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BOARD OF EQUALIZATION

STATE OF CALIFORNIA

In the Matter of the Appeal of:	**HEARING SUMMARY**
	PERSONAL INCOME TAX APPEAL
CORNELIS A. VAN DIEPEN[1]	Case No. 560406[2]

Year	Proposed Assessment Additional Tax	Late Filing Penalty
2006	$1,705.00	$426.25

Representing the Parties:

For Appellant: Cornelis A. Van Diepen

For Franchise Tax Board: Mary Yee, Tax Counsel III

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

(2) Whether appellant has shown reasonable cause for abatement of the late filing penalty.

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[1] Appellant lists an address in Torrance, Los Angeles County, California.

[2] This appeal was originally set for oral hearing on the July 24-26, 2012 calendar. It was removed from that calendar and scheduled as a nonappearance item for August 21, 2012, because appellant failed to respond to the hearing notice. Later, at appellant's request, this appeal was placed back on the oral hearing calendar. This appeal is now scheduled for an oral hearing on February 26, 2013.

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(3) Whether we should impose a frivolous appeal penalty.[3]

HEARING SUMMARY

Background

Appellant has not filed a 2006 California income tax return. (FTB opening brief (FTB OB) p. 5.) Through its Integrated Non-Filer Compliance (INC) Program, the Franchise Tax Board (FTB) discovered from the Contractor's State Licensing Board that, in 2006, appellant held an active landscaping contractor's license. (*Id*. p. 1.) For the 2006 tax year, the FTB estimated appellant's income was $45,421, based on the fact that appellant was a licensed landscaping contractor and the average income amount of other individuals in appellant's line of work.[4] (*Id*. pp. 1-2.) Based on the foregoing, the FTB issued a notice requesting that appellant file a return or explain why no return was required. (*Id*. p. 2; appellant's opening brief (App. OB), Ex. A, p. 1.) In response, appellant filed a statement, asserting that he did not have an obligation to file and/or pay a 2006 income tax of any kind. (FTB OB, p. 2; App. OB, Ex. A, p. 2.) In response, the FTB mailed appellant a letter dated October 1, 2009, asserting that appellant must file a 2006 California personal income tax return. (FTB OB, p. 2; App. OB, Ex. B.) In reply, appellant mailed the FTB a letter dated October 28, 2009, asserting that he did not have to file a 2006 California return. (App. OB, Ex. C.)

After reviewing appellant's response, the FTB issued a Notice of Proposed Assessment (NPA) on March 8, 2010. (FTB OB, p. 2; App. OB, Ex. D.) The NPA set forth a taxable income of $42,011, an additional tax of $1,705.00, a late filing penalty of $426.25, and interest of $444.12. (App. OB, Ex. D.)

Appellant timely protested the NPA via a letter dated May 6, 2010. (FTB OB, p. 2; App. OB, Ex. E.) In his protest letter, appellant requested (i) a protest hearing, and (ii) copies of all information pertaining to appellant that the FTB received from state and/or local governmental agencies.

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[3] This is appellant's first appeal of this nature. According to the Franchise Tax Board (FTB or respondent), (i) appellant has not filed a valid California income tax return for any tax year, and (ii) the FTB has issued filing enforcement Notice of Proposed Assessments "for the 1999, 2000, 2005, 2007, and 2008 tax years, which are all final, and the for the 2009 tax year which is protested."

[4] The FTB states that the Contractors State License Board records indicate that appellant's license was renewed with an expiration date of May 31, 2012.

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(*Id*.) In response, the FTB issued a letter on August 10, 2010, scheduling a protest hearing for August 19, 2010. (FTB OB, p. 2; App. OB, Ex. F.) Subsequently, appellant called the FTB to inquire if the FTB made a typographical error by setting the protest hearing for August 19, 2010—i.e., a mere nine days after the FTB's letter of August 10, 2010. After looking into the matter, the FTB issued a letter dated August 16, 2010, rescheduling appellant's protest hearing for September 13, 2010. (FTB OB, p. 2; App. OB, Ex. G.) In response, appellant mailed a letter dated August 31, 2010, asserting the he previously requested (and had not yet received) the following documents and/or records: (i) all supporting files used to create the NPA, and (ii) copies of California statutes and/or regulations describing procedures under which the FTB's protest hearings are conducted. (App. OB, Ex. H.) In addition, appellant's letter dated August 31, 2010, requested that the protest hearing be postponed until appellant received the above-requested documents. (*Id*.) Subsequently, the FTB issued a letter dated September 10, 2010, rescheduling appellant's protest hearing for October 27, 2010. (FTB OB, p. 2; App. OB, Ex. I.) The FTB's letter dated September 10, 2010, expressly stated that appellant's failure to attend the protest hearing (or any subsequent request for a postponement thereof) would be considered a waiver of the protest hearing. (*Id*.) In response, appellant mailed a letter dated October 16, 2010, asserting that (i) a person from the FTB's protest section be assigned to discuss the NPA, (ii) the information appellant previously requested be provided, and (iii) the protest hearing be postponed until the FTB complied with appellant's requests. (App. OB, Ex. J.) When appellant did not attend the October 27, 2010 protest hearing, the FTB affirmed the NPA in a Notice of Action (NOA) dated December 8, 2010. (FTB OB, p. 2; App. OB, Ex. K.) Appellant then filed this timely appeal.

Contentions

Appellant

Appellant was denied a protest hearing

Appellant asserts that the NPA is based on "estimates" and was affirmed (i) without a protest hearing, (ii) without the FTB providing answers to appellant's questions, and (iii) without any documentation to support the NPA. (App. OB, pp. 4-5.) Based on the foregoing, appellant asserts that he was not provided with a protest hearing. In addition, appellant asserts that pursuant to *People v. McGee* (1977) 19 Cal.3d 948, the FTB's failure to comply with applicable procedures invalidates the

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NPA. (*Id*. p. 5.)

A protest hearing was not provided because the FTB did not produce relevant evidence and appellant was not given an opportunity to refute such evidence

Appellant notes that Revenue and Taxation Code (R&TC) section 19044 gives appellant the right to request a protest hearing. (App. OB, p. 6.) Appellant asserts, however, that (i) there are no forms or letters which describe the nature of the oral hearing, (ii) the FTB proceeded in an "expedient" manner with no consideration for appellant's constitutional and statutory rights, and (iii) the FTB's actions nullified appellant's right to a protest hearing," citing to *Interstate Commerce Commission v. Louisville and Nashville Railroad Company* (1912) 227 U.S. 88. (*Id*. pp. 6-7.) Appellant concludes with the assertion that "[i]f there exists any documents(s) or forms which would evidence Appellant receiving the amount of income alleged to Appellant in the NPA, such documentation should have been provided . . ." (*Id*. p. 7.)

The assessment is arbitrary and baseless

Appellant asserts that the FTB failed to lay a proper foundation for the NPA, citing to Federal Rule of Evidence 803(6) and *United States v. Scholle* (8th Cir. 1977) 553 F.2d 1109. (App. OB, pp. 7-12.) Specifically, appellant argues that the FTB failed to show (i) the source of the FTB's assessment information, (ii) a record-keeping person having personal knowledge of the facts, and (ii) that the relevant computers from which the FTB's information was obtained were functioning properly:

> Respondent has failed to establish the original source of the information entered into its computer program by electronic transmission, the person having personal knowledge as to the accuracy of the information or even that the computers from which the NPA is derived were "*properly functioning*." (App. OB, p. 8.) (emphasis in original.)

Appellant concludes with the assertion that, because the FTB failed to lay a proper foundation for its assessment, the FTB's presumption of correctness is lost, citing to *Weimerskirch v. Commissioner* (9th Cir. 1979) 596 F.2d 358. (*Id*. p. 11.)

The FTB

The FTB contends that appellant should not prevail here because appellant has failed to meet his burden of proof in demonstrating any error in the FTB's proposed assessment, citing to *Appeals*

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of Fred R. Dauberger, et al, 82-SBE-082, decided on March 31, 1982.[5] (FTB OB, p. 3.) The FTB also disputes each individual contention. In response to the claim that appellant was denied a protest hearing, the FTB contends that it was appellant's failure to appear that resulted in appellant not presenting his arguments at the protest hearing for this matter. (*Id*. p. 4.) The FTB also rejects appellant's claim that the proposed assessment is arbitrary and without factual foundation. The FTB contends that its use of the average income amount of other individuals in appellant's line of work to establish appellant's taxable income, when appellant failed to file his own return, is a reasonable and rational method of establishing taxable income. (*Id*. pp. 3-4.) In addition, the FTB asserts that the Board has an established policy of declining to decide constitutional issues. (*Id*.)

Next, the FTB contends that the late filing penalty was properly imposed and appellant has not presented evidence of reasonable cause to support an abatement of that penalty. (*Id*. pp. 4-5.)

Finally, as for appellant's filing history, the FTB asserts that (i) appellant has not filed a valid California income tax return for any tax year, and (ii) the FTB has issued filing enforcement NPAs "for the 1999, 2000, 2005, 2007, and 2008 tax years, which are all final, and for the 2009 tax year which is protested." (*Id*. p. 5.)

Applicable Law

Proposed Assessment

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

> If any taxpayer fails to file a return, or files a false or fraudulent return with intent to evade the tax, for any taxable year, the Franchise Tax Board, at any time, may require a return or an amended return under penalties of perjury or may make an estimate of the net income, from

[5] Board of Equalization cases are generally available for viewing on the Board's website (www.boe.ca.gov).

[6] It appears undisputed that appellant resided in California during the 2006 tax year.

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> any available information, and may propose to assess the amount of tax, interest, and penalties due.

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

If the FTB makes a tax assessment based on an estimate of income, the FTB's initial burden is to show why its assessment is reasonable and rational. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.) Federal courts have held that the taxing agency need only introduce some evidence linking the taxpayer with the unreported income. (See *Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932.) The FTB's use of the average income amount of other individuals in a taxpayer's line of work to estimate the taxpayer's taxable income, when the taxpayer failed to file his own return, is a reasonable and rational method of estimating taxable income. (See *Palmer v. Internal Revenue Service, supra; Andrews v. Commissioner*, T.C. Memo 1998-316; *Giddio v. Commissioner* (1970) 54 T.C. 1530, 1533.)

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

Constitutional/Due Process Issues

The Board is precluded from determining the constitutional validity of California statutes, and has an established policy of declining to consider constitutional issues. (Cal. Const., art III, § 3.5; *Appeal of Aimor Corp.*, 83-SBE-221, Oct. 26, 1983; *Appeals of Walter Bailey*, 92-SBE-001, Feb. 20, 1992.) In *Bailey, supra*, the Board stated:

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

Late Filing Penalty

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

Frivolous Appeal Penalty

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

STAFF COMMENTS

Proposed Assessment

As noted above, the FTB estimates that appellant had income in 2006 totaling $45,421. The FTB asserts its estimate based on the fact that appellant was a licensed landscaping contractor in 2006 and on the average income amount of other individuals in appellant's line of work in 2006. Here, appellant has not provided any evidence to show that he was not a licensed contractor in 2006 or that the FTB's estimate of income is erroneous. Furthermore, appellant has not filed a 2006 tax return, showing

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the actual amount of income that appellant earned in 2006.

Constitutional/Due Process Issues

As noted above, the Board is precluded from determining the constitutional validity of California statutes, and has an established policy of declining to consider constitutional issues. (Cal. Const., art III, § 3.5; *Appeals of Walter Bailey*, *supra*.)

Late Filing Penalty

At the oral hearing, appellant should be prepared to show reasonable cause for an abatement of the late filing penalty.

Frivolous Appeal Penalty

Appellant was notified that the Board may impose the frivolous appeal penalty in the NOA dated December 8, 2010, and in a letter from Board staff dated June 21, 2011. The FTB's records indicate that (i) appellant has not filed a valid California income tax return for any tax year, and (ii) the FTB has issued filing enforcement NPAs "for the 1999, 2000, 2005, 2007, and 2008 tax years, which are all final, and the for the 2009 tax year which is protested." As indicated above, this is appellant's first appeal of this nature. As stated above, this Board may impose a frivolous appeal penalty of up to $5,000 whenever it appears to the Board that proceedings before it have been instituted or maintained primarily for delay or that an appellant's position is frivolous or groundless.

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