

1 Carl Bessent
2 Tax Counsel III
3 Board of Equalization, Appeals Division
4 450 N Street, MIC:85
5 PO Box 942879
6 Sacramento CA 95814
7 Tel: (916) 324-6592
8 Fax: (916) 324-2618

6 Attorney for the Appeals Division

7 **BOARD OF EQUALIZATION**
8 **STATE OF CALIFORNIA**

10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **NORMAN C. TURLEY**¹) Case No. 358653

	<u>Year</u>	<u>Claim For Refund</u>
	1992	\$43,424.06 ²

16 Representing the Parties:

17 For Appellant: Meghan Hawley, TAAP³
18 For Franchise Tax Board: Suzanne L. Small, Tax Counsel III

20 **QUESTIONS:** (1) Whether appellant has shown that the federal assessment has been revised on its
21 merits or is otherwise in error.
22 (2) Whether appellant has shown reasonable cause for the abatement of a late filing
23 penalty.

25 ¹ Appellant resides in Los Angeles County, California.

26 ² This is the amount that respondent Franchise Tax Board indicates is the claim for refund amount for 1992. This amount
27 includes tax of \$14,306.00, a late filing penalty of \$3,576.50, and interest.

28 ³ TAAP is the Tax Appeals Assistance Program. Other TAAP students involved in this appeal were Jonathan Lee, Deborah
Waggershauser, and Yoonis Han.

1 HEARING SUMMARY

2 Factual Background

3 Respondent Franchise Tax Board (FTB) did not receive a timely 1992 California income
4 tax return from appellant. The Internal Revenue Service (IRS) reached an agreement with appellant that
5 was signed by appellant on October 27, 1998, regarding changes to the 1992 federal return. Appellant
6 did not report these changes to the FTB. In January 1999, the FTB received information from the IRS
7 detailing its adjustments to appellant's 1992 account. Later, the FTB requested a copy of appellant's
8 1992 tax return. Appellant could not find a copy of his federal return. The FTB issued a Notice of
9 Proposed Assessment (NPA) on October 8, 1999. The NPA proposed additional tax of \$14,368 and a
10 late filing penalty of \$3,592. The NPA was based on various income sources as agreed to by appellant
11 and the IRS. Appellant did not protest the NPA, so it became final. Later, the FTB imposed a collection
12 cost recovery fee.

13 Appellant filed a California tax return for 1992 on June 21, 2000. The return reported the
14 same federal adjusted gross income (AGI) as reported to the IRS, which was adjusted upon audit. The
15 FTB issued a second NPA on April 30, 2001, based on appellant's self-reported income of \$-22,845,
16 which the NPA proposed to adjust to \$165,565 based on the federal audit adjustments. The NPA
17 proposed tax of \$14,368, reduced by a personal exemption of \$62, to \$14,306 of additional tax due.
18 Again, appellant did not protest the NPA, so it became final. The FTB started collection of the
19 outstanding balance.

20 Subsequently, appellant sent the FTB a letter stating the federal tax was discharged
21 through bankruptcy. The FTB treated appellant's letter as an Offer in Compromise (OIC) and requested
22 additional information. The FTB did not accept appellant's OIC. The FTB transferred various
23 overpayments from appellant's other tax years, including the following:

<u>Tax Year</u>	<u>Amount⁴</u>
1999	\$1,745.03
2001	1,510.53

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⁴ Respondent indicates that an overpayment for the year 2000 was refunded to appellant on May 22, 2001, in the amount of \$1,561.

1	2002	2,044.05
2	2003	2,857.91
3	2004	3,795.00

4 On September 8, 2005, appellant paid \$31,471.06. Thus, the liability for 1992 was satisfied, according
5 to the FTB. Appellant then requested a refund and later filed this appeal.

6 Procedural Background

7 This matter was originally scheduled for a Board hearing on August 19, 2008. However,
8 the Appeals Division requested further briefing to address the following issues arising from new
9 arguments appellant raised subsequent to his opening brief:

- 10 (1) What amount(s), if any, of tax is appellant claiming for refund;
- 11 (2) What support is there for a refund of taxes paid;
- 12 (3) To what extent does this Board have jurisdiction over the claim for refund of taxes;
- 13 (4) Appellant alleges that he timely filed his 1992 California return. Why did he not
14 contact respondent and ask why he did not receive the refund;
- 15 (5) Is Mr. Bonney willing to sign the October 25, 2006 letter under penalty of perjury;
- 16 (6) How does Mr. Bonney know that appellant's return was mailed from his office on
17 March 1, 1993;
- 18 (7) Please explain appellant's filing compliance history; why has he filed so many other
19 returns late?

20 Appellant responded that he is claiming a refund of tax in the amount of \$45,188, and
21 that his appeal is a timely appeal from respondent's denial of his claim for refund pursuant to Revenue
22 and Taxation Code (R&TC) section 19324. (This appears to be undisputed.) Appellant claims that
23 respondent's 1992 proposed assessment is based on federal information the IRS later dismissed, and is
24 therefore incorrect. With respect to the late filing penalty, Mr. Bonney (appellant's tax preparer) has
25 signed the October 25, 2006 letter under penalty of perjury (this is attached to appellant's additional
26 brief as exhibit D). Based on his memory, Mr. Bonney claims that he mailed appellant's 1992 return on
27 the evening of March 1, 1993.

28 FTB responded to the foregoing questions by contending that there have been no changes

1 to the federal determination upon which its proposed assessment is based. Respondent further notes that
2 appellant has a long history of filing returns late, as discussed further, below. Respondent notes that its
3 available information indicates that the IRS accepted an OIC from appellant, but does not indicate that
4 the federal determination was incorrect.

5 Contentions

6 On appeal, appellant initially argued that he filed his 1992 California tax return in April
7 1993. According to appellant's accountant, appellant signed for and paid for his 1992 California tax
8 return on March 1, 1993, which return was mailed that same day. (App. Addit. Br., exhibit D.)
9 Appellant claims that return shows a refund due of \$215. Appellant argues that the state taxes were
10 assessed based on information the IRS later dismissed; in his reply brief dated February 29, 2008,
11 appellant indicates that the IRS accepted his OIC and argues that respondent should do the same.
12 Appellant asserts that he was engaged in various court proceedings in the years between 1993 and 1997
13 so he gave the FTB refund due for 1992 little priority.

14 Respondent argues that appellant did not timely file his return and that the tax assessed
15 on the second NPA was correct based on the available federal information. The FTB asserts that it is
16 inconsistent that the 1992 return was purportedly timely filed when appellant's returns for 1988, 1990,
17 1991, 1993, 1994, 1997 and 1998 were filed late. The FTB contends that appellant has not shown that
18 the federal assessment has been revised on its merits.

19 Discussion

20 Federal Assessment

21 When the IRS makes a correction to a taxpayer's account, state law requires that the
22 taxpayer report the changes to the FTB and either concede the accuracy of the final federal
23 determination or state wherein it is erroneous. (Rev. & Tax. Code, § 18622.) Additionally, a state
24 deficiency assessment based on a federal audit report is presumptively correct and appellant bears the
25 burden of proving error. (*Appeal of Sheldon I. and Helen E. Brockett*, 86-SBE-109, June 18, 1986.)
26 Absent uncontradicted, credible, competent and relevant evidence showing that the FTB's
27 determinations are incorrect, they must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-
28 154, Nov. 18, 1980.)

1 Late Filing Penalty

2 California imposes a penalty for the failure to file a return on or before the due date,
3 unless it is shown that the failure is due to reasonable cause and not due to willful neglect. (Rev. & Tax.
4 Code, § 19131.) Without evidence to the contrary, it is presumed that respondent’s determinations of
5 penalties are correct. (*Appeal of Robert Scott*, 83-SBE-094, Apr. 5, 1983.) To establish reasonable
6 cause, the taxpayer “must show that the failure to file timely returns occurred despite the exercise of
7 ordinary business care and prudence, or that cause existed as would prompt an ordinary intelligent and
8 prudent businessman to have so acted under similar circumstances.” (*Appeal of Howard G. and Mary*
9 *Tons*, 79-SBE-027, Jan. 9, 1979.) A taxpayer’s misunderstanding of the law generally does not
10 constitute reasonable cause. (*Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.) If a taxpayer
11 asserts that he timely filed his California tax return, he should provide convincing evidence, such as a
12 certified mail receipt, or other competent evidence, of a timely mailing of the return. (*Appeal of LaSalle*
13 *Hotel Co.*, 66-SBE-071, Nov. 23, 1966.)

14 STAFF COMMENTS

15 Appellant has the burden to show that the IRS revised their assessment based on a change
16 in the correct amount of tax. Appellant should be prepared at the hearing to offer reliable evidence of
17 error in the federal determination. It is not clear whether appellant made an OIC to the IRS for doubt as
18 to collectibility (which would have no bearing on the federal determination), or doubt as to liability.
19 Appellant must be prepared to explain and provide proof that the IRS either changed its determination or
20 that the IRS accepted appellant’s OIC based on doubt as to liability.

21 Although appellant’s accountant signed a statement under penalty of perjury stating that
22 he mailed appellant’s 1992 return on March 1, 1993, appellant’s returns for 1988, 1990, 1991, 1993,
23 1994, 1997 and 1998 were filed late. Respondent will want to be prepared to explain why the
24 accountant’s statement is not sufficient to demonstrate appellant’s 1992 return was timely filed and
25 eliminate the late filing penalty. Appellant will want to be prepared to explain why he filed so many
26 returns late and, if the 1992 return was timely filed, what made that year unique such that the return was
27 timely filed that year? Appellant may also wish to address the 15 year period lapsed between his
28 meeting with Mr. Bonney to sign his 1992 California tax return and Mr. Bonney’s statement under

1 penalty of perjury that he recalls filing the 1992 return the same evening. Staff notes that this detail
2 appears to be based solely on Mr. Bonney’s memory; whereas the other events cited in his declaration
3 are based on notes in his file.

4 Appellant should also address the discrepancy between his initial assertion that he filed
5 his return “in April of 1993” with his current assertion that Mr. Bonney filed the return on March 1,
6 1993.

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