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10 **BOARD OF EQUALIZATION**  
 11 **STATE OF CALIFORNIA**

12 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
 13 ) **PERSONAL INCOME TAX APPEAL**  
 14 **ALEX BATES**<sup>1</sup> ) Case No. 445335

	<u>Year</u>	<u>Proposed Assessment</u> <sup>2</sup> <u>Tax</u>	<u>Penalties</u>
	2005	\$2,420	\$1,210 <sup>3</sup>

15 Representing the Parties:

16 For Appellant: Alex Bates  
 17 For Franchise Tax Board: Andrew O’Boyle, Staff Service Manager

18 **QUESTIONS:** (1) Whether appellant has demonstrated error in respondent Franchise Tax Board’s  
 19 (FTB) proposed assessment.  
 20 (2) Whether there is reasonable cause for appellant’s failure to file a timely return and

21 <sup>1</sup> Appellant resides in Los Angeles County, California.

22 <sup>2</sup> Respondent will provide the interest calculation amount at the oral hearing.

23 <sup>3</sup> This is comprised of a late filing penalty of \$605 and a notice and demand penalty of \$605. Respondent also imposed a  
 24 filing enforcement cost recovery fee of \$122.

1 failure to file upon the FTB's notice and demand.

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

3 HEARING SUMMARY

4 Background

5 Because appellant did not file a 2005 California income tax return, the FTB mailed a  
6 letter demanding that he file a return or explain why no return was required. Appellant did not respond  
7 to the demand letter by the February 28, 2007 deadline by filing a 2005 tax return or demonstrating that  
8 he had no return-filing requirement. On March 26, 2007, appellant made a request, under the  
9 Information Practices Act (IPA), to FTB for records it maintained for tax years 1999-2005 that related to  
10 him. On May 17, 2007, FTB sent appellant a Determination of Filing Requirement/Tax Return Demand  
11 notice advising him that he was required to file a 2005 return and that if he failed to do so by June 18,  
12 2007, that FTB would estimate appellant's tax liability based on available information, impose penalties,  
13 a cost recovery filing enforcement fee and applicable interest.

14 Appellant sent two letters to respondent. On May 17, 2007, appellant sent a letter  
15 complaining that FTB had not responded to his March 26, 2007, request for information within 30 days  
16 as required by law. On July 10, 2007, appellant submitted a second IPA request to respondent for  
17 records pertaining to 2005. FTB responded to appellant's IPA requests and his complaint about FTB's  
18 delay in replying.<sup>5</sup>

19 FTB issued a Notice of Proposed Assessment (NPA) on August 27, 2007, because  
20 appellant had not filed a 2005 return or demonstrated why none was required. As part of its Integrated  
21 Non-Filer Compliance Program, respondent was informed by the California Department of Real Estate  
22 that appellant held a license to sell real estate. By using the calculation of average business income from  
23 Schedule C information filed by real estate salespeople, and adjusting it using the 2005 California  
24 Consumer Price Index percentage, respondent estimated income of \$52,036 for appellant. In addition,  
25

26 \_\_\_\_\_  
27 <sup>4</sup> This is appellant's fourth appeal filed with the Board. As discussed in greater detail herein, two of the prior appeals were  
28 dismissed at varying points prior to decision and one appeal reached decision; the Board imposed a \$1,000 penalty in that  
appeal (Case No. 406133, for 2003 and 2004).

<sup>5</sup> Appellant did not respond to respondent's demand for a 2005 tax return.

1 Option One Mortgage filed a federal Form 1099-INT and reported paying appellant interest of \$17.

2 The NPA for 2005 proposed a tax liability of \$2,420 and imposed two penalties of \$605  
3 each for late filing and failure to file upon notice and demand. The FTB also imposed a filing  
4 enforcement fee of \$122. The FTB based the NPA on the income FTB attributed to appellant's real  
5 estate license activities and the IRS Form 1099-INT.

6 Appellant timely protested the NPA and requested an oral hearing with the FTB.<sup>6</sup> The  
7 FTB scheduled and notified appellant about a protest hearing for January 22, 2008. At appellant's  
8 request, the protest hearing was rescheduled to February 28, 2008. Appellant provided a written  
9 statement to the Hearing Officer setting forth the basis for his protest. The FTB held the protest hearing.  
10 Subsequently, the FTB affirmed the NPA when it issued a Notice of Action (NOA). This timely appeal  
11 followed.

### 12 Contentions

13 On appeal, appellant raises the following arguments:

- 14 ■ appellant had no gross income and no filing requirement in 2005. Appellant lived on  
15 savings, family support and private loans in 2005;
- 16 ■ appellant received no other money from any other source in 2005.
- 17 ■ appellant denies being a 'taxpayer' and respondent has not shown he is a taxpayer;
- 18 ■ respondent has no legal authority to use professional license information to determine  
19 his income.
- 20 ■ respondent failed to make a "Determination of Deficiency" before issuing the NPA,  
21 thus making the NPA and NOA void;
- 22 ■ respondent is restricted in its authority under R&TC section 19087 to make an  
23 estimate of net income from any available information by the Information Practices  
24 Act (IPA);
- 25 ■ the proposed assessment is not based on "real income information" and is therefore  
26 arbitrary, lacks foundation, and is invalid (citing, e.g., *Wertin v. Franchise Tax Board*  
27

28 <sup>6</sup> Appellant also sent an IPA Request Follow-up to FTB, complaining that it had failed to respond to appellant's questions in his March 26, 2007, IPA request.

1 (1998) 68 Cal.App.4<sup>th</sup> 961; 966); and

- 2 ■ FTB's employees acted without authority in making a determination that appellant  
3 was required to file a return, making a demand that appellant file a return, issuing the  
4 NPA, affirming the NPA and issuing the NOA; thus, the determination, demand,  
5 NPA's and NOA's are void.

6 Respondent contends that appellant has failed to demonstrate error in the proposed  
7 assessment of tax, in that appellant has made no attempt to show that the assessment is inaccurate or  
8 incorrect. Respondent asserts it made a proper assessment based on the calculated average business  
9 income of real estate salespersons. It states that, since appellant has refused to supply the necessary  
10 information regarding his 2005 income, it is authorized to make an estimate.

11 Respondent argues that the Board has previously determined that R&TC 19570 prohibits  
12 application of the IPA to the determination of any liability under the Personal Income Tax Law. Thus,  
13 respondent contends, the Board must not consider any alleged violation of the IPA in the determination  
14 of appellant's tax. The FTB asserts that appellant has not shown reasonable cause warranting the  
15 abatement of the late filing and notice and demand penalties. With respect to the frivolous appeal  
16 penalty, the FTB has no record of appellant filing a California income tax return since at least 1999.<sup>7</sup>

### 17 Applicable Law

#### 18 Assessment of Tax

19 Revenue and Taxation Code (R&TC) section 17041 imposes a tax “. . . upon the entire  
20 taxable income of every resident of this state . . .” and upon the taxable income of every nonresident or  
21 part-year resident which is derived from sources in this state.<sup>8</sup> R&TC section 18501 requires every  
22 individual subject to the Personal Income Tax to make and file a return with respondent “stating  
23 specifically the items of the individual's gross income from all sources and the deductions and credits  
24 allowable . . . .” R&TC section 19087, subdivision (a), provides:

25 If any taxpayer fails to file a return, or files a false or fraudulent return with intent to  
26 evade the tax, for any taxable year, the Franchise Tax Board, at any time, may require a

27 <sup>7</sup> Respondent has also provided information regarding appellant's compliance history that will be discussed in detail below.

28 <sup>8</sup> It appears undisputed that appellant lived in California during the year at issue.

1 return or an amended return under penalties of perjury or may make an estimate of the net  
2 income, from any available information, and may propose to assess the amount of tax,  
interest, and penalties due.

3 Respondent's initial burden is to show why its assessment is reasonable and rational.  
4 (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001-SBE-001,  
5 May 31, 2001.)<sup>9</sup> Federal courts have held that the taxing agency need only introduce some evidence  
6 linking the taxpayer with the unreported income. (*Rapp v. Commissioner* (9<sup>th</sup> Cir. 1985) 774 F.2d 932.)  
7 Thereafter, respondent's determination of an assessment is presumed correct, and appellant has the  
8 burden of proving it to be wrong. (*Todd v. McColgan, supra*; *Appeal of Michael E. Myers, supra*.)  
9 Unsupported assertions are not sufficient to satisfy appellant's burden of proof. (*Appeal of Aaron and*  
10 *Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence of uncontradicted, credible, competent  
11 and relevant evidence showing error in respondent's determinations, they must be upheld. (*Appeal of*  
12 *Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.) With respect to respondent's authority  
13 under R&TC section 19087 to "make an estimate of the net income, from any available information . . ."  
14 when a taxpayer fails to file a return for any taxable year, the 11<sup>th</sup> Circuit noted that, "it lay in  
15 appellants' power to prove their actual incomes and to controvert the statistics, but they chose not to do  
16 so," and therefore ruled against the taxpayer and imposed sanctions. (*Pollard v. Commissioner* (11<sup>th</sup> Cir.  
17 1986) 786 F.2d 1063, 1066.)

18 Appellant did not file a 2005 tax return providing better information than respondent's  
19 estimate and, as of yet, has not provided evidence in support of his contention that he lived on money  
20 from savings, family and private loans in 2005. Therefore, it appears that respondent has met its initial  
21 burden, the proposed assessment is presumed correct, and the burden of proof is on appellant to show  
22 error in the proposed assessment.

23 In *Bates v. Franchise Tax Board* (2004) 124 Cal.App.4<sup>th</sup> 367, the court discussed whether  
24 alleged IPA violations could be used to defeat a proposed tax assessment. The *Bates* court held that the  
25 R&TC provisions governing the estimation of income for persons who do not file tax returns, and the  
26 related provisions for the assessment and collection of taxes, are not superseded by the IPA. R&TC  
27

28 <sup>9</sup> Board of Equalization cases are generally available for viewing on its website ([www.boe.ca.gov](http://www.boe.ca.gov)).

1 section 19570 prohibits the application of the IPA to the determination of any liability under the  
2 Personal Income Tax Law.

### 3 Notice and Demand and Late Filing Penalties

4 A notice and demand penalty is imposed when a person fails to provide requested  
5 information or fails to make and file a return upon notice and demand by respondent, unless it is shown  
6 that such failure was due to reasonable cause and not willful neglect. (Rev. & Tax. Code, § 19133.)  
7 Without evidence to the contrary, it is presumed that respondent's determinations of penalties are  
8 correct. (*Appeal of Robert Scott*, 83-SBE-094, Apr. 5, 1983.) Appellant bears the burden of showing  
9 that reasonable cause prevented him from responding to the notice and demand letter. (*Appeal of David*  
10 *A. and Barbara L. Beadling*, 77-SBE-021, Feb. 3, 1977.)

11 R&TC section 19131 imposes a penalty when a taxpayer fails to file a return on or before  
12 the due date, unless it is shown that the failure is due to reasonable cause and not due to willful neglect.  
13 To establish reasonable cause, the taxpayer "must show that the failure to file timely returns occurred  
14 despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an  
15 ordinary intelligent and prudent businessman to have so acted under similar circumstances." (*Appeal of*  
16 *Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) The burden is on the taxpayer to prove that the  
17 difficulties experienced prevented him or her from filing a timely return. (*Appeal of Kerry and Cheryl*  
18 *James*, 83-SBE-009, Jan. 3, 1983.) Furthermore, ignorance of the filing requirement does not excuse the  
19 late filing penalty. (*Appeal of Diebold, Incorporated*, 83-SBE-002, Jan. 3, 1983.)

### 20 Filing Enforcement Fee

21 R&TC section 19254 authorizes imposition of a filing enforcement fee when respondent  
22 has mailed notice to a taxpayer that the continued failure to file a return may result in imposition of the  
23 fee. Once the fee is properly imposed, here for 2005, there is no language in the statute that would  
24 excuse the fee under any circumstances, including for reasonable cause.

### 25 Frivolous Appeal Penalty

26 Finally, the Board may impose a penalty of up to \$5,000 whenever it appears to the  
27 Board that proceedings before it have been instituted or maintained primarily for delay or that the  
28 position is frivolous or groundless. (Rev. & Tax. Code, § 19714; Cal. Code Regs., title 18, § 5454.)

1 Appellant was notified of this fact in both the NOA dated March 18, 2008, as well as in a letter from  
2 Board staff dated June 3, 2008.

3 The Board has considered and rejected most of appellant's contentions as frivolous and  
4 without merit. (See *Appeals of Robert E. Wesley and Jerry J. Couchman*, 2005-SBE-002, Nov. 15,  
5 2005; *Appeal of Michael E. Myers, supra.*; *Appeal of Alfons Castillo*, 92-SBE-020, July 20, 1992;  
6 *Appeals of Walter R. Bailey*, 92-SBE-001, Feb. 20, 1992; and *Appeals of Fred R. Dauberger, et al.*, 82-  
7 SBE-082, Mar. 31, 1982.) Appellant has made one relevant (as yet undocumented) argument in this  
8 appeal; that is that he had no gross income and no filing requirement for 2005, and that he lived on  
9 savings, family support, and private loans. Many of appellant's remaining arguments, in addition to  
10 being frivolous and without merit, have been repeated by appellant in his previous appeals.

11 The following factors are considered in determining whether, and in what amount, to  
12 impose the penalty: (1) whether appellant is making arguments that have been previously rejected by  
13 this Board in a Formal Opinion or by courts, (2) whether appellant is repeating arguments that he or she  
14 made in prior appeals, (3) whether appellant filed the appeal with the intent of delaying legitimate tax  
15 proceedings or the legitimate collection of tax owed and (4) whether appellant has a history of filing  
16 frivolous appeals or failing to comply with California's tax laws. (Cal. Code Regs, title 18, § 5454.)  
17 The Board may consider other relevant factors, in addition to the factors listed above. (*Id.*) The Board  
18 regularly imposes the frivolous appeal penalty in increasing amounts up to \$5,000 for repeated  
19 subsequent filings of frivolous appeals.

20 Respondent indicates that appellant has not filed a return since at least 1999. Appellant  
21 filed an appeal for 1999 to the Board (Case No. 182323) that was dismissed for failure to supplement his  
22 appeal. Appellant filed an appeal for 2001 to the Board (Case No. 268546) in which he raised many of  
23 the same issues as in this appeal. A Hearing Summary was prepared by the Appeals Division staff but  
24 prior to a Board decision appellant had the case dismissed with the FTB's position sustained. Appellant  
25 has filed an appeal for 2003 and 2004 (Case No. 406133) in which the Board sustained FTB's position  
26 and imposed a frivolous appeal penalty of \$1,000. Thus, it appears that this is appellant's fourth appeal  
27 filed with the Board, three of which were dismissed prior to decision and one of which reached decision  
28 and for which a \$1,000 penalty was imposed.

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STAFF COMMENTS

Appellant should be prepared to substantiate with documentary evidence his claim that he received no income in 2005 (and therefore had no filing requirement), and instead lived on savings, family support and private loans. Such evidence may include bills, bank statements, loan documents, and affidavits from family members, made under penalty of perjury, supporting that appellant was able to meet his basic living expenses from those sources. The parties should be prepared to discuss whether appellant had reasonable cause for: (1) his failure to respond to FTB’s demands to provide a 2005 tax return or demonstrate that no return was required; or (2) his failure to timely file a 2005 return. In addition, the parties should also be prepared to discuss whether the frivolous appeal penalty is appropriate under the circumstances in this appeal.

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