)
- 13 • He has shown reasonable cause to abate the late filing penalty and/or the demand penalty
14 because he “shied away from the complex tax codes” and “was misled that everybody
15 owes federal and state income taxes . . .” (*Id.* p 4.) Also, the FTB did not specify what
16 was frivolous; its agents “deceitfully reclassified the ‘nontaxpayer’ into ‘taxpayer’ status”
17 and exceeded constitutional powers. (*Id.* p 5.)
- 18 • “Agents reach beyond constitutional boundaries when they act based on personal
19 opinions or popular beliefs, which are not laws, statutes, regulations, or judicial reviews.”
20 .(*Id.* p 6. [internal citations omitted])
- 21 • “Agents provided no statutes supporting their assessments and determinations of
22 deficiency for the alleged liabilities or penalties.” (*Id.* p 7.)
- 23 • Agents “issued garnishment orders . . . without valid verification of a ‘debt’ or judgment
24 . . .” (App. Reply Br. p 8.)

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27 ⁶ Staff notes that these provisions address, respectively, abusive tax shelters, aiding and abetting and the filing of a frivolous return.

28 ⁷ Staff notes that California does not conform to IRC section 7491. In R&TC section 21024, California sets forth limited circumstances where the burden of proof will be shifted, requiring, among other things, that there be a “reasonable dispute” regarding an item reported on certain types of information returns and that the taxpayer “fully cooperates” with the FTB.

- 1 • “Agents also mailed unsigned penalties and unverified notices . . .” (*Id.*)
- 2 • “Agents’ conclusive presumptions were annulled by the contrary evidence provided in
- 3 my sworn affidavits . . .” (*Id.* p 9 [internal citations omitted].)
- 4 • Agents have no authority “to force people into accepting privileges, benefits or services.”
- 5 (*Id.* p 11.)
- 6 • “Agents ignored my offers to settle the issues, by mailing nonresponsive replies to my
- 7 inquiries, and by ignoring my demands for verified evidence and cross examination.”
- 8 (*Id.* p 12 [internal citations omitted] .)
- 9 • Agents breached their oath of office by, among other things, “dishonoring their burden to
- 10 prove their claims” and “misrepresenting their authority, with full knowledge of the
- 11 correct facts.” (*Id.* pp 14-15.)

12 The FTB

13 The FTB contends that appellant refuses to file a valid 2008 return in violation of the
14 California Personal Income Tax law and by making frivolous arguments appellant attempts to avoid
15 payment of tax for which he is liable. The FTB further contends appellant should not prevail here
16 because appellant has failed to meet his burden of proof in demonstrating any error in the FTB’s
17 proposed assessment. The FTB asserts that appellant has never denied receiving the amounts reported
18 by the payor. In addition, the FTB contends that it has legal authority to use income information from
19 various sources to estimate appellant’s taxable income, because appellant failed to file a valid return
20 providing the information necessary to determine appellant’s income tax liability. The FTB contends
21 that it used a reasonable and rational method of establishing taxable income and making the proposed
22 assessment which method is entitled to a presumption of correctness.

23 Next, the FTB contends that the late filing penalty and the demand penalty were properly
24 imposed and appellant has not presented evidence of reasonable cause to support abatement of those
25 penalties. Finally, the FTB contends that appellant is maintaining a frivolous appeal and requests the
26 Board impose a frivolous appeal penalty.

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1 Applicable Law

2 Proposed Assessment

3 R&TC section 17041 imposes a tax “. . . upon the entire taxable income of every resident
4 of this state . . .” and upon the entire taxable income of every nonresident or part-year resident which is
5 derived from sources in this state. R&TC section 18501 requires every individual subject to the
6 Personal Income Tax to make and file a return with the FTB “stating specifically the items of the
7 individual’s gross income from all sources and the deductions and credits allowable . . .” R&TC
8 sections 17071 and 17072 define “gross income” and “adjusted gross income” by referring to and
9 incorporating into California law IRC sections 61 and 62, respectively. IRC section 61 provides that
10 unless otherwise provided “gross income means all income from whatever source derived,” including
11 compensation for services. Income includes any “accession to wealth.” (*Commissioner v. Glenshaw*
12 *Glass Co.* (1955) 348 U.S. 426, 431; *Appeals of Robert E. Wesley and Jerry J. Couchman*, 2005-SBE-
13 002, Nov. 15, 2005.)⁸ Taxable income is gross income minus allowed deductions. (Rev. & Tax. Code,
14 § 17073; Int.Rev. Code, § 63.)

15 R&TC section 19087, subdivision (a), provides:

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

21 In *Palmer v. Internal Revenue Service* (9th Cir. 1997) 116 F.3d 1309, 1313, the court
22 stated that when a taxpayer fails to report any income, the FTB may reconstruct the taxpayer’s income
23 based on statistics and the “evidentiary foundation necessary for the presumption of correctness to
24 attach is minimal.”

25 If the FTB makes a tax assessment based on an estimate of income, the FTB’s initial
26 burden is to show why its assessment is reasonable and rational. (*Todd v. McColgan* (1949)
27 89 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.) Federal courts have
28 held that the taxing agency need only introduce some evidence linking the taxpayer with the unreported

⁸ State Board of Equalization cases can be viewed on the Board’s website (www.boe.ca.gov).

1 income. (See *Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932.) The FTB's use of income
2 information from various sources to estimate a taxpayer's taxable income, when a taxpayer fails to file a
3 valid return, is a reasonable and rational method of estimating taxable income. (See *Palmer v. Internal*
4 *Revenue Service, supra*; *Andrews v. Commissioner*, T.C. Memo 1998-316; *Giddio v. Commissioner*,
5 (1970) 54 T.C. 1530, 1533; *Appeals of Walter R. Bailey*, 92-SBE-001, Feb. 20, 1992; *Appeals of R. and*
6 *Sonja J. Tonsberg*, 85-SBE-034, Apr. 9, 1985.)

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

15 Late Filing Penalty

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

22 Demand Penalty

23 California imposes a penalty for the failure to file a return or provide information upon
24 the FTB's demand to do so, unless reasonable cause prevented the taxpayer from responding to the
25 request. (Rev. & Tax. Code, § 19133.) The burden is on the taxpayer to prove that reasonable cause
26 prevented him from responding to the demand. (*Appeal of Kerry and Cheryl James*, 83-SBE-009,
27 Jan. 3, 1983.) The FTB will only impose a demand penalty if the taxpayer fails to respond to a current
28 Demand for Tax Return and the FTB issued an NPA under the authority of R&TC section 19087,

1 subdivision (a), after the taxpayer failed to timely respond to a Request for Tax Return or a Demand for
2 Tax Return at any time during the four-taxable-years preceding the year for which the current Demand
3 for Tax Return is being issued. (Cal. Code Regs., tit. 18, § 19133, subd. (b).)

4 Constitutional/Due Process Issues

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

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

12 Frivolous Appeal Penalty

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

23 STAFF COMMENTS

24 Proposed Assessment

25 The FTB has provided a copy of IRS information showing that appellant received wages
26 or other compensation of \$65,745 in 2008. Appellant should be aware that the Board has consistently
27 rejected arguments that wage or other compensation income is not taxable as well as arguments that the
28 FTB has not identified the law imposing tax liability. (See, *e.g.*, See *Appeals of Robert E. Wesley and*

1 *Jerry J. Couchman, supra.)*

2 Late Filing Penalty and the Demand Penalty

3 It does not appear that appellant has shown reasonable cause for relief from the late filing
4 penalty and/or the demand penalty. In relation to the demand penalty, staff notes that the FTB
5 apparently complied with the provisions of California Code of Regulations, title 18, section 19133,
6 subdivision (b), given that appellant failed to respond to the current demand notice and the FTB issued
7 an NPA and a demand for the 2007 tax year. At the hearing, appellant should be prepared to present
8 evidence and argument to establish reasonable cause for abatement of these penalties.

9 Frivolous Appeal Penalty

10 The parties should be prepared to discuss whether the Board should impose a frivolous
11 appeal penalty and, if so, the amount of that penalty. As noted above, this is appellant's first appeal of
12 this nature. According to the FTB, it issued an NPA for the 2007 tax year. Appellant was notified that
13 the Board may impose a frivolous appeal penalty in the NOA and in a letter from Board staff dated
14 October 27, 2010.

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