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

10 In the Matter of the Appeals of:

) **HEARING SUMMARY**

) **PERSONAL INCOME TAX APPEALS¹**

13 **CHRISTOPHER LIM;**

) **Case No. 599567 (CHRISTOPHER LIM)**

14 **GREGORY J. LIM AND MYA LIM;**

) **Case No. 599568 (GREGORY & MYA LIM)**

15 **JAMES E. LIM AND MELINDA LIM;**

) **Case No. 599575 (JAMES & MELINDA LIM)**

16 **PAUL T. LIU AND CHRISTIANA LIU.**

) **Case No. 599583 (PAUL & CHRISTIANA LIU)**

18 Representing the Parties:

19 For Appellants: Stephen M. Kuhn, CPA

20 For Franchise Tax Board: Thomas Grossman, Tax Counsel

22 **CONSOLIDATED APPEALS**

23 These consolidated appeals are made pursuant to section 19324 of the Revenue and
24 Taxation Code (R&TC) from the actions of the Franchise Tax Board (FTB or respondent) in denying
25 each appellant's claim for refund, as set forth in the respective exhibits below.

27 ¹ These consolidated appeals were originally scheduled for an oral hearing on October 23, 2012. The taxpayers'
28 representative, however, requested a postponement due to scheduling conflicts. These consolidated appeals are now
scheduled for an oral hearing on February 26, 2013.

1 HEARING SUMMARY

2 QUESTION: Whether an appellant has shown that his/her post-amnesty penalty should be abated.

3 Background

4 The facts for each appellant are set forth in the respective exhibit(s), which are attached at
5 the end of this Hearing Summary.

6 Contentions

7 Appellants

8 Each appellant asserts that (i) after his/her real property was condemned, he/she deferred
9 the gain under R&TC sections 24944-24949, (ii) under R&TC section 24949.2, subdivision (d), the gain
10 can be deferred for a maximum of three years, measured from the first day of the tax period following
11 the year of the loss, (iii) the deferral period at issue was from January 1, 2003 through December 31,
12 2005, (iv) the deferral period at issue did not end until December 31, 2005, which was nine months after
13 the conclusion of the amnesty period on March 31, 2005, (v) during the amnesty period, he/she did not
14 have an existing liability to report and, thus, did not participate in the amnesty program, and (vi) he/she
15 reported a deferred gain (and additional tax) with his/her amended 2002 California return, which was
16 filed in 2006. Based on the foregoing, each appellant asserts that he/she should not be subject to an
17 amnesty penalty that was “designed to penalize taxpayers with underreporting issues that actually
18 existed at the amnesty deadline.”

19 The FTB

20 The FTB contends that appellants fail to realize that, under R&TC section 19777.5, there
21 are essentially two amnesty penalties: one for unpaid liabilities that existed at the time of amnesty, and a
22 second post-amnesty penalty based on subsequent assessments, including self-assessments. (FTB’s
23 Opening Brief (FTB OB), p. 4.) The FTB asserts that each appellant self-assessed additional tax for an
24 amnesty eligible year and, as a result, the FTB was required under R&TC section 19777.5, subdivision
25 (a)(2), to impose a post-amnesty penalty on each appellant. (*Id.*)

26 The FTB asserts that, for taxpayers who were uncertain of their liabilities during the
27 amnesty period, the FTB instructed taxpayers to pay an estimated amount they expected to owe for an
28 amnesty eligible year and then file a protective claim for refund to protect the statute of limitations on

1 the claim. (*Id.*) Specifically, the FTB cites to its website, which provides in part:

2 **Protective claim – individual: Can I pay and file a protective claim to avoid the**
3 **amnesty penalty for my personal income tax liability?**

4 Yes. To ensure correct processing of your claims and payments, estimate the amount you
5 expect to owe for each amnesty year. Then, by March 31, 2005 send a separate payment
6 of your estimated amount along with your amended return (Form 540X) for each year.
7 Be sure to write “Protective Claim” in red, at the top of each amended return and fill in
8 the tax year at the top of each amended return. Enter the protective claim payment
9 amount for that year on Part 1, lines 2 and 3 and indicate in the explanation section (Part
10 II item 5) of the Form 540X that it is a “Protective claim to reduce potential amnesty
11 penalty.” (See <https://www.ftb.ca.gov/amnesty/2005/payPenMis.shtml>.)

12 The FTB asserts that many taxpayers took advantage of the protective claim process to avoid potential
13 post-amnesty penalties. (*Id.*) The FTB contends, however, that appellants failed to take advantage of
14 the protective claim process and are properly subject to the post-amnesty penalty on the additional tax
15 they self-assessed on their 2002 amended returns filed in 2006. (*Id.*)

16 The FTB asserts that the amnesty provisions provide no exceptions for taxpayers who
17 acted in good faith or had reasonable cause for failing to participate in the amnesty program. (*Id.* p. 5.)
18 In addition, the FTB asserts that a taxpayer may not file a claim for refund of the amnesty penalty unless
19 the refund claim asserts that the FTB failed to properly compute the amount of the penalty. As to the
20 facts at hand, the FTB asserts that it properly computed the respective amnesty penalties. (*Id.*)

21 Applicable Law

22 In 2004, the Legislature enacted the income tax amnesty program. (Rev. & Tax. Code,
23 §§ 19730-19738.) Under R&TC section 19777.5, there are essentially two amnesty penalties: one for
24 unpaid liabilities that existed at the time of amnesty and a second post-amnesty penalty based on
25 subsequent assessments, including self-assessments. (Rev. & Tax. Code, 19777.5, subds. (a)(1) and
26 (a)(2).)

27 The Board’s jurisdiction to review an amnesty penalty is extremely limited. For
28 example, a taxpayer has no right to an administrative protest or appeal of an unpaid amnesty penalty.
(Rev. & Tax. Code, § 19777.5, subd. (d).) A taxpayer also has no right to file an administrative claim
for refund of a paid amnesty penalty, except upon the basis that the penalty was not properly computed.
(*Id.*, subd. (e).) Therefore, the Board’s jurisdiction to review the amnesty penalty is limited to situations
where the penalty is assessed and paid, the taxpayer files a timely appeal from a denial of a refund

1 claim, and the taxpayer attempts to show a computational error in the penalty.

2 STAFF COMMENTS

3 As noted above, the Board’s jurisdiction to review an amnesty penalty is extremely
4 limited. Specifically, a taxpayer has no right to file an administrative claim for refund of a paid amnesty
5 penalty, except upon the basis that the penalty was not properly computed. (*Id.*, subd. (e).) Here,
6 appellants are not asserting that the FTB made computational errors. Accordingly, it appears to Appeals
7 Division staff that the Board may not have jurisdiction to review the post-amnesty penalties.

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11 Attachments: Exhibits 1-4.

12 Lim, et al_wjs

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1 Exhibit 1 – Christopher Lim, Case No. 599567

2 Appellant Christopher Lim filed a 2002 California income tax return on October 10,
3 2003, reporting, among other things, a California taxable income of \$59,201 and a total tax liability of
4 \$3,550. (FTB OB, p. 2 & Exs. A & B.) Later, on September 15, 2006, appellant filed an amended 2002
5 California income tax return, reporting, among other things, a California taxable income of \$203,660
6 and a total tax liability of \$17,065. (*Id.*) With his amended 2002 California return, appellant included a
7 payment of \$16,095. (*Id.*)

8 Subsequently, in October of 2006, the FTB imposed a post-amnesty penalty of \$655.09.
9 (*Id.*, Ex. E.)

10 In response, appellant filed a letter dated November 20, 2006, requesting that the post-
11 amnesty penalty be abated. (*Id.*, Ex. U at pp. 1-2.) In that letter, appellant asserted that (i) after his
12 property was condemned, he deferred the gain under R&TC sections 24944-24949, (ii) under R&TC
13 section 24949.2, subdivision (d), the gain can be deferred for a maximum of three years, measured from
14 the first day for the tax period following the year of the loss, (iii) the deferral period at issue was from
15 January 1, 2003 through December 31, 2005, (iv) the deferral period at issue did not end until December
16 31, 2005, which was nine months after the conclusion of the amnesty period on March 31, 2005, (v)
17 during the amnesty period, he did not have an existing liability to report and, thus, did not participate in
18 the amnesty program, and (vi) he reported deferred gain (and additional tax) with his amended 2002
19 California return, which he filed in 2006. (*Id.*) Based on the foregoing, appellant asserted that he should
20 not be subject to an amnesty penalty, which appellant argued was “designed to penalize taxpayers with
21 underreporting issues that actually existed at the amnesty deadline.” (*Id.*, Ex. U at p. 2.)

22 In response, the FTB sent appellant a letter dated January 4, 2007, denying appellant’s
23 request for “waiver” of the post-amnesty penalty. (*Id.*, Ex. V at p. 1.) Afterwards, appellant paid the
24 penalty amount in full and filed a claim for refund, asking that, if the FTB intended to deny the claim,
25 that it hold the claim until a court could resolve pending litigation on the constitutionality of the post-
26 amnesty penalty. (*Id.*, Ex. W at p. 1.)

27 In a letter dated October 23, 2008, the FTB advised appellant that (i) the FTB would treat
28 appellant’s claim as a protective claim for refund, and (ii) the FTB would not take any action on the

1 claim for refund, pending a “decision of the court of appeal or action on the legislation”. (*Id.*, Ex. X at
2 p. 1.) Later, a California Court of Appeal upheld the constitutionality of the post-amnesty penalty law in
3 *River Garden Retirement Homes v. Franchise Tax Board* (2010) 186 Cal.App.4th 932. (See also FTB
4 OB, p. 3.) Subsequently, after reviewing the matter, the FTB denied appellant’s claim for refund in a
5 letter dated September 15, 2011. (FTB OB, p. 3 & Ex. Y at p. 1.) In response, appellant filed this
6 timely appeal.²

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27 ² Appellant Christopher Lim’s appeal letter is dated December 16, 2011. Because the FTB mailed its denial on September
28 15, 2011, to an address in California, appellant had until December 19, 2011 (i.e., 90 days + 5 days) to file an appeal. (See
Cal. Code Regs., tit. 18, § 5422, subd. (b)(1).) Although the Board Proceedings Division received the appeal on December
21, 2011, nothing in the appeal record indicates that the appeal was not mailed by December 16, 2011 (the date of the appeal
letter).

1 Exhibit 2 – Gregory J. Lim and Mya Lim, Case No. 599568

2 Appellants Gregory J. Lim and Mya Lim filed a 2002 California income tax return on
3 October 15, 2003, reporting, among other things, a California taxable income of \$160,461 and a total tax
4 liability of \$10,260. (FTB OB, p. 2 & Exs. F & G.) Later, on September 15, 2006, appellants filed an
5 amended 2002 California income tax return, reporting, among other things, a California taxable income
6 of \$305,267 and a total tax liability of \$24,498. (*Id.*) With their amended 2002 California return,
7 appellants included a payment of \$16,956. (FTB OB, p. 2.)

8 Subsequently, in October of 2006, the FTB imposed a post-amnesty penalty of \$690.15.
9 (FTB OB, p. 2 & Ex. J.)

10 In response, appellants filed a letter dated November 20, 2006, requesting that the post-
11 amnesty penalty be abated. (*Id.*, Ex. U at pp. 3-4.) In that letter, appellants asserted that (i) after their
12 property was condemned, they deferred the gain under R&TC sections 24944-24949, (ii) under R&TC
13 section 24949.2, subdivision (d), the gain can be deferred for a maximum of three years, measured from
14 the first day for the tax period following the year of the loss, (iii) the deferral period at issue was from
15 January 1, 2003 through December 31, 2005, (iv) the deferral period at issue did not end until December
16 31, 2005, which was nine months after the conclusion of the amnesty period on March 31, 2005,
17 (v) during the amnesty period, appellants did not have an existing liability to report and, thus, did not
18 participate in the amnesty program, and (vi) they reported deferred gain (and additional tax) with their
19 amended 2002 California return, which they filed in 2006. (*Id.*) Based on the foregoing, appellants
20 asserted that they should not be subject to an amnesty penalty, which appellants argued was “designed to
21 penalize taxpayers with underreporting issues that actually existed at the amnesty deadline.” (*Id.*, Ex. U
22 at p. 4.)

23 In response, the FTB sent appellants a letter dated January 9, 2007, denying appellants’
24 request for “waiver” of the post-amnesty penalty. (*Id.*, Ex. V at p. 2.) Afterwards, appellants paid the
25 penalty amount in full and filed a claim for refund, requesting that, if the FTB intended to deny the
26 claim, the FTB hold the claim for refund until a court could resolve pending litigation on the
27 constitutionality of the post-amnesty penalty. (*Id.*, Ex. W at p. 2.)

28 In a letter dated October 23, 2008, the FTB advised appellants that (i) the FTB would

1 treat appellants' claim as a protective claim for refund, and (ii) the FTB would not take any action on the
2 claim for refund, pending a "decision of the court of appeal or action on the legislation". (*Id.*, Ex. X at
3 p. 2.) Later, a California Court of Appeal upheld the constitutionality of the post-amnesty penalty law in
4 *River Garden Retirement Homes v. Franchise Tax Board, supra*. (See also FTB OB, p. 3.)
5 Subsequently, after reviewing the matter, the FTB denied appellants' claim for refund. (FTB OB, p. 3 &
6 Ex. Y at p. 2.) In response, appellants filed this timely appeal.

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1 Exhibit 3 – James E. Lim and Melinda Lim, Case No. 599575

2 Appellants James E. Lim and Melinda Lim filed a 2002 California income tax return on
3 October 10, 2003, reporting, among other things, a California taxable income of \$388,691 and a total tax
4 liability of \$32,398. (FTB OB, p. 2 & Exs. K & L.) Later, on September 13, 2006, appellants filed an
5 amended 2002 California income tax return, reporting, among other things, a California taxable income
6 of \$845,441 and a total tax liability of \$74,876. (FTB OB, p. 2 & Exs. K & L.) With their amended
7 2002 California return, appellants included a payment of \$50,587. (FTB OB, p. 2.)

8 Subsequently, in October of 2006, the FTB imposed a post-amnesty penalty of \$2,058.99.
9 (FTB OB, p. 2 & Ex. O.)

10 In response, appellants filed a letter dated November 20, 2006, requesting that the post-
11 amnesty penalty be abated. (*Id.*, Ex. U at pp. 5-6.) In that letter, appellants asserted that (i) after their
12 property was condemned, they deferred the gain under R&TC sections 24944-24949, (ii) under R&TC
13 section 24949.2, subdivision (d), the gain can be deferred for a maximum of three years, measured from
14 the first day for the tax period following the year of the loss, (iii) the deferral period at issue was from
15 January 1, 2003 through December 31, 2005, (iv) the deferral period at issue did not end until December
16 31, 2005, which was nine months after the conclusion of the amnesty period on March 31, 2005,
17 (v) during the amnesty period, appellants did not have an existing liability to report and, thus, did not
18 participate in the amnesty program, and (vi) they reported deferred gain (and additional tax) with their
19 amended 2002 California return, which they filed in 2006. (*Id.*) Based on the foregoing, appellants
20 asserted that they should not be subject to an amnesty penalty, which appellants argued was “designed to
21 penalize taxpayers with underreporting issues that actually existed at the amnesty deadline.” (*Id.*, Ex. U
22 at p. 6.)

23 In response, the FTB sent appellants a letter dated January 3, 2007, denying appellants’
24 request for “waiver” of the post-amnesty penalty. (*Id.*, Ex. V at p. 3.) Afterwards, appellants paid the
25 penalty amount in full and filed a claim for refund, requesting that, if the FTB intended to deny the
26 claim, the FTB hold the claim for refund until a court could resolve pending litigation on the
27 constitutionality of the post-amnesty penalty. (*Id.*, Ex. W at p. 3.)

28 In a letter dated October 23, 2008, the FTB advised appellants that (i) the FTB would

1 treat appellants' claim as a protective claim for refund, and (ii) the FTB would not take any action on the
2 claim for refund, pending a "decision of the court of appeal or action on the legislation". (*Id.*, Ex. X at
3 p. 3.) Later, a California Court of Appeal upheld the constitutionality of the post-amnesty penalty law in
4 *River Garden Retirement Homes v. Franchise Tax Board, supra*. (See also FTB OB, p. 3.)
5 Subsequently, after reviewing the matter, the FTB denied appellants' claim for refund. (FTB OB, p. 3 &
6 Ex. Y at p. 3.) In response, appellants filed this timely appeal.

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1 Exhibit 4 – Paul T. Liu and Christiana Liu, Case No. 599583

2 Appellants Paul T. Liu and Christiana Liu filed a 2002 California income tax return on
3 August 15, 2003, reporting, among other things, a California taxable income of \$222,146 and a total tax
4 liability of \$15,996. (FTB OB, p. 2 & Exs. P & Q.) Later, on October 15, 2006, appellants filed an
5 amended 2002 California income tax return, reporting, among other things, a California taxable income
6 of \$361,383 and a total tax liability of \$29,858. (*Id.*) With their amended 2002 California return,
7 appellants included a payment of \$13,862. (FTB OB, p. 2.)

8 Subsequently, in November of 2006, the FTB imposed a post-amnesty penalty of
9 \$671.92. (*Id.* & Ex. T.) Thereafter, the FTB reduced the post-amnesty penalty to \$635.25. (*Id.*)

10 Afterwards, appellants Paul T. Liu and Christiana Liu filed a letter dated November 20,
11 2006, requesting that the post-amnesty penalty be abated. (*Id.*, Ex. U at pp. 7-8.) In that letter,
12 appellants asserted that (i) after their property was condemned, they deferred the gain under R&TC
13 sections 24944-24949, (ii) under R&TC section 24949.2, subdivision (d), the gain can be deferred for a
14 maximum of three years, measured from the first day for the tax period following the year of the loss,
15 (iii) the deferral period at issue was from January 1, 2003 through December 31, 2005, (iv) the deferral
16 period at issue did not end until December 31, 2005, which was nine months after the conclusion of the
17 amnesty period on March 31, 2005, (v) during the amnesty period, appellants did not have an existing
18 liability to report and, thus, did not participate in the amnesty program, and (vi) they reported deferred
19 gain (and additional tax) with their amended 2002 California return, which they filed in 2006. (*Id.*)
20 Based on the foregoing, appellants asserted that they should not be subject to an amnesty penalty, which
21 appellants argued was “designed to penalize taxpayers with underreporting issues that actually existed at
22 the amnesty deadline.” (*Id.*, Ex. U at p. 8.)

23 In response, the FTB sent appellants a letter dated January 4, 2007, denying appellants’
24 request for “waiver” of the post-amnesty penalty. (*Id.*, Ex. V at p. 4.) Afterwards, appellants paid the
25 penalty amount in full and filed a claim for refund, asking that, if the FTB intended to deny the claim,
26 that it hold the claim until a court could resolve pending litigation on the constitutionality of the post-
27 amnesty penalty. (*Id.*, Ex. W at p. 4.)

28 In a letter dated October 23, 2008, the FTB advised appellants that (i) the FTB would

1 treat appellants' claim as a protective claim for refund, and (ii) the FTB would not take any action on the
2 claim for refund, pending a "decision of the court of appeal or action on the legislation". (*Id.*, Ex. X at
3 p. 4.) Later, a California Court of Appeal upheld the constitutionality of the post-amnesty penalty law in
4 *River Garden Retirement Homes v. Franchise Tax Board, supra*. (See also FTB OB, p. 3.)
5 Subsequently, after reviewing the matter, the FTB denied appellants' claim for refund. (FTB OB, p. 3 &
6 Ex. Y at p. 4.) In response, appellants filed this timely appeal.

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