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7 **BOARD OF EQUALIZATION**

8 **STATE OF CALIFORNIA**

9
10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **RODNEY SLOSS**¹) Case No. 440362
13

14 Year Claim
2005 For Refund
15 \$698²

16 Representing the Parties:

17 For Appellant: Alyssa Gendron
Tax Appeals Assistance Program
18

19 For Franchise Tax Board: Anne Mazur, Specialist
20

21 **QUESTIONS:** (1) Whether appellant has shown reasonable cause for a refund of the late filing
22 penalty;
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25 ¹ Appellant currently resides in Santa Clara County, California. Appellant listed his name as “Roddy Sloss” in his Appeal
26 Letter and as “Rodney F. Sloss” in his Reply Brief dated January 15, 2009. Although appellant and his wife filed a joint 2005
California nonresident or part-year resident income tax return, only appellant signed his name to the Appeal Letter.

27 ² Although appellant’s Appeal Letter lists a claim amount of \$608, appellant’s Reply Brief dated October 9, 2008, lists a
28 claim amount of \$698, which appellant asserts represents a “late filing penalty in the amount of \$608 and interest on the late
filing penalty in the amount of \$90.” The FTB should be prepared to verify the amount of interest at the time of the oral
hearing.

1 (2) Whether the doctrine of equitable estoppel applies to allow a refund of the late
2 filing penalty; and

3 (3) Whether appellant is entitled to a refund of interest that was assessed on the late
4 filing penalty.³

5 HEARING SUMMARY

6 Background

7 Appellant did not timely file California tax returns for either 2004 or 2005.⁴ On April 10,
8 2006, respondent issued a notice, requesting that appellant file a 2004 return or explain why no return
9 was required.⁵

10 In response, appellant sent respondent a letter dated April 16, 2006, explaining that he did
11 not file a 2004 California return because he was not a California resident during any part of 2004:

12 I did not file a California Income Tax return for 2004 as I was employed
13 in and was resident in the state of Oregon for the entire year. I was not a
California resident during any part of 2004.

14 In that same letter, appellant also stated that he did not file a 2005 California return because he left
15 California in 1994, he did not return to California until September 1, 2005, and he earned less than
16 \$7,000 of gross income from September 1, 2005 through December 31, 2005. Specifically, appellant
17 stated in part:

18 I left California and became a resident of Oregon in April 1994 and
19 returned to California and became a California resident on 9/1/2005. . . . I
20 did not file a 2005 California income tax return because I had less than
\$7,000 of gross income earned from 9/1/05-12/31/05, the period I was
resident in California, during 2005.

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23 _____
24 ³ Staff notes that if appellant prevails on the issue of the late filing penalty, he will automatically be entitled to a refund of
25 the interest assessed on the late filing penalty. At the hearing, appellant may want to clarify whether he is asserting any other
26 basis for relief of interest in relation to the late filing penalty. For the sake of being complete, we will briefly analyze the
criteria otherwise required for relief of interest.

27 ⁴ Only the 2005 tax return is at issue; however, a chronological history of the 2004 tax return is necessary for an
28 understanding of the facts. Therefore, we will briefly discuss the facts starting with the 2004 tax return.

⁵ A copy of the April 10, 2006 notice was not included with the appeal file. Appellant asserts that the notice was issued on
April 10, 2006, and the FTB does not dispute this assertion in its appeal briefs.

1 After receiving the above-mentioned letter, respondent apparently made no further
2 attempt to contact appellant regarding appellant's 2004 return.⁶ However, respondent later received
3 information from various reporting sources that appellant received sufficient income in 2005 to trigger
4 the 2005 filing requirement;⁷ thus, respondent issued a notice dated June 18, 2007, requesting that
5 appellant file a 2005 return or explain why no return was required.

6 In response, appellant sent respondent a letter dated June 29, 2007, explaining that he had
7 already set forth reasons why he did not file a 2005 return in the above-mentioned letter dated April 16,
8 2006. Specifically, appellant stated in part:

9 This is in response to your 6/18/07 letter regarding my 2005 California
10 Income Tax Return. I enclose a copy of a letter I sent to you on 4/1/06 . . .
11 which explains why I did not file a California Income Tax Return for both
12 2004 and 2005.⁸

13 Afterwards, respondent mailed a letter dated July 23, 2007, listing estimated income from
14 several sources based on information received by respondent and informed appellant that he was
15 required to either file a 2005 California income tax return or substantiate why he was not required to
16 file. Appellant responded with a letter dated July 25, 2007, asserting that only a portion of the estimated
17 income listed in respondent's July 23, 2007 letter was taxable by California and that such portion was
18 less than the gross income threshold for filing a 2005 return.

19 Not satisfied with appellant's response, respondent sent appellant another letter, this one
20 dated September 10, 2007, which set forth the filing requirements for part-year residents in 2005. At the
21 same time, respondent also sent appellant FTB publications 1031 and 1032, which summarized the filing
22 requirements for part-year residents in 2005.

23 After receiving the above-mentioned documents, appellant answered respondent's
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25 ⁶ The appeal file is silent as to whether the FTB took further action to contact appellant in relation to the 2004 return. The
26 appeal file does not show whether appellant ever filed a 2004 return.

27 ⁷ For 2005, respondent estimated that appellant had California source income of \$63,500, based on the following: \$39,792 in
28 dividends from 27 West 67 Studio; \$15,620 in interest from 27 West 67 Studio; \$1,802 in wages from
PricewaterhouseCoopers; \$3,948 in interest from Wells Fargo Bank; and \$2,338 in interest from Washington Mutual Bank.

⁸ It appears that appellant's reference to April 1, 2006, is a typographical error. Appellant appears to be referring to the letter
sent on April 16, 2006, not a letter sent on April 1, 2006.

1 inquiry on October 1, 2007, filing a joint part-year resident tax return for 2005. In that return, appellant
2 reported an adjusted gross income (AGI) from all sources of \$244,087, total itemized deductions of
3 \$17,989, and a total taxable income of \$226,098. Appellant also reported a California AGI of \$37,655,
4 California itemized deductions of \$2,775, and a California taxable income of \$34,880. Furthermore,
5 appellant self assessed a tax of \$2,432, plus interest of \$261, for a total amount due of \$2,693, which
6 appellant paid with his return.

7 After scrutinizing appellant's 2005 return, respondent issued a Return Information Notice
8 on October 30, 2007, which revised appellant's 2005 tax liability and assessed a late filing penalty of
9 \$608, plus interest, for a balance due of \$697.53. Subsequently, appellant paid the balance in full and
10 requested a refund. When the FTB denied appellant's claim for refund, appellant filed this timely
11 appeal.

12 Contentions

13 On appeal, appellant states that he relied on the instructions set forth in FTB Form
14 540NR and FTB Publication 1031 to calculate his California part-year resident filing requirement, and
15 appellant asserts that the instructions in those documents are "inconsistent and insufficient" because they
16 did not set forth limitations on itemized deductions for part-year residents. Accordingly, appellant states
17 that based on those inconsistent and insufficient instructions, he came to the wrong conclusion that he
18 had a "proportionately larger California itemized deduction" than he was actually entitled to claim, and
19 appellant asserts that this larger deduction led him to believe that he did not have a California tax
20 liability for 2005. In short, appellant asserts that he reasonably relied upon the inconsistent and
21 insufficient instructions to calculate his need to file a 2005 return, and therefore, he has shown
22 reasonable cause for abatement of the late filing penalty. Appellant also appears to be asserting that
23 because of the inconsistent and insufficient instructions, respondent should be estopped from denying
24 appellant's claim for refund of the late filing penalty.

25 Next, appellant states that he informed respondent in the letter dated April 16, 2006, that
26 he was a part-year resident in 2005 and that he did not intend to file a California tax return for 2005;
27 however, appellant asserts that respondent did not respond to his April 16, 2006 letter until 14 months
28 later, and appellant contends that if respondent would have responded in a timely manner, appellant

1 would not have incurred most of the late filing penalty, which is computed at five percent of the tax due
2 for every month that the return is late, up to a maximum of 25 percent. In short, appellant appears to be
3 arguing that because respondent took 14 months to respond to appellant's April 16, 2006 letter,
4 respondent should be estopped from denying appellant's claim for refund of the late filing penalty.

5 Finally, appellant requests a refund of interest in the amount of \$90. Specifically, even
6 though appellant's Appeal Letter lists a claim amount of only \$608, appellant's Reply Brief dated
7 October 9, 2008, lists a claim amount of \$698, which appellant asserts represents a "late filing penalty in
8 the amount of \$608 and interest on the late filing penalty in the amount of \$90."

9 Respondent contends that appellant should not prevail here because (1) appellant has
10 failed to show reasonable cause for abatement of the late filing penalty, and (2) appellant has failed to
11 prove that he is entitled to relief under the principles of equitable estoppel. Respondent does not address
12 appellant's argument regarding relief of interest.

13 Respondent also disputes each of appellant's contentions. Respondent states that the
14 2005 instructions in Form 540NR and Publication 1031 are NOT inconsistent and are NOT insufficient,
15 and respondent asserts that appellant's ignorance of the law is apparently the reason that appellant failed
16 to file his 2005 return in a timely manner. Furthermore, respondent asserts that, as an administrative
17 agency, it does not have legal authority to interpret a statute in a way to change its meaning or effect.
18 Accordingly, respondent asserts that even if its forms and publications are unclear or misleading, a
19 taxpayer must follow the law and not its forms and publications.

20 Respondent also rejects appellant's claim that respondent failed to respond to appellant's
21 April 16, 2006 letter in a timely manner. Specifically, respondent states that appellant's April 16, 2006
22 letter did not request a response from respondent regarding whether appellant had a filing requirement
23 for the 2005 tax year; thus, respondent asserts that appellant may not rely on respondent's lack of
24 response as reasonable cause for the late filing. Moreover, respondent notes that because, as a matter of
25 policy, it does not make determinations as to whether taxpayers have 2005 filing requirements until
26 October 15, 2006 (i.e., the extended due date to file a timely tax return for 2005), it was not reasonable
27 for appellant to expect that respondent would contact appellant before October 15, 2006, regarding the
28 status of appellant's 2005 tax return; however, respondent notes that by October 15, 2006, the late filing

1 penalty (which is computed at a rate of 5 percent per month, up to 25 percent) had already accrued in
2 full.

3 Applicable Law

4 Reasonable Cause

5 California imposes a penalty for failure to file a return by its due date, unless the failure
6 to file was due to reasonable cause and not due to willful neglect. (Rev. & Tax. Code, § 19131.) To
7 establish reasonable cause, a taxpayer “must show that the failure to file timely returns occurred despite
8 the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinary
9 intelligent and prudent businessman to have so acted under similar circumstances.” (*Appeal of Howard*
10 *G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.)⁹ Ignorance of a filing requirement or a
11 misunderstanding of the law generally does not excuse a late filing. (*Appeal of Diebold, Incorporated*,
12 83-SBE-002, Jan. 3, 1983.) Several federal cases indicate that a taxpayer who fails to consult with a tax
13 advisor is proceeding at his or her own risk when the taxpayer comes to the conclusion that a return does
14 not have to be filed. (See *Shomaker v. Commissioner* (1962) 38 T.C. 192, 202; *Ellabban v.*
15 *Commissioner*, T.C. Memo 1996-382.) Absent advice from competent counsel, a taxpayer's erroneous
16 belief that he or she did not have taxable income is usually not reasonable cause for the failure to file a
17 timely return. (*Ellabban v. Commissioner, supra.*) Respondent’s determination is presumed to be
18 correct, and a taxpayer has the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509;
19 *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.)

20 Equitable Estoppel

21 Equitable estoppel is applied against the government only in rare and unusual
22 circumstances, when all of its elements are present, and its application is necessary to prevent manifest
23 injustice. (See *Appeal of Richard R. and Diane K. Smith*, 91-SBE-005, Oct. 9, 1991.) The four
24 elements of equitable estoppel are: (1) the government agency must be shown to have been aware of the
25 actual facts; (2) the government agency must be shown to have made an incorrect or inaccurate
26 representation to the relying party and intended that its incorrect or inaccurate representation would be
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28 ⁹ Board of Equalization cases are generally available for viewing on the Board’s website (www.boe.ca.gov).

1 acted upon by the relying party or have acted in such a way that the relying party had a right to believe
2 that the representation was so intended; (3) the relying party must be shown to have been ignorant of the
3 actual facts; and (4) the relying party must be shown to have detrimentally relied upon the
4 representations or conduct of the government agency. (*Appeal of Western Colorprint*, 78-SBE-071,
5 Aug. 15, 1978.) Where one of these elements is missing, there can be no estoppel. (*Hersch v. Citizens*
6 *Savings & Loan Assn.* (1983) 146 Cal.App.3d 1002, 1011.) The burden of proving estoppel is on the
7 party asserting estoppel. (*Appeal of Priscilla L. Campbell*, 79-SBE-035, Feb. 8, 1979.) The FTB is an
8 administrative agency, and it does not have the legal authority to interpret a statute in such a way as to
9 change its meaning or effect. (*Appeal of Melvin D. Collamore*, 72-SBE-031, Oct. 24, 1972; *Appeal of*
10 *Priscilla L. Campbell, supra.*) In *Appeal of Priscilla L. Campbell, supra*, the Board stated in part:

11 Estoppel is an equitable principal which will be invoked against the
12 government where the cause is clear and the injustice great. However, it is
13 indicated in several federal income tax cases that taxpayers should not
14 regard such informal publications as the instruction pamphlet as sources of
15 authoritative law which give rise to the doctrine of estoppel where
16 misleading statements are made therein. (See, *Eugene A. Carter*, 51 T.C.
17 932 (1969); *Thomas J. Green, Jr.*, 59 T.C. 456 (1972); see also *Lewis F.*
18 *Ford*, . . . [33 TCM 496 (1974).])

16 Likewise, in *Eugene A. Carter, supra*, p. 935, at fn. 3, the court stated in part:

17 We do not question petitioner's good faith in claiming the fee as a
18 deduction. Indeed his plea, "If I cannot rely on the * * * IRS instructions,
19 what can I rely on?" has a strong appeal. Despite the ambiguities,
20 however, we cannot apply either the instructions or the ruling in such way
21 as to allow a deduction not permitted by the statute.

20 Relief of Interest

21 Interest is required to be assessed from the date when payment of tax is due, through the
22 date that it is paid. (Rev. & Tax. Code, § 19101.) Imposition of interest is mandatory; it is not a
23 penalty, but is compensation for appellant's use of money after it should have been paid to the state.
24 (*Appeal of Amy M. Yamachi*, 77-SBE-095, June 28, 1977.) There is no reasonable cause exception to
25 the imposition of interest. (*Appeal of Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.)

26 To obtain relief from interest, appellant must qualify under one of three statutes: Revenue
27 and Taxation Code (R&TC) sections 19104, 19112 or 21012. R&TC section 21012 is not applicable,
28 because there has been no reliance on any written advice requested of the FTB. R&TC section 19112

1 requires a showing of extreme financial hardship caused by significant disability or other catastrophic
2 circumstance. However, there is no provision in R&TC section 19112 or other law that gives the Board
3 jurisdiction to determine whether R&TC section 19112 applies in this instance. (However, the
4 Legislature did provide the Board jurisdiction over appeals of denied interest abatement requests under
5 R&TC section 19104 as discussed below.)

6 Under R&TC section 19104, for tax years beginning on or after January 1, 1998,¹⁰ this
7 Board may only abate or refund interest on appeal:

8 [T]o the extent that interest is attributable in whole or in part to any unreasonable
9 error or delay by an officer or employee of the Franchise Tax Board (acting in his
or her official capacity) in performing a ministerial or managerial act.

10 (Rev. & Tax. Code, § 19104, subd. (a)(1) [emphasis added].)

11 Further, the error or delay can be taken into account only if no significant aspect is
12 attributable to the taxpayer, and the error or delay occurred after respondent contacted the taxpayer in
13 writing about the underlying deficiency.¹¹ (Rev. & Tax. Code, § 19104, subd. (b)(1).) In the *Appeal of*
14 *Michael and Sonia Kishner* (99-SBE-007), decided on September 29, 1999, the Board adopted the
15 language from Treasury Regulation section 301.6404-2 (b)(2), defining a “ministerial act” as:

16 A procedural or mechanical act that does not involve the exercise of judgment or
17 discretion, and that occurs during the processing of a taxpayer’s case after all
18 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.

19 This Board has not yet adopted a definition for the term “managerial act.” However,
20 when a California statute is substantially identical to a federal statute (such as, with the interest
21 abatement statute in this case), we may consider federal law interpreting the federal statute as highly
22 persuasive. (*Douglas v. State of California* (1942) 48 Cal.App.2d 835.) In this regard, Treasury
23 Regulations section 301.6404-2 (b)(1) defines a “managerial act” as:

24 [A]n administrative act that occurs during the processing of a taxpayer’s case
25 involving the temporary or permanent loss of records or the exercise of judgment

26 ¹⁰ For years prior to January 1, 1998, managerial acts were not included as a reason for abatement of interest.

27 ¹¹ Here, the underlying deficiency was self assessed by appellant and paid (along with accrued interest of \$261) with his
28 return on October 1, 2007. Respondent issued no written contact regarding the self assessed tax liability. Subsequent
correspondence by respondent, on October 30, 2007, concerned the late filing penalty, upon which approximately \$90 of
interest occurred.

1 or discretion relating to management of personnel. A decision concerning the
2 proper application of federal tax law (or other federal or state law) is not a
managerial act.

3 STAFF COMMENTS

4 If appellant has any further evidence that he wishes to submit, pursuant to California
5 Code of Regulations, title 18, section 5523.6, appellant should provide his evidence to the Board
6 Proceedings Division at least 14 days prior to the oral hearing.¹²

7 Reasonable Cause

8 At the oral hearing, appellant should present arguments that there was reasonable cause
9 for his failure to file a timely return. As indicated above, several federal cases indicate that a taxpayer
10 who fails to consult with a tax advisor is proceeding at his or her own risk when the taxpayer comes to
11 the conclusion that a return does not have to be filed. (See *Shomaker v. Commissioner, supra*; *Ellabban*
12 *v. Commissioner, supra*.) Absent advice from competent counsel, a taxpayer's erroneous belief that he
13 or she did not have taxable income is usually not reasonable cause for the failure to file a timely return.
14 (*Ellabban v. Commissioner, supra*.)

15 Equitable Estoppel

16 Appellant will need to demonstrate that equitable estoppel should apply and that each of
17 the four elements of equitable estoppel have been met. As indicated above, in *Appeal of Priscilla L.*
18 *Campbell, supra*, the Board stated in part:

19 Estoppel is an equitable principal which will be invoked against the
20 government where the cause is clear and the injustice great. However, it is
21 indicated in several federal income tax cases that taxpayers should not
22 regard such informal publications as the instruction pamphlet as sources of
23 authoritative law which give rise to the doctrine of estoppel where
misleading statements are made therein. (See, *Eugene A. Carter, 51 T.C.*
932 (1969); *Thomas J. Green, Jr., 59 T.C. 456 (1972)*; see also *Lewis F.*
Ford, . . . [33 TCM 496 (1974)].)

24 Likewise, in *Eugene A. Carter, supra*, p. 935, at fn. 3, the court stated in part:

25 We do not question petitioner's good faith . . . Indeed his plea, "If I cannot
26 rely on the * * * IRS instructions, what can I rely on?," has a strong
27 appeal. Despite the ambiguities, however, we cannot apply either the
instructions or the ruling in such way as to allow a deduction not permitted

28 ¹² 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.

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by the statute.

Relief of Interest

Staff notes that should appellant prevail on the request for refund of the late payment penalty, interest will automatically be refunded. At the hearing, appellant may want to clarify whether he is asserting any other basis for relief of interest. It appears to staff that, with respect to the approximately \$90 of interest accrued on the late filing penalty, a significant aspect of that accrual is attributable to appellant due to his mistaken belief that he had no filing requirement.

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