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7 **BOARD OF EQUALIZATION**

8 **STATE OF CALIFORNIA**

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10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **DANIEL L. MAHNKE**¹) Case No. 430934

	<u>Year</u>	<u>Proposed Assessment</u> ²
		<u>Tax</u> <u>Penalties</u> ³
	2004	\$434 \$217

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17 Representing the Parties:

18 For Appellant: Daniel L. Mahnke

19 For Franchise Tax Board: Mary Yee, Tax Counsel

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21 **QUESTIONS:** (1) Whether appellant has demonstrated error in the underlying tax assessment.
22 (2) Whether appellant has shown reasonable cause for abatement of penalties.
23 (3) Whether the filing enforcement cost recovery fee should be abated.

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26 ¹ Appellant resides in Trona, San Bernardino County, California.

27 ² The FTB should be prepared to provide the accrued interest amounts at the time of the oral hearing.

28 ³ This amount is comprised of a \$108.50 late filing penalty and a \$108.50 notice and demand penalty. A \$120 filing enforcement cost recovery fee was also charged.

1 (4) Whether the Board should impose a frivolous appeal penalty.⁴

2 HEARING SUMMARY

3 Background

4 Appellant has not filed a 2004 California income tax return. Having received information
5 from the Employment Development Department (EDD) that appellant received sufficient income to
6 trigger the filing requirement,⁵ the Franchise Tax Board (FTB or respondent) issued a notice dated
7 December 27, 2005, demanding that appellant file a return or explain why no return was required.
8 When appellant neither filed a return nor demonstrated why a return was not required, respondent issued
9 a Notice of Proposed Assessment (NPA) on June 26, 2006, based on the EDD wage information.
10 Appellant timely protested the NPA, and on September 20, 2007, a protest hearing was conducted by
11 respondent. Respondent later affirmed its assessment in a Notice of Action (NOA) issued on October
12 19, 2007. Appellant then filed this timely appeal.

13 Contentions

14 Appellant set forth the following contentions: First, appellant appears to argue that he
15 received no “taxable income” during 2004. Second, appellant raises various arguments regarding the
16 interpretation and application of various terms such as “resident” and “taxpayer,” and he questions the
17 authority of respondent to impose and collect state income tax. Third, appellant argues that the
18 assessment is arbitrary and baseless. Finally, appellant argues that respondent violated appellant’s
19 constitutional and due process rights.

20 Respondent contends that appellant should not prevail here because appellant has failed
21 to meet his burden of proof in demonstrating any error in respondent’s proposed assessment.
22 Respondent asserts that its use of wage information from the EDD to estimate appellant’s taxable
23 income when appellant failed to file his own return is a reasonable and rational method of estimating
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25 ⁴ This is appellant’s third appeal of this nature; in his first appeal (for 2001, case no. 317354), the Board heard the matter on
26 June 13, 2006, and found against appellant, imposing a frivolous appeal penalty of \$5,000; in his second appeal (for 2003,
27 case no. 334606), the Board heard the matter on February 28, 2007, and found against appellant, imposing a frivolous appeal
28 penalty of \$5,000. Appellant filed a petition for rehearing for his 2003 appeal, which was denied by the Board on September
12, 2007. According to respondent, appellant has not filed a valid California income tax return since the 2000 tax year.

⁵ For the 2004 tax year, appellant’s estimated income of \$24,931 is based on EDD records, which showed that appellant received \$24,931 in wages from The GEO Group, Inc.

1 taxable income. Respondent also contends that the late filing penalty and the notice and demand penalty
2 were properly imposed and that appellant has not presented evidence of reasonable cause to support
3 abatement of those penalties. Respondent also asserts that there is no language in the statutes that will
4 excuse the filing enforcement cost recovery fee. Finally, respondent contends that appellant is
5 maintaining a frivolous appeal and requests that this Board impose a frivolous appeal penalty.

6 Discussion

7 Proposed Assessment

8 Revenue and Taxation Code (R&TC) section 17041 imposes a tax “. . . upon the entire
9 taxable income of every resident of this state . . .” and upon the entire taxable income of every
10 nonresident or part-year resident which is derived from sources in this state.⁶ R&TC section 18501
11 requires every individual subject to the Personal Income Tax to make and file a return with respondent
12 “stating specifically the items of the individual’s gross income from all sources and the deductions and
13 credits allowable . . .” R&TC section 19087, subdivision (a), provides:

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

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

27 ⁶ It appears undisputed that appellant resided in California during the 2004 tax year.

28 ⁷ Board of Equalization cases are generally available for viewing on the Board’s website (www.boe.ca.gov).

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

9 Constitutional/Due Process Issues

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

14 [D]ue process is satisfied with respect to tax matters so long as an opportunity
15 is given to question the validity of a tax at some stage of the proceedings. It
16 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.

17 Late Filing and Notice and Demand Penalties

18 California imposes a penalty for the failure to file a return on or before the due date,
19 unless it is shown that the failure is due to reasonable cause and not due to willful neglect. (Rev. & Tax.
20 Code, § 19131.) To establish reasonable cause, the taxpayer "must show that the failure to file timely
21 returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as
22 would prompt an ordinary intelligent and prudent businessman to have so acted under similar
23 circumstances." (*Appeal of Howard G. and Mary Tons, 79-SBE-027, Jan. 9, 1979.*) California also
24 imposes a penalty for the failure to file a return or provide information upon respondent's demand to do
25 so, unless reasonable cause prevented the taxpayer from responding to the request. (Rev. & Tax. Code §
26 19133.) The burden is on the taxpayer to prove that reasonable cause prevented him from responding to
27 the notice and demand. (*Appeal of Kerry and Cheryl James, 83-SBE-009, Jan. 3, 1983.*)

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1 Filing Enforcement Cost Recovery Fee

2 R&TC section 19254 authorizes imposition of a filing enforcement cost recovery fee
3 when respondent has mailed notice to a taxpayer that the continued failure to file a return may result in
4 imposition of the fee. Once the fee is properly imposed, there is no language in the statute that would
5 excuse the fee under any circumstances, including for reasonable cause. (See *Appeal of Michael E.*
6 *Myers, supra.*)

7 Frivolous Appeal Penalty

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

18 The Board previously considered arguments similar to appellant's arguments and has
19 rejected each of the arguments as frivolous and without merit. (See *Appeals of Robert E. Wesley, et al.*,
20 2005-SBE-002, Nov. 15, 2005; *Appeal of Michael E. Myers, supra*; *Appeal of Alfons Castillo*, 92-SBE-
21 020, July 30, 1992; *Appeals of Walter R. Bailey, supra*; and *Appeals of Fred R. Dauberger, et al.*, 82-
22 SBE-082, Mar. 31, 1982.)

23 Appellant was notified that the Board may impose the frivolous appeal penalty in the
24 NOA dated October 19, 2007, and in a letter from Board staff dated February 28, 2008. Respondent's
25 records indicate that appellant has not filed a valid California income tax return since the 2000 year. As
26 indicated above, this is appellant's third appeal of this nature; the two previous appeals resulted in the
27 Board imposing a \$5,000 frivolous appeal penalty in each matter.

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1 STAFF COMMENTS

2 Respondent based its assessment on income information obtained from the EDD. The
3 Board previously concluded that this method of estimating income is rational and reasonable, and thus,
4 the burden of proof has shifted to appellant in this matter. Appellant, therefore, should provide evidence
5 to substantiate his contentions and rebut the assessment made by respondent, such as evidence of his
6 actual income and sources of support. Staff notes that appellant appears to concede in his protest letter
7 that he received the income in question, but argues that it is not “statutory income for federal income
8 taxes” and not taxable by California. Pursuant to California Code of Regulations, title 18, section
9 5523.6, appellant should provide any evidence to the Board Proceedings Division at least 14 days prior
10 to the oral hearing.⁸

11 The parties should also be prepared to discuss whether reasonable cause exists for relief
12 from the late filing penalty and the notice and demand penalty, and whether a frivolous appeal penalty
13 should be imposed for the 2004 tax year. If the frivolous appeal penalty is imposed, the Board will want
14 to consider the amount of the penalty in light of this being appellant’s third appeal of this nature and
15 other relevant factors.

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

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28 ⁸ Evidence exhibits should be sent to: Mira Tonis, Appeals Analyst, Board Proceedings Division, State Board of
Equalization, P.O. Box 942879, Sacramento, California, 94279-0081.