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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 **JOSEPH MCCARTHY AND** ) Case No. 712368  
13 **ROBIN MCCARTHY<sup>1</sup>** )  
14 \_\_\_\_\_ )

15 Year Claim for  
16 2009 Refund  
\$11,832<sup>2</sup>

17 Representing the Parties:

18 For Appellants: Joseph McCarthy and Robin McCarthy  
19 For Franchise Tax Board: Greg W. Heninger, Program Specialist  
20

21 **QUESTIONS:** (1) Whether appellants have shown reasonable cause for the abatement of the  
22 notice and demand penalty (demand penalty);  
23 (2) Whether the collection cost recovery fee may be abated; and  
24

25 <sup>1</sup> Appellants filed this appeal from Orange County.

26 <sup>2</sup> Appellants claimed a refund of this amount. Of this amount, \$5,947.50 was attributable to the demand penalty and  
27 \$154.00 was attributable to the collection cost recovery fee. No interest has been charged for the 2009 tax year. According  
28 to respondent's records, the remaining amount of the claimed overpayment of \$5,730.50 (i.e., \$11,832.00 - \$5,947.50 -  
\$154.00) was refunded to appellant on or about June 5, 2012. Therefore, respondent asserts that appellants are only able to  
claim a maximum refund of \$6,101.50 (i.e., \$11,832.00 overpayment less \$5,730.50 already refunded; or, in other words,  
the \$5,947.50 demand penalty plus the \$154.00 collection cost recovery fee). (Resp. Op. Br., p. 5.)

Appeal of Joseph McCarthy and Robin McCarthy

**NOT TO BE CITED AS PRECEDENT** - Document prepared for Board review. It does not represent the Board's decision or opinion.

1 (3) Whether respondent properly computed appellants' overpayment for 2009.

2 HEARING SUMMARY

3 Background

4 Appellants did not file a timely 2009 tax return. The Franchise Tax Board (respondent  
5 or FTB) received information indicating that appellant-husband resided in California and received  
6 sufficient income to require him to file a 2009 California tax return. On or about February 8, 2011,  
7 respondent mailed a Demand for Tax Return (Demand) to appellant-husband, requiring him to respond  
8 by March 16, 2011, either by filing a 2009 return or explaining why a return was not required. (Resp.  
9 Op. Br., pp.1-2, Exh. A.)

10 Appellants did not respond by the due date in the Demand. On April 11, 2011,  
11 respondent issued a Notice of Proposed Assessment (NPA) to appellant-husband for the 2009 tax year.  
12 On the NPA, respondent estimated appellant-husband's income as \$297,584 and taxable income as  
13 \$293,947, after allowing the standard deduction of \$3,637. The NPA reflected tax of \$25,802 and,  
14 after applying withholding credits of \$25,136, reflected appellant-husband's proposed tax liability of  
15 \$666. The NPA also imposed a late filing penalty of \$166.50, a demand penalty of \$6,450.50,<sup>3</sup> a filing  
16 enforcement fee of \$100.00, plus applicable interest. The NPA stated that this proposed assessment  
17 would become due and payable on June 10, 2011, unless the FTB received appellants' tax return or  
18 protest by that date. (Resp. Op. Br., p. 2, Exh. B.)

19 On May 15, 2011, appellants filed a joint tax return, which according to appellants,  
20 reported their 2009 tax year information on a 2010 tax year form. Respondent was unaware that the  
21 information on the 2010 return related to the 2009 tax year and processed the return as a 2010 tax  
22 return. On the return, appellants reported federal adjusted gross income (AGI) of \$367,542, itemized  
23 deductions of \$27,000, taxable income of \$340,542, and total tax of \$27,890. Appellants also claimed  
24 withholding credits of \$35,622 and a refund of \$7,732. (Resp. Op. Br., p. 2; Appeal Letter, Exh. B.)

25 Respondent was unaware that appellants inadvertently filed their 2009 tax year  
26

27  
28 <sup>3</sup> Respondent states that it imposed the demand penalty for the 2009 tax year in accordance with California Code of  
Regulations, title 18, (Regulation) section 19133, as it issued a Demand on March 18, 2010, and an NPA on June 1, 2010,  
for the 2008 tax year to appellant-husband. (Resp. Op. Br., p. 2, Exh. C; App. Addl. Br., Exh. A.)

1 information on a 2010 form, and, as a result, the liability on the 2009 NPA became final and  
2 collectible. On or about July 11, 2011, respondent issued a Notice of State Income Tax Due to  
3 appellants informing them of the balance due from the liability shown on the NPA for the 2009 tax  
4 year. (Resp. Op. Br., p. 2; Appeal Letter, Exh. C.)

5 On November 15, 2011, appellants filed a 2009 joint tax return. On the return,  
6 appellants reported federal AGI of \$335,537, itemized deductions of \$35,000, taxable income of  
7 \$300,537, and total tax of \$27,412.<sup>4</sup> Appellants also claimed withholding credits of \$35,622 and a  
8 refund of \$8,210. (Resp. Op. Br., p. 2; Appeal Letter, Exh. D.)

9 Respondent processed appellants' 2009 tax return and made the following corrections  
10 to their 2009 tax year account. Respondent reduced appellants' reported total tax of \$27,412 to  
11 \$23,790, which is the correctly computed total tax on the self-reported taxable income shown on  
12 appellants' 2009 return of \$300,537. In addition, respondent reduced appellants' withholding from  
13 \$35,622.00 to \$25,136.15, a difference of \$10,485.85, because respondent could only verify that  
14 amount. Respondent removed the late filing penalty and reduced the demand penalty to \$5,947.50.  
15 After applying the verified amount of withholding of \$25,136.15 to the total balance due for the 2009  
16 tax year including interest, it resulted in an underpayment of \$4,705.25. Accordingly, respondent  
17 issued a Return Information Notice to appellants on December 12, 2011, reflecting these changes.  
18 (Resp. Op. Br., p. 2; Appeal Letter, Exh. E.)

19 Subsequently, respondent began collection activity and issued several billing notices for  
20 the 2009 tax year, including a Final Notice Before Levy dated January 24, 2012. On March 6, 2012,  
21 respondent imposed a collection cost recovery fee of \$154. Respondent issued a Notice of State  
22 Income Tax Due to appellants dated April 5, 2012. On June 4, 2012, after receiving additional  
23 documentation from appellants, respondent verified that appellants were entitled to the remaining  
24 withholding of \$10,485.85 claimed on their return. Respondent abated all interest previously charged  
25 because the withholding was effective April 15, 2010, and satisfied the entire 2009 liability prior to the  
26 ///

27 \_\_\_\_\_  
28 <sup>4</sup> The 2009 amounts of federal AGI and itemized deductions that appellants self-reported on the 2010 tax forms are different from the amounts self-reported on the subsequently-filed 2009 form.

1 due date. This resulted in an overpayment of \$5,730.50.<sup>5</sup> Respondent issued a refund of \$5,835.79,  
2 which included the overpayment of \$5,730.50 and allowed interest of \$105.29, to appellants on  
3 June 5, 2012. (Resp. Op. Br., p. 3, Exhs. D & F; Appeal Letter, Exh. E.)

4 Appellants filed a timely claim for refund of the demand penalty. Upon review,  
5 respondent issued a denial of appellants' claim for refund on November 3, 2012. Although respondent  
6 already removed the late filing penalty, the notice incorrectly stated that the amount paid to satisfy the  
7 late filing penalty could not be refunded because appellants failed to establish reasonable cause for the  
8 late filing of their 2009 tax return. Respondent states that the notice should have stated that the amount  
9 paid to satisfy the demand penalty could not be refunded because appellants failed to establish  
10 reasonable cause for not responding to the Demand within the prescribed time period. (Resp. Op. Br.,  
11 p. 3; Appeal Letter, Exh. A.)

12 This timely appeal then followed.

### 13 Contentions

#### 14 Appellants' Appeal Letter

15 Appellants discuss why the late filing penalty was improperly imposed. Appellants state  
16 that, although they confirmed the proper information regarding income and expenses for the 2009 tax  
17 year, appellants filed the 2009 tax information on a 2010 tax form. Appellants contend that taxpayers  
18 are able to reasonably rely on professionals in preparation of tax forms. Appellants state that they were  
19 confounded when they received a Final Assessment for 2009 in mid-July 2011, because they filed their  
20 2009 tax information and expected a credit many months earlier. Appellants state that they requested  
21 information from their tax professional and subsequently realized that they filed the 2009 tax  
22 information on the wrong form and quickly amended the filing. Appellants contend that, while they  
23 paid \$35,622 in withholding, their actual tax liability was \$23,790 and, therefore, they are entitled to an  
24 overpayment of \$11,832 (i.e., \$35,622 - \$23,790). Appellants contend that they have shown reasonable  
25 cause for their failure to file pursuant to R&TC section 19131. Appellants further contend that no late  
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27 <sup>5</sup> The \$5,730.50 overpayment results from the following: the \$23,790.00 tax liability less \$35,622.00 in withholding credits  
28 equals an overpayment of \$11,832.00; the \$11,832.00 overpayment less the \$5,947.50 demand penalty and the \$154.00  
collection cost recovery fee results in a remaining overpayment of \$5,730.50.

1 filing penalty can be imposed when there is no tax owed, citing Revenue and Taxation Code (R&TC)  
2 section 19131, subdivision (c), and the *Appeal of Eugene and Lily Heller*, 97-SBE-014, decided by the  
3 Board on November 20, 1997.<sup>6</sup> Accordingly, appellants request the abatement of the penalty,  
4 collection cost, and interest, and a refund of \$11,832. (Appeal Letter, pp. 1-2, Exhs. B, C, D, E, F,  
5 & G.)

6 Respondent's Opening Brief

7 Respondent contends that it properly imposed the demand penalty pursuant to R&TC  
8 section 19133, and appellants have not shown that reasonable cause existed for their failure to respond  
9 to the Demand. Respondent contends that it issued the Demand on February 8, 2011, and required a  
10 response from appellant-husband by March 16, 2011, to avoid the demand penalty. Respondent  
11 contends that appellant did not file a 2009 return or provide any response to the Demand by  
12 March 16, 2011. Respondent contends that, had appellants' tax preparer used the correct form, the  
13 demand penalty would still have been imposed because the 2009 tax return information was not  
14 provided until May 15, 2011, almost two months after the deadline for appellant-husband to respond to  
15 the Demand. Respondent further contends that it properly calculated the demand penalty of \$5,947.50,  
16 which is twenty-five percent of appellants' total tax of \$23,790.00. With regard to appellants'  
17 argument that they reasonably relied on their tax preparer, respondent contends that each taxpayer has a  
18 nondelegable obligation to respond to a Demand from the FTB that a return be filed and to furnish  
19 requested information, citing the *Appeal of Thomas K. and Gail G. Boehme*, 85-SBE-134, decided by  
20 the Board on November 6, 1985. Respondent contends that a taxpayer's reliance on an agent, such as  
21 an accountant or tax attorney, to respond to a Demand on behalf of the taxpayer is not reasonable cause.  
22 With regard to appellants' filing history, respondent notes that it asserted a filing enforcement action  
23 against appellant-husband for the 2008 tax year. In addition, appellants filed a late tax return for the  
24 2010 tax year. (Resp. Op. Br., p. 4.)

25 With regard to the collection cost recovery fee, respondent contends that it was required  
26 to impose this fee pursuant to R&TC section 19254. Respondent notes that appellants failed to render  
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28 <sup>6</sup> Board of Equalization cases may be found on the Board's website: [www.boe.ca.gov](http://www.boe.ca.gov).

1 payment in response to the FTB's collection notices for the 2009 tax year, including a Final Notice  
2 Before Levy dated January 24, 2012, which advised appellants that their continued failure to pay the  
3 amount due may result in the imposition of the collection cost recovery fee. Respondent further  
4 contends that, once properly imposed, there is no provision in R&TC section 19254 to excuse the  
5 imposition of the fee for any circumstances. (Resp. Op. Br., p. 5, Exh. F.)

6 With regard to the computation of the overpayment, respondent notes that, if appellants  
7 prevail in this appeal, they are only entitled to an overpayment of \$6,101.50, and not \$11,832.00.  
8 Respondent contends that the overpayment of \$6,101.50 consists of the demand penalty of \$5,947.50  
9 and the collection cost recovery fee of \$154.00. Respondent notes that, according to its records, it  
10 issued a refund to appellants for the 2009 tax year on or about June 5, 2012, in the amount of  
11 \$5,835.70.<sup>7</sup> (Resp. Op. Br., p. 5, Exh. G.)

12 Appellants' Additional Briefing

13 In response to the Appeals Division staff's request in a letter dated September 25, 2013,  
14 for additional briefing on the issue of the demand penalty, appellants contend that California law has  
15 two conflicting penalties: the late filing penalty under R&TC section 19131 and the demand penalty  
16 under R&TC section 19133. Appellants contend that, in every communication from respondent,  
17 appellants were informed that they were being penalized for failure to file a return or failure to file a  
18 return by the due date. Appellants argue that respondent now requests adjudication based on the  
19 demand penalty rather than the late filing penalty. Appellants contend that the penalties imposed  
20 should be made pursuant to R&TC section 19131. (App. Addl. Br., pp. 1-2, Exhs. B, C, D, E, F, G, H,  
21 I, & K.)

22 Appellants also contend that they received the NPA twice from the FTB.<sup>8</sup> Appellants  
23 note that, in each of these NPAs, appellants were notified that the proposed assessment would become  
24 due and payable on August 2, 2010 or June 11, 2011, unless respondent received appellant-husband's  
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26 \_\_\_\_\_  
27 <sup>7</sup> Respondent may wish to provide evidence that this refund was received by appellants, such as a copy of a negotiated check  
28 from the State Controller's office.

<sup>8</sup> Appellants submitted copies of NPAs for the 2008 tax year and the 2009 tax year. The 2008 tax year is not at issue in this  
appeal.

1 tax return or protest of the proposed assessment. Appellants contend that they filed their tax returns  
2 prior to the date specified. With regard to the 2009 tax return, appellants acknowledge that the filing  
3 was made on the wrong form, but argue that the filing was made and the information was correct.  
4 Appellants contend that respondent incorrectly imposed the penalty as respondent was unaware that the  
5 information was provided 26 days prior to the due date. As such, appellants contend that they neither  
6 failed to file upon demand nor failed to provide information upon demand. Appellants maintain that  
7 they filed on the wrong form, and should only be liable for the late filing penalty under R&TC section  
8 19131. (App. Addl. Br., p. 2, Exhs. A & C.)

9 Appellants also contend that they had reasonable cause to believe that they were not  
10 subject to the demand penalty and, therefore, have the right to an offset for taxes paid. Appellants  
11 further contend that the penalty should be abated. Appellants contend that their payment of taxes offset  
12 any assessed penalties pursuant to R&TC section 19131. Appellants contend that their diligence in  
13 preparing their return was not impacted by the due date of March 16, 2011. Appellants state they have  
14 been at a loss throughout this process as to how or why the proposed demand penalty was being  
15 assessed, since their reading of the relevant statute and every communication from respondent  
16 associated the penalty with a failure to file a return by the due date. Appellants contend that the FTB  
17 was confused enough to assess that penalty and then subsequently retract it. Appellants question how  
18 they can be held to a standard that the FTB never met and cannot meet under the circumstances.  
19 Appellants note that they were provided with a second communication on April 11, 2011 (the NPA)  
20 that stated two separate penalties, but also stated that the proposed assessment became due and payable  
21 on June 10, 2011, unless the FTB received their return, and that filing a return might reduce their tax  
22 liability and ensure that appellants received full credit for tax withheld by employers, and any other  
23 credits, exemptions, and deductions to which appellants were entitled. Appellants state that, in  
24 response to this notice, they filed their return on May 15, 2011, 26 days prior to the due date.  
25 Appellants argue that, under the circumstances, appellants acted as a reasonably intelligent and prudent  
26 person and met respondent's deadlines. (App. Addl. Br., p. 2, Exh. B.)

27 In support of appellants' contentions, appellants point to the following notices: (1) an  
28 NPA for the 2008 tax year dated June 1, 2010, which reflects a late filing penalty of \$138.75 and a zero

1 demand penalty (App. Addl. Br., Exh. A); (2) the Demand for the 2009 tax year dated  
2 February 8, 2011, which states that, if appellant-husband did not respond to the 2009 Demand, a  
3 demand penalty would be assessed (App. Addl. Br., Exh. B); (3) the NPA for the 2009 tax year dated  
4 April 11, 2011, reflecting a proposed assessment including a late filing penalty of \$166.50 and a  
5 demand penalty of \$6,450.50 (App. Addl. Br., Exh. C); (4) a Notice of State Income Tax Due for the  
6 2009 tax year dated July 11, 2011, stating that the proposed assessment for the 2009 tax year is final  
7 and reflecting a penalty of \$6,617.00 and penalty code of "AD" (App. Addl. Br., Exh. D); (5) an  
8 Income Tax Due Notice for the 2009 tax year dated November 2, 2011, reflecting a penalty of  
9 \$6,617.00 and penalty code of "AD" (App. Addl. Br., Exh. E.); (6) a Notice of State Income Tax Due  
10 for the 2009 tax year dated December 12, 2011, reflecting a penalty of \$5,947.50 and penalty code of  
11 "D" (App. Addl. Br., Exh. F); (7) a Final Notice Before Levy for the 2009 tax year dated  
12 January 24, 2012, reflecting a penalty of \$5,947.50 and penalty code of "D" (App. Addl. Br., Exh. G);  
13 (8) a Final Notice Before Levy for the 2009 tax year dated January 31, 2012, reflecting a penalty of  
14 \$5,947.50 and penalty code of "D" (App. Addl. Br., Exh. H); (9) a Notice of State Income Tax Due for  
15 the 2009 tax year dated April 5, 2012, reflecting a penalty of \$5,947.50 and penalty code of "D" (App.  
16 Addl. Br., Exhs. I & J); and (10) a Notice dated November 3, 2012, reflecting that appellants' claim for  
17 refund for \$5,947.50 has been denied and stating that appellants have not shown reasonable cause for  
18 the failure to file their return by the due date (App. Addl. Br., Exh. K.).

19 Respondent's Additional Brief

20 With regard to appellants' argument of the conflicting penalties, respondent contends  
21 that there are two separate and distinct penalties imposed under R&TC section 19131 and R&TC  
22 section 19133. Respondent contends that these two penalties are not conflicting, contrary to appellants'  
23 claim. Respondent contends that the late filing penalty and the demand penalty are commonly imposed  
24 together on the NPAs issued during respondent's filing enforcement. (Resp. Addl. Br., p. 1.)

25 With regard to the late filing penalty, respondent explains that appellants' 2009 tax  
26 return was due on April 15, 2010, but appellants did not file their first 2009 tax return until after the  
27 extended due date of the return. As such, respondent contends that it computed and imposed a small  
28 late filing penalty on the April 11, 2011 NPA based on the underpayment of proposed tax on the NPA

1 and appellants' failure to file a timely 2009 tax return. Respondent explains that, when appellants  
2 finally filed their first late 2009 tax return on May 15, 2011, and their second late 2009 tax return on  
3 November 15, 2011, the late filing penalty was not imposed because appellants' timely payments fully  
4 satisfied their total 2009 tax liability shown on both returns. (Resp. Addl. Br., p. 2.)

5 With regard to the demand penalty, respondent explains that it issued the Demand for  
6 the 2009 tax year to appellant-husband, which is a prerequisite for the imposition of the demand  
7 penalty. Respondent states that the Demand clearly explained that, if appellant-husband failed to  
8 respond to the Demand by March 16, 2011, he would be subject to the demand penalty. Respondent  
9 notes that appellant-husband failed to respond to the Demand by March 16, 2011, and  
10 appellant-husband never disputed this fact. As such, respondent contends that it computed and properly  
11 imposed the demand penalty on the April 11, 2011 NPA, based on appellant-husband's failure to  
12 respond to the Demand by March 16, 2011. Respondent notes that appellants later filed the first late  
13 2009 tax return on May 15, 2011, showing a total tax of \$27,890, and the second late 2009 tax return on  
14 November 15, 2011, showing a total tax of \$27,412 which was reduced by respondent to \$23,790 after  
15 the correction of a math error. Respondent contends that it is clear that the demand penalty was  
16 properly imposed when appellant-husband failed to respond to the Demand by March 16, 2011. (Resp.  
17 Addl. Br., p. 2.)

18 Respondent argues that it is unclear why appellants believe the penalties are conflicting.  
19 Respondent contends that it is clear that these penalties are imposed for two distinct and separate  
20 failures to comply by taxpayers and the imposition of these two penalties are in harmony. With regard  
21 to appellants' contention that respondent chose to assess the demand penalty over the lesser late filing  
22 penalty, respondent contends that it does not have discretion to decide whether to impose penalties.  
23 Respondent further contends that the penalties are imposed by the operation of law and the penalties  
24 may only be abated if a taxpayer establishes reasonable cause for the relative failures. (Resp. Addl. Br.,  
25 pp. 2-3.)

26 With regard to appellants' claim that they filed their first late 2009 return in response to  
27 the April 11, 2011 NPA and, therefore, the demand penalty was not properly imposed, respondent notes  
28 that appellants apparently believe that the demand penalty is imposed for their failure to file a tax return

1 by June 10, 2011, or within the protest period set forth in the NPA. Respondent contends that the  
2 demand penalty was properly imposed for appellant-husband's failure to respond to the March 16, 2011  
3 Demand deadline. Accordingly, respondent contends that appellant's argument that they did not fail to  
4 file upon demand is meritless. (Resp. Addl. Br., p. 3.)

5 Respondent also contends that appellants have not explained the reasoning and analysis  
6 behind their belief that they are not subject to the demand penalty based on their research. Respondent  
7 notes that appellants appear to contend that they were not required to respond to the Demand by  
8 March 16, 2011. Respondent contends that appellants' misinterpretation of the tax law is not a basis  
9 for the abatement of the demand penalty. Respondent contends that appellants' ignorance of the law is  
10 not an excuse for failing to file a return in response to a Demand, citing the *Appeal of J. Morris and*  
11 *Leila G. Forbes*, 67-SBE-042, decided by the Board on August 7, 1967 and the *Appeal of Diebold,*  
12 *Incorporated*, 83-SBE-002, decided by the Board on January 3, 1983. (Resp. Addl. Br., pp. 3-4.)

### 13 Applicable Law

#### 14 Demand Penalty

15 R&TC section 19133 provides that, if any taxpayer fails or refuses to furnish any  
16 information requested in writing by the FTB or fails or refuses to make and file a return upon notice  
17 and demand by the FTB, then, unless the failure is due to reasonable cause and not willful neglect, the  
18 FTB may add a penalty of 25 percent of the amount of tax determined pursuant to R&TC section 19087  
19 or of any deficiency tax assessed by the FTB concerning the assessment of which the information or  
20 return was required. The FTB will only impose a demand penalty if the taxpayers fail to respond to a  
21 current Demand for Tax Return and the FTB issued an NPA under the authority of R&TC section  
22 19087, subdivision (a), after the taxpayers failed to timely respond to a Request for Tax Return or a  
23 Demand for Tax Return at any time during the four taxable years preceding the year for which the  
24 current Demand for Tax Return is being issued. (Cal. Code Regs., tit. 18, § 19133, subd. (b).)

25 When the FTB imposes a demand penalty, the law presumes that the penalty was  
26 imposed correctly. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509.) The burden of proof is on the  
27 taxpayer to show that reasonable cause exists to support an abatement of the penalty. (*Appeal of*  
28 *Eugene C. Findley*, 86-SBE-091, May 6, 1986.) To establish reasonable cause, a taxpayer must show

1 that the failure to reply to the notice and demand or to the request for information occurred despite the  
2 exercise of ordinary business care and prudence. (*Appeal of Stephen C. Bieneman*, 82-SBE-148,  
3 July 26, 1982.) A taxpayer's reason for failing to respond to the notice and demand or the request for  
4 information must be such that an ordinarily-intelligent and prudent businessperson would have acted  
5 similarly under the circumstances. (*Appeal of Eugene C. Findley, supra.*) The demand penalty is  
6 designed to penalize the failure of the taxpayers to respond to a notice and demand, and not their failure  
7 to pay the proper tax. (*Appeal of Frank E and Lilia Z. Hublou*, 77-SBE-102, July 26, 1977.)

#### 8 Collection Cost Recovery Fee

9 R&TC section 19254 requires the imposition of a collection cost recovery fee when a  
10 taxpayer fails to pay the amount due after the FTB mails notice to a taxpayer that the continued failure  
11 to pay the amount due may result in the imposition of the fee. Once properly imposed, there is no  
12 provision in the statute that excuses respondent from imposing the collection cost recovery fee for any  
13 circumstances, including reasonable cause. (*Appeal of Michael E. Myers*, 2001-SBE-001,  
14 May 31, 2001.)

#### 15 STAFF COMMENTS

16 Staff notes that, although the FTB's claim for refund denial notice discusses the late  
17 filing penalty, the penalty at issue is the demand penalty. In addition, no interest was charged to  
18 appellants' 2009 tax year account. Therefore, the amount of the claim for refund consists solely of the  
19 demand penalty and collection cost recovery fee.

#### 20 Demand Penalty

21 The demand penalty is imposed when a taxpayer fails to respond timely to a Demand.  
22 As noted above, respondent's records show that it previously issued a Demand and NPA for the 2008  
23 tax year. Thus, it appears that respondent satisfied Regulation section 19133, subdivision (b), as  
24 respondent issued a Demand and NPA for the 2008 tax year, which is within the four-taxable-year  
25 period preceding the taxable year at issue (2009) for which the current Demand was issued. With  
26 regard to the calculation of the demand penalty, the demand penalty is calculated as 25 percent of the  
27 amount of tax, without regard to payments and withholding credits. (Rev. & Tax. Code, § 19133;  
28 *Appeal of Frank E and Lilia Z. Hublou, supra.*) Here, it appears that the FTB correctly calculated the

1 demand penalty as \$5,947.50 (i.e., \$23,790.00 x 0.25).

2           The parties should be prepared to discuss whether the circumstances of appellants' lack  
3 of response to the February 8, 2011 Demand provides a basis to find that reasonable cause, not willful  
4 neglect, caused the lack of response. The Demand required appellant-husband's response by  
5 March 16, 2011. Appellants did not file a tax return (for which they incorrectly used the 2010 tax  
6 form) until May 15, 2011, which was after respondent issued its NPA for the 2009 tax year and  
7 approximately two months after the deadline imposed by the Demand. Appellants contend that they  
8 filed the May 15, 2011 tax return in response to the NPA issued on April 11, 2011.

9           Appellants contend that, due to the representations of respondent in its notices and the  
10 alleged inconsistencies between R&TC section 19131 and R&TC section 19133, the lesser late filing  
11 penalty pursuant to R&TC section 19131 should apply (and be offset by their timely withholding  
12 credits) instead of the demand penalty pursuant to R&TC section 19133. Appellants allege that  
13 respondent's notices only referenced the late filing penalty and, therefore, appellants are not subject to  
14 the demand penalty. Staff notes that the Demand for the 2009 tax year informed appellants that if  
15 appellant-husband did not respond to the 2009 Demand, a demand penalty would be assessed, and the  
16 April 11, 2011 NPA for the 2009 tax year reflects the proposed assessment of the late filing penalty and  
17 the demand penalty (App. Addl. Br., Exh. B & C). Staff notes that the billing notices for the 2009 tax  
18 year submitted by appellants reflect a penalty code of "AD" or "D." (App. Addl. Br., Exhs. D, E, F, G,  
19 H, I & J.) The parties should be prepared to discuss the meaning of these codes.

20           Staff notes that appellants do not allege that they timely responded to the Demand for the  
21 2009 tax year. It appears that appellants cannot obtain a refund unless they are able to establish  
22 reasonable cause for failing to respond to respondent's written Demand by the March 16, 2011 deadline  
23 shown on the Demand. Appellants should be prepared to discuss the circumstances surrounding the  
24 March 16, 2011 due date of the Demand which caused them to miss this due date. If the parties have  
25 additional supporting evidence that they would like the Board to consider, they should submit it at least  
26 14 days prior to the hearing pursuant to California Code of Regulations, title 18, section 5523.6.<sup>9</sup>

27  
28 <sup>9</sup> Evidence exhibits should be sent to: Khaaliq Abd'Allah, Associate Governmental Program Analyst, Board Proceedings  
Division, State Board of Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.

1                    Collection Cost Recovery Fee

2                    It appears that appellants failed to render any payment in response to the collection  
3 notices for the 2009 tax year and at least one of these notices advised appellants that their continued  
4 failure to render payment could result in the imposition of the collection cost recovery fee. As such, it  
5 appears that the FTB properly imposed the collection cost recovery fee. R&TC section 19254 does not  
6 allow an abatement of this fee for any circumstance, including reasonable cause.

7                    Computation of the Overpayment

8                    Appellants contend that they are due an overpayment of \$11,832 (i.e., \$23,790 tax  
9 liability - \$35,622 withholding credits). On or about June 5, 2012, the FTB issued a refund of  
10 \$5,835.79, which consisted of an overpayment of \$5,730.50 and allowed interest of \$105.29. Both  
11 parties should be prepared to discuss, and provide evidence of, whether appellants received this refund.  
12 If appellants are able to demonstrate reasonable cause for failing to respond to the demand penalty, it  
13 appears that respondent correctly notes that the maximum available refund would be \$6,101.50 (i.e.,  
14 \$11,832.00 overpayment - \$5,730.50 already refunded), plus applicable interest.

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