
NOTE

Penalties and Reasonable Cause: Have You Exercised Ordinary Business Care and Prudence?

Russell A. Sternshein*

TABLE OF CONTENTS

INTRODUCTION	2283
I. STATE OF THE LAW	2285
A. <i>California Has a Unique and Problematic Tax System</i>	2285
1. The Board of Equalization	2285
2. The Franchise Tax Board	2286
3. Criticism of the California Tax System	2287
B. <i>The R&TC Prescribes the Penalties Assessed by the FTB and Reviewed by the BOE</i>	2290
1. The Late Filing, Late Payment, and Demand Penalties	2290
2. The Appeal Process	2291
C. <i>The R&TC, Courts, and BOE Formal Opinions Define Reasonable Cause</i>	2292
II. REASONABLE CAUSE ANALYSIS	2292
A. <i>The BOE Fails to Advance the Reasonable Cause Standard for California Taxpayers</i>	2294
1. The Federal Reasonable Cause Standard	2295
2. Available Formal Opinions Abating Penalties Provide Limited Explanations of Reasonable Cause..	2296

* Copyright © 2017 Russell A. Sternshein. J.D. Candidate, University of California, Davis School of Law, 2017; B.B.A., University of Iowa, 2014. Thank you to the Editors and Members of the UC Davis Law Review. And a special thank you to Emily Goodenow, my SNCE, and Professors Darien Shanske and Dennis Ventry.

3.	Formal Opinions and Summary Decisions Sustaining Penalties Provide Limited Explanations of Reasonable Cause	2299
4.	More Formal Opinions on Reasonable Cause Are Needed	2303
B.	<i>The Non-Delegable Duty Rule for Filing a Timely Return Is Inconsistent with the Reality of Tax Return Preparation</i>	2306
1.	The Non-Delegable Duty Rule	2307
2.	An Alternative View on the Duty to Timely File	2308
3.	The BOE's Application of the Non-Delegable Duty Rule	2309
C.	<i>BOE Deference to the FTB Leads to Incorrect Applications of the Law</i>	2312
1.	The BOE Mistakenly Applies the Completely Prevented Standard and the Credible and Competent Evidence Burden of Proof in Its Summary Decisions	2313
2.	The BOE Mistakenly Follows the FTB Law Summary Asserting that the Non-Delegable Duty Rule Applies to the Demand Penalty.....	2314
D.	<i>The Last-Known Address Rule Conflicts with the Purpose of the Demand Penalty</i>	2316
1.	The Last-Known Address Rule	2316
2.	Comparing the Purpose of Timeliness Penalties and the Demand Penalty	2317
3.	The BOE's Application of the Last-Known Address Rule	2318
III.	SOLUTION	2321
A.	<i>The BOE Should Issue More Formal Opinions</i>	2322
B.	<i>The Legislature Should Amend the R&TC and Overhaul the Tax System</i>	2325
	CONCLUSION.....	2327

INTRODUCTION

In 2014, California collected over \$138 billion in total taxes, more than New York and Texas combined.¹ However, California's system for administering those taxes is inefficient, confusing, and ripe for change.² Taxpayers navigating the flawed administration and appeal process for disputes are unable to obtain a clear understanding of the law.³ The interpretation and application of "reasonable cause," as the standard that taxpayers must meet for the tax appeals board to abate several penalties, is particularly concerning.⁴ Reasonable cause is generally defined as the exercise of ordinary business care and prudence.⁵ However, the appeals board responsible for applying the

¹ Total taxes include property taxes, sales and gross receipts taxes, license taxes, income taxes, and other taxes. See *State Government Tax Collections*, U.S. CENSUS BUREAU (Apr. 16, 2015), https://www.census.gov/govs/statetax/historical_data_2014.html (follow "2014 Annual Survey of State Government Tax Collections Detailed Table" hyperlink) (listing the top three states for total taxes collected in 2014 as California with \$138,131,690,000, New York with \$76,978,982,000, and Texas with \$55,146,619,000).

² See generally ASSEMBLY INTERIM COMM. ON GOV'T ORG., CALIFORNIA'S TAX ADMINISTRATION: THE NEED FOR A CENTRAL REVENUE DEPARTMENT 10 (1965) (commenting that the "distribution of tax collection responsibility among several agencies presents a complicated picture to the taxpayer"); CAL. PERFORMANCE REVIEW COMM'N, CALIFORNIA PERFORMANCE REVIEW — THE PUBLIC PERSPECTIVE: THE REPORT OF THE CALIFORNIA PERFORMANCE REVIEW COMMISSION 440 (2004) (finding that California's tax system is duplicative, inefficient, and confusing for taxpayers); CAL. TAX COMM'N, FINAL REPORT OF THE CALIFORNIA TAX COMMISSION 1 (1929) (describing the tax system as "fundamentally faulty"); SUBCOMM. OF THE ASSEMBLY INTERIM COMM. ON GOV'T ORG., THE NEED FOR A DEPARTMENT OF REVENUE IN CALIFORNIA 9 (1955) (concluding that California's revenue administration structure should be efficient, economical, and understandable); Daniel L. Simmons, *California Tax Collection: Time for Reform*, 48 SANTA CLARA L. REV. 279, 279 (2008) ("The tax collection structure in California is a duplicative aggregation of competing agencies that have evolved from California's original dependence on property taxes as the base for state support.").

³ See Simmons, *supra* note 2, at 350-51 (stating that the BOE has "no basis for consistency in decision making," and taxpayers "should not be faced with California's confusing multiplicity of tax collection agencies").

⁴ See CAL. REV. & TAX. CODE §§ 18668, 19011, 19131, 19132, 19133, 19134, 19164, 19172, 19172.5 (2017) (withholding liability for tax and withholding penalties; electronic fund transfer penalty; late filing penalty; late payment penalty; demand penalty; dishonored payment penalty; accuracy-related penalty; partnership late filing penalty; S-corporation late filing penalty). See generally STATE OF CAL. FRANCHISE TAX BD., REASONABLE CAUSE — INDIVIDUAL AND FIDUCIARY CLAIM FOR REFUND (2014), <https://www.ftb.ca.gov/forms/misc/2917.pdf> (FTB's streamlined form to request a penalty abatement due to reasonable cause).

⁵ See Appeal of Howard G. Tons, 79-SBE-027 (Cal. State Bd. Eq. Jan. 9, 1979), 1979 WL 4068, at *2 (stating that reasonable cause exists if the reason for a penalty "occurred despite the exercise of ordinary business care and prudence").

standard to California income tax appeals has not clarified its definition in many contexts.⁶ Because the penalties that may be abated for reasonable cause are remedial (designed to reimburse the government for investigation rather than punish taxpayers),⁷ the interpretation and application of reasonable cause should be clear to help avoid costly appeals when the penalties are improper.

This Note argues that the California State Board of Equalization (“BOE”) needs to issue more formal opinions clarifying, and in some cases correcting, its interpretation and application of the reasonable cause standard.⁸ Alternatively, the California Legislature (“Legislature”) has the power to amend the Revenue and Taxation Code (“R&TC”) or restructure the tax system to address those problems.⁹ Part I discusses the background of California’s tax system, the appeal process for personal income tax disputes, and the current standard for reasonable cause.¹⁰ Part II analyzes the standard for reasonable cause and reveals the problems with its current interpretation and application.¹¹ Part III explains how the problems with the reasonable cause standard can be solved.¹²

⁶ Compare Appeal of Michael J. Halaburka, 85-SBE-025 (Cal. State Bd. Eq. Apr. 9, 1985), 1985 WL 15809, at *2 (stating that illness may constitute reasonable cause if it “prevented” him from filing a timely return), and Appeal of Stephen C. Bieneman, 82-SBE-148 (Cal. State Bd. Eq. July 26, 1982), 1982 WL 11825, at *1 (“[M]erely asserting that certain records were unavailable is insufficient to prove reasonable cause.”), with Edison R. Khourisader, 97R-1154, (Cal. State Bd. Eq. Nov. 19, 1998), 1998 WL 902545, at *2 (summary decision not to be cited as precedent) (stating that illness may be considered reasonable cause if it “completely prevented” the taxpayer from filing a timely return), and Appeal of Jacqueline Taylor, 95R-0771 (Cal. State Bd. Eq. Aug. 22, 1996), 1996 WL 768327, at *2 (summary decision not to be cited as precedent) (“In order to show reasonable cause, the taxpayer must present credible and competent proof . . .”).

⁷ See *Helvering v. Mitchell*, 303 U.S. 391, 401 (1938); Appeal of Estate of Samuel L. Lewis, 61-SBE-021 (Cal. State Bd. Eq. Apr. 6, 1961), 1961 WL 1411, at *1.

⁸ See discussion *infra* Parts II.A–D, III.A.

⁹ See discussion *infra* Part III.B.

¹⁰ See discussion *infra* Part I.A–C.

¹¹ See discussion *infra* Part II.A–D.

¹² See discussion *infra* Part III.A–B.

I. STATE OF THE LAW

A. California Has a Unique and Problematic Tax System

California's tax system is currently divided into four separate agencies.¹³ The BOE collects sales, use and special taxes, and adjudicates franchise, income and other tax appeals.¹⁴ The State of California Franchise Tax Board ("FTB") collects individual income and corporate franchise taxes.¹⁵ The California Department of Motor Vehicles ("DMV") collects vehicle license fees, and the State of California Employment Development Department ("EDD") collects employment taxes.¹⁶ The following discussion focuses on the BOE and FTB, describing how this multi-agency structure came about and its criticisms.

1. The Board of Equalization

The California tax system was created by the Constitution of the State of California of 1849, Article XI, section 13, which provided that property "shall be taxed in proportion to its value" and "shall be equal and uniform throughout the state."¹⁷ In 1870, the Legislature, with that purpose in mind, created an agency to collect property taxes and aptly named it the Board of Equalization.¹⁸ However, the California Supreme Court struck down the first BOE because the statute granting it authority to collect taxes conflicted with its constitutional mandate to be equal and uniform.¹⁹ In 1879, the Legislature adopted a new

¹³ CAL. PERFORMANCE REVIEW COMM'N, *supra* note 2, at 440.

¹⁴ See Simmons, *supra* note 2, at 327; *Tax Appeals*, CAL. STATE BD. OF EQ., <http://www.boe.ca.gov/appeals/> (last visited Jan. 15, 2017) (listing appeals the BOE may hear, including property, sales, use, special, franchise, and personal income tax appeals). "Although BOE does not assess local properties, it does oversee the assessment standards and practices of each county assessor. BOE, however, does directly assess properties belonging to over 400 privately-owned public utilities." CAL. STATE BD. OF EQ., PUBLICATION 21.2, (Apr. 2014), <http://www.boe.ca.gov/runner/pdf/pub21-2.pdf>.

¹⁵ See Simmons, *supra* note 2, at 327.

¹⁶ See *id.*

¹⁷ CAL. CONST. of 1849, art. XI, § 13; see Steven P. Arena, *Publication 216, The First 100 Years*, CAL. STATE BD. OF EQ., <http://www.boe.ca.gov/info/pub216/index.html> (last visited Jan. 16, 2017) (follow "Contents," then "Introduction") (digital reproduction of a publication that is no longer in print).

¹⁸ See Arena, *supra* note 17 (follow "Contents," then "Creation of the First State Board of Equalization").

¹⁹ *Houghton v. Austin*, 47 Cal. 646, 651 (1874); see Arena, *supra* note 17 (follow "Contents," then "Creation of the First State Board of Equalization").

Constitution to solve the problems of the first, and created a new BOE, in an attempt to end inequitable taxation.²⁰

In 1883, a statute directing the State Controller to collect taxes established the practice of separating tax assessment and collection, which continues today.²¹ The Personal Income Tax Act of 1935 assigned administration of income taxes to the Franchise Tax Commissioner and income tax appeal hearings to the BOE.²² The Franchise Tax Commissioner was eventually restructured into the Franchise Tax Board and today the BOE reviews appeals of the FTB's determinations on personal income and corporate tax disputes.²³

The actual BOE board consists of five members that serve concurrent four-year terms; one member is elected from each of California's four BOE districts, and the State Controller serves as the fifth member.²⁴ The BOE is the only elected tax commission in the United States, and those elected members rarely have professional tax experience.²⁵

2. The Franchise Tax Board

The Franchise Tax Commissioner position was created in 1929 to administer income taxes.²⁶ In 1934, a Constitutional amendment

²⁰ CAL. CONST. of 1879, art. XIII, § 9; see Arena, *supra* note 17 (follow "Contents," then "The Board of Equalization Becomes a Constitutional Agency").

²¹ See Act of Mar. 9, 1883, ch. 40, 1883 Cal. Stat. 65, 68-71 (codified as amended at CAL. POL. CODE §§ 3666, 3670 (1883)); Simmons, *supra* note 2, at 285.

²² See CAL. CONST. of 1879, art. XIII, § 15; Personal Income Tax Act of 1935, ch. 329, 1935 Cal. Stat. 1090-91; Simmons, *supra* note 2, at 289.

²³ See Act of July 25, 1949, ch. 1188, 1949 Cal. Stat. 2108; *Annual Report 2011-2012*, CAL. STATE BD. OF EQ., <http://www.boe.ca.gov/annual/2011-12/annualrpts.htm> (last visited Jan. 16, 2017); Simmons, *supra* note 2, at 290-91.

²⁴ *Annual Report 2011-2012*, *supra* note 23. District 1 consists of "Alameda, Colusa, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, San Francisco, San Luis Obispo, San Mateo, Santa Barbara (57 percent), Santa Clara, Santa Cruz, Solano, Sonoma, Trinity, and Yolo" counties. PUBLICATION 21.2, *supra* note 14. District 2 consists of "Alpine, Amador, Butte, Calaveras, El Dorado, Fresno, Glenn, Inyo, Kern, Kings, Lassen, Los Angeles (9 percent), Madera, Mariposa, Merced, Modoc, Mono, Nevada, Placer, Plumas, Sacramento, San Bernardino (46 percent), San Joaquin, Santa Barbara (43 percent), Shasta, Sierra, Siskiyou, Stanislaus, Sutter, Tehama, Tulare, Tuolumne, Ventura, and Yuba" counties. *Id.* District 3 consists of "Imperial, Los Angeles (2 percent), Orange, Riverside, San Bernardino (54 percent), and San Diego" counties. *Id.* District 4 consists of "Los Angeles (89 percent)" county. *Id.*

²⁵ See ASSEMBLY COMM. ON APPROPRIATIONS, ANALYSIS OF ASSEMBLY BILL 2016, 2005-2006 Reg. Sess. (Cal. 2006); Simmons, *supra* note 2, at 308.

²⁶ See Simmons, *supra* note 2, at 290-91.

established civil service protections for state employees, which prevented the Commissioner from being removed.²⁷ As a result, the position was not accountable to anyone, and this free reign was inevitably abused.²⁸ In 1949, the Legislature finally abolished the position and created the Franchise Tax Board.²⁹

The FTB is a three-member board comprised of the State Controller, the Chair of the BOE, and the Director of Finance.³⁰ Not coincidentally, the board is the same group that previously appointed the Franchise Tax Commissioner, two of which are BOE members.³¹ The FTB may appoint an executive officer with two-thirds approval by the California Senate, but the executive officer may be removed by the other two FTB board members.³²

3. Criticism of the California Tax System

The structures of the BOE and FTB involve a serious separation of powers concern.³³ The two members serving on each board have the duty of both implementing policy for income tax administration and presiding as adjudicators over income tax appeals.³⁴ Additionally, all BOE members, who generally lack tax backgrounds, rely on staff recommendations whose findings are the ones being appealed.³⁵ An appeals structure should ensure that taxpayers receive impartial hearings, but the elective, and thus political nature of the BOE prevents impartial hearings.³⁶ The California Government Code states

²⁷ See CAL. CONST. of 1879, art. XXIV, § 4 (1934) (current version at CAL. CONST. art. VII, § 4); Simmons, *supra* note 2, at 290.

²⁸ See Simmons, *supra* note 2, at 290.

²⁹ See Act of July 25, 1949, ch. 1188, 1949 Cal. Stat. 2108; Simmons, *supra* note 2, at 290-91.

³⁰ *Strategic Plan 2012–2016*, STATE OF CAL. FRANCHISE TAX BD., https://www.ftb.ca.gov/aboutFTB/stratgic/strategic_plan_2012_2016.shtml#history (last visited Jan. 16, 2017).

³¹ See Simmons, *supra* note 2, at 290-91.

³² CAL. GOV'T CODE § 15701 (2017).

³³ See SUBCOMM. OF THE ASSEMBLY INTERIM COMM. ON GOV'T ORG., *supra* note 2, at 18-19; Simmons, *supra* note 2, at 319-20.

³⁴ See Simmons, *supra* note 2, at 321-22; *Strategic Plan 2012–2016*, *supra* note 30.

³⁵ See SUBCOMM. OF THE ASSEMBLY INTERIM COMM. ON GOV'T ORG., *supra* note 2, at 19; Simmons, *supra* note 2, at 321.

³⁶ See Simmons, *supra* note 2, at 319-21. For a discussion on the three essential elements of an independent tax appeals tribunal, see COUNCIL ON STATE TAXATION, INDEPENDENT TAX APPEALS TRIBUNALS, http://www.cost.org/uploadedFiles/About_COST/Policy_Statement/IndependentTaxAppealsTribunals.pdf (last visited Jan. 16, 2017) (listing the three essential elements as independence, trained tax judges, and no

that the presiding officers in administrative adjudication are subject to disqualification for bias, prejudice, or interest.³⁷ The dual administrative and adjudicatory roles of the BOE are inappropriate because they create opportunities for bias and ultimately, disqualification.³⁸ Because BOE members are elected, candidates can campaign on the promise to decrease or increase taxes, and the overall position of the BOE can change each election cycle.³⁹ Thus, the political nature of the BOE can lead to biased hearings.⁴⁰

Shortly after the inception of California's tax system and the BOE, both were criticized for being confusing, inefficient, and unaccountable.⁴¹ Despite the criticism, the BOE's administrative and adjudicatory authority expanded over time.⁴² In 1929, a final report by the California Tax Commission recommended abolishing the BOE and replacing it with a commission of three members.⁴³ The recommendation would have the Governor appoint commission members for six-year terms in order to increase accountability to the executive branch.⁴⁴ In 1955, a legislative report recommended creating a Department of Revenue, with the head appointed by the Governor, to replace the current structure.⁴⁵ The recommendation aimed to make California's tax administration responsible to the Governor, the Legislature, and the people.⁴⁶ The 1955 report noted that every objective finding on California's tax administration structure endorsed consolidating its multi-agency form.⁴⁷

Ten years later, another legislative study made a similar suggestion and added that the BOE should be designated as the "Board of Tax Appeals."⁴⁸ The study criticized the current structure as confusing for

prepayment requirement).

³⁷ CAL. GOV'T CODE § 11425.10.

³⁸ See Simmons, *supra* note 2, at 321-22.

³⁹ See *id.*

⁴⁰ See SUBCOMM. OF THE ASSEMBLY INTERIM COMM. ON GOV'T ORG., *supra* note 2, at 19; Simmons, *supra* note 2, at 319-22.

⁴¹ See Simmons, *supra* note 2, at 291-94.

⁴² See Arena, *supra* note 17 (follow "Contents").

⁴³ See CAL. TAX COMM'N, *supra* note 2, at xxiv; Simmons, *supra* note 2, at 291-92.

⁴⁴ See CAL. TAX COMM'N, *supra* note 2, at xxiv; Simmons, *supra* note 2, at 291-92.

⁴⁵ See SUBCOMM. OF THE ASSEMBLY INTERIM COMM. ON GOV'T ORG., *supra* note 2, at 9; Simmons, *supra* note 2, at 294.

⁴⁶ See SUBCOMM. OF THE ASSEMBLY INTERIM COMM. ON GOV'T ORG., *supra* note 2, at 9; Simmons, *supra* note 2, at 294.

⁴⁷ See SUBCOMM. OF THE ASSEMBLY INTERIM COMM. ON GOV'T ORG., *supra* note 2, at 25, 37; Simmons, *supra* note 2, at 294.

⁴⁸ See ASSEMBLY INTERIM COMM. ON GOV'T ORG., *supra* note 2, at 43-44; Simmons,

individual taxpayers because they must deal with four separate agencies just to pay their state taxes, and potentially more than one agency for a single payment.⁴⁹ In 1996, the Constitutional Revision Commission made similar recommendations.⁵⁰

However, a bill introduced in 2006, which proposed consolidating the FTB and EDD into the BOE, was rejected.⁵¹ The Legislature was concerned about having an elected agency, which would be unaccountable to the executive branch, with even greater administrative and adjudicative authority over tax disputes.⁵² Unfortunately, a bill that consolidates tax administration into a single agency and establishes an independent adjudicatory process is unlikely to pass.⁵³ The political influence of BOE members (who do not want their roles reduced) and legislators (who may eventually run for BOE positions), and the lobbying efforts by major accounting firms and labor unions often precludes the Legislature from passing such bills.⁵⁴ Even a bill that is limited to merely establishing an independent adjudicatory body, which would provide a fairer system than the current one, is unlikely to pass.⁵⁵ Given this reality, the BOE should use its authority to provide taxpayers as fair a process as possible.

supra note 2, at 294-95.

⁴⁹ See ASSEMBLY INTERIM COMM. ON GOV'T ORG., *supra* note 2, at 10; Simmons, *supra* note 2, at 295.

⁵⁰ See CAL. CONSTITUTION REVISION COMM'N, FINAL REPORT AND RECOMMENDATIONS TO THE GOVERNOR AND THE LEGISLATURE 20 (1996); Simmons, *supra* note 2, at 297-98.

⁵¹ See ASSEMBLY COMM. ON APPROPRIATIONS, ANALYSIS OF ASSEMBLY BILL 2016, 2005-2006 Reg. Sess. (Cal. 2006); Simmons, *supra* note 2, at 300-01.

⁵² See ASSEMBLY COMM. ON APPROPRIATIONS, ANALYSIS OF ASSEMBLY BILL 2016, 2005-2006 Reg. Sess. (Cal. 2006); Simmons, *supra* note 2, at 300-01.

⁵³ Some legislators oppose bills that eliminate the BOE positions because when they are no longer able to run for their former positions they see elected BOE positions as jumping off points for their political careers. Other political officials oppose bills that would consolidate the BOE and FTB, but retain elected positions, because responsibility for tax collection would be removed from California's executive branch. See Simmons, *supra* note 2, at 301-02 (discussing political factors that bar reform to California's tax system).

⁵⁴ See *id.*; C. David Anderson et al., *The Puzzle of the FTB's Reputation: The Effect of Settlement Procedures*, 63-7 USC L. SCH. INST. ON MAJOR TAX PLAN. ¶ 703, ¶ 703.5 (2011) (noting that BOE board members are unlikely to support major reductions in their tax adjudication roles); Laura Mahoney, *State's Lack of Independent Tax Dispute Forum Criticized, but Efforts to Create Alternative to SBOE Face Uphill Battle*, DAILY TAX REP., Sept. 10, 2010 (stating that major accounting firms have hired contract lobbyists to work on accounting issues in the Legislature and that labor unions representing public employees hold more political sway than taxpayers and practitioners).

⁵⁵ See Simmons, *supra* note 2, at 301-02 ("[S]ome improvement in California Tax administration might be achieved by providing an independent review mechanism of

B. *The R&TC Prescribes the Penalties Assessed by the FTB and Reviewed by the BOE*

1. The Late Filing, Late Payment, and Demand Penalties

This Note focuses on three of the penalties assessed by the FTB that may be abated for reasonable cause.⁵⁶ First, the FTB shall assess a late filing penalty if a taxpayer fails to file a return by the due date, and the penalty is five percent of the tax owed for each month that the return is late, with a twenty-five percent maximum.⁵⁷ Second, the FTB shall assess a late payment penalty if a taxpayer fails to pay income or corporate taxes, and the penalty is five percent of the unpaid tax plus one-half percent each month the payment is late, with a twenty-five percent maximum.⁵⁸ The late filing and late payment penalties are collectively referred to as “timeliness penalties.”⁵⁹

Finally, the FTB shall assess a demand penalty if a taxpayer fails to respond to, or file a return in response to a notice and demand by the FTB, and the penalty is twenty-five percent of the tax owed.⁶⁰ The demand penalty is assessed after a taxpayer fails to respond to a Request for Tax Return (“Request”) and subsequent Demand for Tax Return (“Demand”).⁶¹ The timeliness penalties each have federal counterparts in the Internal Revenue Code (“IRC”), but the demand penalty does not.⁶²

Board actions.”); Mahoney, *supra* note 54 (stating lawmakers have failed seven times in the past twenty-five years to take the adjudicatory function out of the BOE’s hands).

⁵⁶ See CAL. REV. & TAX. CODE §§ 19131, 19132, 19133 (2017). Other penalties that may be abated for reasonable cause include withholding liability for tax and withholding penalties, electronic fund transfer penalty, dishonored payment penalty, accuracy-related penalty, partnership late filing penalty, and S-corporation late filing penalty. See *id.* §§ 18668, 19011, 19134, 19164, 19172, 19172.5.

⁵⁷ See *id.* § 19131.

⁵⁸ See *id.* § 19132.

⁵⁹ See STATE OF CAL. FRANCHISE TAX BD., 2014 LEGISLATIVE PROPOSALS, at LP - D pp. 5-6 (2014), <https://www.ftb.ca.gov/law/meetings/attachments/120413/2.pdf> (referring to late filing and late payment penalties as timeliness penalties).

⁶⁰ See CAL. REV. & TAX. CODE § 19133.

⁶¹ See CAL. CODE REGS. tit. 18, § 19133 (2017).

⁶² Compare CAL. REV. & TAX. CODE §§ 19131, 19132, 19133 (imposing late filing, late payment, and demand penalties), with I.R.C. § 6651 (2012) (imposing a penalty for failure to file tax return or to pay tax).

2. The Appeal Process

If the FTB determines that a taxpayer's return is incorrect, or a penalty is warranted, it mails a notice of proposed assessment ("NPA") to the taxpayer.⁶³ The taxpayer has 60 days to protest the NPA to the FTB or the assessment becomes final.⁶⁴ The FTB reviews any timely protest and issues a notice of action ("NOA"), which the taxpayer has 30 days (90 days for a refund claim) to appeal to the BOE or the action becomes final.⁶⁵ If the taxpayer properly appeals, the BOE hears the appeal and notifies the FTB and taxpayer of its determination and reasons therefor.⁶⁶ The decision becomes final after 30 days or, if a petition for rehearing is granted, 30 days after the decision on rehearing.⁶⁷

When the BOE hears an income tax appeal, it must issue either a formal opinion or summary decision.⁶⁸ Each opinion or decision must include: (1) findings of fact, (2) the legal issue(s) presented, (3) applicable law, (4) analysis, (5) disposition, and (6) the names of adopting board members.⁶⁹ The BOE has discretion over whether to issue a formal opinion, rather than a summary decision, but must issue a formal opinion if the amount in controversy is \$500,000 or greater.⁷⁰ Taxpayers can rely on formal opinions, but cannot cite summary decisions as precedent when arguing their own appeals.⁷¹ Summary decisions may indicate how the BOE is likely to decide an appeal with similar facts because, like a formal opinion, it must include findings of fact and analysis of the applicable law.⁷² However, summary decisions are not binding in subsequent controversies, so taxpayers cannot rely on them.⁷³

⁶³ See CAL. REV. & TAX. CODE § 19033.

⁶⁴ See *id.* §§ 19033, 19041, 19042.

⁶⁵ See *id.* §§ 19045, 19046, 55243.

⁶⁶ See *id.* § 19047.

⁶⁷ See *id.* § 19048.

⁶⁸ See *id.* § 40. Memorandum opinions are also issued by the BOE, but only for business tax appeals, not income tax appeals. See *Formal & Memorandum Opinions — Board of Equalization*, CAL. STATE BD. OF EQ., <http://www.boe.ca.gov/legal/legalopcont.htm> [hereinafter *Formal & Memorandum Opinions*] (last visited Sept. 7, 2015) (noting that business taxes refer to sales and use taxes, local and district tax reallocations, and various special taxes and fees).

⁶⁹ CAL. REV. & TAX. CODE § 40.

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *id.*

C. *The R&TC, Courts, and BOE Formal Opinions Define Reasonable Cause*

The R&TC allows the BOE and FTB to abate timeliness and demand penalties if the event triggering the penalty was “due to reasonable cause and not willful neglect.”⁷⁴ The BOE’s analysis usually focuses on reasonable cause because the existence of reasonable cause presumes that there was no willful neglect.⁷⁵ The taxpayer has the burden of proof by a preponderance of the evidence to show reasonable cause.⁷⁶ BOE and court opinions have defined reasonable cause as proof that “such cause existed as would prompt an ordinary intelligent and prudent businessman to have so acted under similar circumstances.”⁷⁷

II. REASONABLE CAUSE ANALYSIS

The BOE needs to provide more guidance or make significant changes to the reasonable cause standard for California taxpayers to receive a fairer appeals process.⁷⁸ The major issues with the standard

⁷⁴ *Id.* §§ 19131, 19132, 19133.

⁷⁵ *See* Appeal of Samuel R. & Eleanor H. Walker, 73-SBE-020 (Cal. State Bd. Eq. Mar. 27, 1973), 1973 WL 2752, at *1 (“Appellants argue that their conduct was not willful. However, both reasonable cause and ‘absence of willful neglect must’ be satisfied.”).

⁷⁶ *See* Appeal of Eugene & Lily Heller, 97-SBE-014 (Cal. State Bd. Eq. Nov. 20, 1997), 1997 WL 768547, at *3 (“Further, and consistent with a taxpayer’s burden of proof on appeal, appellants must do more than merely aver the facts necessary to establish reasonable cause, they must make an affirmative evidentiary showing to establish those facts before relief will be granted.”); Appeal of Myron E. & Alice Z. Gire, 69-SBE-029 (Cal. State Bd. Eq. Sept. 10, 1969), 1969 WL 1806, at *1 (“A determination by the Franchise Tax Board is presumptively correct, and the burden is on the taxpayer to prove that it is erroneous.”); *see also* Appeal of James A. Alyn & Lisa E. Alyn, 09-SBE-001 (Cal. State Bd. Eq. May 27, 2009), 2009 WL 2340393, at *12 (stating that a “taxpayer must meet his burden by a preponderance of the evidence”).

⁷⁷ Appeal of Howard G. & Mary Tons, 79-SBE-027 (Cal. State Bd. Eq. Jan. 9, 1979), 1979 WL 4068, at *2; *see also* *Sanders v. Comm’r*, 225 F.2d 629, 636 (10th Cir. 1955), *cert. denied*, 350 U.S. 967 (1956). Additionally, “illness is ‘reasonable cause’ if it can be shown that the taxpayer is prevented from filing a timely return because of such illness.” *Hayes v. Comm’r*, 26 T.C.M. (CCH) 393 (1967); *see also* Appeal of Michael J. & Diane M. Halaburka, 85-SBE-025 (Cal. State Bd. Eq. Apr. 9, 1985), 1985 WL 15809, at *3 (concluding that appellants did not prove that their son’s illness, while stressful, prevented them from filing a timely return).

⁷⁸ *See* Anderson et al., *supra* note 54, at ¶ 703.4 (“[E]ven [BOE] appeals which are pursued to judgment often produce no detailed opinion . . . [T]he overall effect is that California cases seem to produce much less precedent ‘per capita’ than the federal Tax Court system.”). *Compare* Appeal of Raymond H. & Margaret R. Berner, 01-SBE-006 (Cal. State Bd. Eq. Dec. 20, 2001), 2001 WL 1674981 (reasonable cause to abate demand penalty), Appeal of Estate of Anna Armstrong, 64-SBE-068 (Cal. State Bd. Eq.

include a lack of formal opinions, certain applications of the non-delegable duty and last-known address rules, and the BOE's deference to the FTB.⁷⁹ These issues are unique to California taxpayers because not all IRC and Code of Federal Regulations ("Treasury Regulations") interpretations are interchangeable with California's R&TC and Code of Regulations ("Regulations") interpretations, even though the same reasonable cause language is used.⁸⁰

Most BOE formal opinions and summary decisions involving timeliness or demand penalties include the assertion that to establish reasonable cause the appellant must demonstrate the exercise of ordinary business care and prudence.⁸¹ Although the "ordinary business care and prudence" standard is also applied to IRC penalties by the Internal Revenue Service ("IRS") and courts, the BOE must clarify how the standard specifically applies to R&TC penalties.⁸² The

Oct. 27, 1964), 1964 WL 1473 (California nonresident return at issue), *and* Appeal of William T. & Joy P. Orr, 68-SBE-010 (Cal. State Bd. Eq. Feb. 5, 1968), 1968 WL 1640 (sacrificing the timeliness of one aspect of business affairs to pursue other endeavors is not reasonable cause), *with* United States v. Boyle, 469 U.S. 241, 249 (1985) (holding that the burden of prompt filing is on the taxpayer, not on some agent or employee), *McKenna v. Comm'r, T.C. Summ. Op.* 2010-58 (May 4, 2010), 2010 WL 1780876, at *2 (assessing late filing and late payment penalties), *and* *Meanley v. McColgan*, 121 P.2d 45, 48 (Cal. Ct. App. 1942) (holding that court interpretations of the federal statute are not binding authority for the proper interpretation of the state statute).

⁷⁹ Compare *Berner*, 2001 WL 1674981 (reasonable cause to abate demand penalty), *Armstrong*, 1964 WL 1473 (California nonresident return at issue), *and* *Orr*, 1968 WL 1640 (sacrificing the timeliness of one aspect of business affairs to pursue other endeavors is not reasonable cause), *with* *Boyle*, 469 U.S. at 249 (holding that burden of prompt filing is on the taxpayer, not on some agent or employee), *McKenna*, 2010 WL 1780876, at *2 (assessing late filing and late payment penalties), *and* *Meanley*, 121 P.2d at 48 (holding that court interpretations of the federal statute are not binding authority for the proper interpretation of the state statute).

⁸⁰ See ARNOLD H. GOLD ET AL., CALIFORNIA CIVIL PRACTICE: PROBATE AND TRUST PROCEEDINGS § 17:94 (2016) ("Like federal law, the penalties are imposed absent a showing of reasonable cause."); 1 JAMES STANISLAW, CALIFORNIA TRANSACTIONS FORMS: ESTATE PLANNING § 3:105 (2016) (noting that federal penalties for failure to file and pay tax due are similar in California); *cf.* I.R.C. § 6651 (2012); Treas. Reg. § 301.6651-1 (2017).

⁸¹ See, e.g., Appeal of Stephen C. Bieneman, 82-SBE-148 (Cal. State Bd. Eq. July 26, 1982), 1982 WL 11825, at *1; *Tons*, 1979 WL 4068, at *2; Appeal of F.J.A. Winery, Inc., No. 303607, (Cal. State Bd. Eq. June 13, 2006), 2006 WL 1688132, at *1 (summary decision).

⁸² Compare *Boyle*, 469 U.S. at 249-50 (holding that ordinary business care and prudence is not satisfied by delegating the burden of prompt filing on an agent or tax professional), *and* Appeal of Thomas K. & Gail G. Boehme, 85-SBE-134 (Cal. State Bd. Eq. Nov. 6, 1985), 1979 WL 4224, at *4 (holding that reliance on an agent does not excuse a late filing penalty), *with* Appeal of Frank E. & Lilia Z. Hublou, 77-SBE-102

BOE has clarified the standard in some situations, but others require more explanation, or an alternative application.⁸³

A. *The BOE Fails to Advance the Reasonable Cause Standard for California Taxpayers*

The R&TC recognizes that there are circumstances when imposing a timeliness or demand penalty is improper.⁸⁴ However, it ambiguously defines those circumstances as whenever there is “reasonable cause” for failing to file a return, make a payment, or respond to a Demand.⁸⁵ The California Regulations define reasonable cause as “circumstances that would prevent an ordinarily prudent and competent person exercising ordinary care and diligence” from complying with the R&TC.⁸⁶ Another section of the Regulations provides examples of reasonable cause, but those examples only address corporate tax penalties.⁸⁷ A large body of common law

(Cal. State Bd. Eq. July 26, 1977), 1977 WL 4093, at *2 (stating that the demand penalty is designed to penalize the failure of a taxpayer to respond to the Demand and not failure to pay the proper tax), and Appeal of Brad Sweeney & Stephanie Johnson, 1998 WL 98943 (Cal. State Bd. Eq. Feb. 26, 1998), at *3 (summary decision not to be cited as precedent) (holding that *Boehme, Miller and Boyle* “do not provide direct authority for [FTB’s] position with respect to notice and demand penalties”).

⁸³ See, e.g., Appeal of J. Ray Risser, 84-SBE-044 (Cal. State Bd. Eq. Feb. 28, 1984), 1984 WL 16123, at *1 (finding lack of reasonable cause for failure to pay the balance due because appellant could not remember if prior year refund was credited to his future tax liability); Appeal of Loretta L. Hamilton, 83-SBE-053 (Cal. State Bd. Eq. Mar. 1, 1983), 1983 WL 15439, at *2 (finding lack of reasonable cause for failure to respond to a Demand because appellant “merely exercised her Fifth Amendment right against self-incrimination”); Appeal of Hermine M. Arnold, 73-SBE-023 (Cal. State Bd. Eq. Apr. 9, 1973), 1973 WL 2755, at *2 (finding FTB correctly disallowed tax credit because appellant willfully failed to pay her tax liability before the due date). Compare *Boyle*, 469 U.S. at 249-50 (holding that ordinary business care and prudence is not satisfied by delegating the burden of prompt filing on an agent or tax professional), and *Boehme*, 1979 WL 4224, at *4 (holding that reliance on an agent does not excuse a late filing penalty), with *Hublou*, 1977 WL 4093, at *2 (stating that the demand penalty is designed to penalize the failure of a taxpayer to respond to the Demand and not failure to pay the proper tax), and *Sweeney & Johnson*, 1998 WL 98943, at *3 (summary decision not to be cited as precedent) (holding that *Boehme, Miller and Boyle* “do not provide direct authority for [FTB’s] position with respect to notice and demand penalties”).

⁸⁴ See CAL. REV. & TAX. CODE § 19133 (2017) (stating that the FTB may penalize a taxpayer for failing to file a return upon notice and demand “unless the failure is due to reasonable cause and not willful neglect”); see also *id.* §§ 19131, 19132.

⁸⁵ See *id.* §§ 19131, 19132, 19133.

⁸⁶ CAL. CODE REGS. tit. 18, § 5511 (2017).

⁸⁷ See *id.* § 25112 (“Destruction of a document, or failure to maintain information, if occurring in the normal course of business, is reasonable cause . . .”).

interpreting such an amorphous standard seems warranted, but BOE guidance on the reasonable cause standard is limited to a few formal opinions.⁸⁸ Furthermore, several formal opinions create more questions than they answer, and summary decisions cannot answer those questions because they are not binding authority.⁸⁹

1. The Federal Reasonable Cause Standard

The Treasury Regulations define reasonable cause for failing to file a federal return, or pay federal taxes as the exercise of “ordinary business care and prudence,” and provide examples demonstrating reasonable cause, but only related to managing a taxpayer’s finances.⁹⁰ Additionally, the Treasury Regulations contain a reasonable cause component for penalties related to informational returns that is not present in the California Regulations.⁹¹ Under this component, the IRS may waive penalties if the filer acted in a “responsible manner” and establishes “significant mitigating factors,” or that “[t]he failure arose

⁸⁸ See, e.g., Appeal of Raymond H. & Margaret R. Berner, 01-SBE-006 (Cal. State Bd. Eq. Dec. 20, 2001), 2001 WL 1674981 (finding penalty abated because FTB tax assessment abated); Appeals of Amyas & Evelyn P. Ames, et al., 87-SBE-042 (Cal. State Bd. Eq. June 17, 1987), 1987 WL 50165 (finding penalty abated because FTB tax assessment reversed); Appeal of Estate of Anna Armstrong, 64-SBE-068 (Cal. State Bd. Eq. Oct. 27, 1964), 1964 WL 1473; see also *infra* Figure 1. For a list of formal opinions addressing reasonable cause see *Legal Department - Franchise and Income Tax Formal Legal Opinions Keyword Index*, CAL. STATE BD. OF EQ., <http://www.boe.ca.gov/legal/legalindexR.htm#reasonabat> (last visited Feb. 3, 2017) [hereinafter *Legal Opinions Index*] (containing formal opinions listed by key words).

⁸⁹ See, e.g., Appeal of Michael D. Schwab, 2013 WL 6804555 (Cal. State Bd. Equal. May 22, 2013) (summary decision) (failing to receive a Demand was not reasonable cause to abate a notice and demand penalty); Appeal of F.J.A. Winery, Inc., No. 303607 (Cal. State Bd. Eq. June 13, 2006), 2006 WL 1688132 (summary decision) (finding trustee’s actions were not reasonable cause for appellant); Appeal of Loew’s S.F. Hotel Corp., 73-SBE-050 (Cal. State Bd. Eq. Sept. 17, 1973), 1973 WL 2783 (filing a late return due to complications from a merger was not reasonable cause); Appeal of Samuel R. & Eleanor H. Walker, 73-SBE-020 (Cal. State Bd. Eq. Mar. 27, 1973), 1973 WL 2752 (relying on a secretary to mail a return was not reasonable cause).

⁹⁰ Treas. Reg. § 301.6651-1(c)(1) (2017) (“Thus, for example, a taxpayer who incurs lavish or extravagant living expenses in an amount such that the remainder of his assets and anticipated income will be insufficient to pay his tax, has not exercised ordinary business care and prudence in providing for the payment of his tax liability.”).

⁹¹ Compare Treas. Reg. § 301.6724-1 (describing reasonable cause to waive a “penalty for a failure relating to an information reporting requirement”), with CAL. CODE REGS. tit. 18, § 5511 (describing reasonable cause simply as “circumstances that would prevent an ordinarily prudent and competent person exercising ordinary care and diligence from complying” with the regulations).

from events beyond the filer's control."⁹² Unfortunately for California taxpayers, this standard does not apply to the R&TC penalties.⁹³

The most significant difference between abating federal penalties and California penalties is the Internal Revenue Manual's ("IRM") first-time abatement policy.⁹⁴ Under this policy, an IRS-imposed timeliness penalty is automatically abated if the taxpayer has properly and timely filed in the preceding three years.⁹⁵ Given the remedial nature of these penalties, abatement for taxpayers with a history of compliance reduces costs that the IRS would otherwise incur investigating a penalty's appropriateness. In 2013, the FTB approved a proposed regulation with a similar first-time abatement policy that required proper and timely filing in the preceding four years, but it never became a final regulation.⁹⁶ In 2014, the policy was introduced in an assembly bill, but was referred to the Committee on Appropriations, where it was held under submission and died.⁹⁷ The bill's failure was a major blow to California taxpayers affected by timeliness penalties because the first-time abatement policy could have reduced taxpayer dissatisfaction, increased filing compliance, and decreased costs incurred by taxpayers and the BOE.⁹⁸

2. Available Formal Opinions Abating Penalties Provide Limited Explanations of Reasonable Cause

The BOE rarely abates FTB penalty assessments in formal opinions. The few existing opinions provide limited guidance as to what satisfies reasonable cause.⁹⁹ The "Reasonable Cause — Penalty Abatement" section on the BOE's website does not contain any such opinions, but

⁹² Treas. Reg. § 301.6724-1.

⁹³ Cf. CAL. REV. & TAX. CODE §§ 19131, 19132, 19133 (2017).

⁹⁴ See IRM 20.1.1.3.6.1 (Aug. 5, 2014) (providing that penalty relief is available if the taxpayer has not previously been required to file a return or has no prior penalties for the preceding 3 years, and has filed all currently required returns and paid any tax due).

⁹⁵ See *id.*

⁹⁶ See STATE OF CAL. FRANCHISE TAX Bd., STATE OF CALIFORNIA FRANCHISE TAX BOARD PUBLIC MEETING 15-18 (Dec. 4, 2013), <https://www.ftb.ca.gov/law/meetings/transcripts/120413.pdf> (approving "Proposal D" to establish a first-time penalty abatement program).

⁹⁷ See Assemb. B. 1777, 2014 State Assemb., 2013–2014 Reg. Sess. (Cal. 2014), http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201320140AB1777 ("Inactive Bill - Died" "11/30/14 From committee without further action.").

⁹⁸ See 2014 LEGISLATIVE PROPOSALS, *supra* note 59 ("Pro: Authorizing the FTB to implement first-time abatement penalty relief would reduce taxpayer dissatisfaction, result in increased filing compliance, and decrease the costs incurred by taxpayers and the BOE.").

⁹⁹ See *Legal Opinions Index*, *supra* note 88.

three can be found in the formal opinion index, which lists formal opinions by year.¹⁰⁰ Two of the opinions abate penalties for mistakes by the FTB, and the scope of the third opinion is limited to filing a complicated nonresident return.¹⁰¹

In *Appeal of Amyas and Evelyn P. Ames*, the BOE abated demand penalties because no tax was due.¹⁰² The FTB assessed taxes and penalties on the partners of a limited partnership, none of whom were California residents.¹⁰³ The BOE held that since the partnership was not in California, the partners did not have California-source income.¹⁰⁴ The BOE did not consider whether reasonable cause existed because, as it stated, the FTB could not impose penalties when no amount of tax was due.¹⁰⁵ Thus, this opinion does not add to how California taxpayers can exercise ordinary business care and prudence.¹⁰⁶

In *Appeal of Raymond H. and Margaret R. Berner*, the BOE abated demand penalties because the appellants proved that they changed their domicile from California to Nevada.¹⁰⁷ The BOE found that reasonable cause existed because the appellants' change in domicile meant that they did not have California-source income, and thus did not need to file a return.¹⁰⁸ Taken together, the *Ames* and *Berner* opinions make it clear that penalties may be abated when the FTB makes an incorrect assessment.¹⁰⁹ However, these opinions do not

¹⁰⁰ See *id.* (containing formal opinions listed by key words); *Appeal of Raymond H. & Margaret R. Berner*, 01-SBE-006 (Cal. State Bd. Eq. Dec. 20, 2001), 2001 WL 1674981; *Appeals of Amyas & Evelyn P. Ames, et al.*, 87-SBE-042 (Cal. State Bd. Eq. June 17, 1987), 1987 WL 50165; *Appeal of Estate of Anna Armstrong*, 64-SBE-068 (Cal. State Bd. Eq. Oct. 27, 1964), 1964 WL 1473.

¹⁰¹ See *Berner*, 2001 WL 1674981, at *6; *Ames, et al.*, 1987 WL 50165, at *5; *Armstrong*, 1964 WL 1473, at *3.

¹⁰² See *Ames, et al.*, 1987 WL 50165, at *5.

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See *Appeal of Raymond H. & Margaret R. Berner*, 01-SBE-006 (Cal. State Bd. Eq. Dec. 20, 2001), 2001 WL 1674981.

¹⁰⁸ See *id.* This opinion does not distinguish why reasonable cause was found here, but in *Appeals of Amyas and Evelyn P. Ames, et al.*, the BOE held it could not consider whether reasonable cause existed. Compare *Berner*, 2001 WL 1674981, with *Appeals of Amyas & Evelyn P. Ames, et al.*, 87-SBE-042 (Cal. State Bd. Eq. June 17, 1987), 1987 WL 50165.

¹⁰⁹ See *Berner*, 2001 WL 1674981; *Ames, et al.*, 1987 WL 50165.

address how taxpayers themselves can exercise ordinary business care and prudence to satisfy reasonable cause.¹¹⁰

In *Appeal of Estate of Anna Armstrong*, the BOE abated several penalties, holding that the estate's executor exercised ordinary business care and prudence.¹¹¹ The executor sought "competent professional advice" on the income tax consequences for the sale of Anna Armstrong's property by relying on a certified public accountant.¹¹² The reliance was justified because the requirement to file a nonresident return in this situation was not "a simple and fundamental matter."¹¹³ This opinion provides a meaningful explanation of what constitutes reasonable cause.¹¹⁴ However, its application is limited to the employment of, and reliance upon a competent professional for "filing a nonresident return in this situation."¹¹⁵

These three formal opinions reveal that reasonable cause may exist to abate penalties when the FTB assessment is incorrect or a taxpayer relied on competent professional advice specifically for filing a nonresident return.¹¹⁶ However, the only guidance for future taxpayers is to hire competent professional advice when filing returns, which is something taxpayers should already know.¹¹⁷ Thus, these opinions fail to increase taxpayers' understanding of the reasonable cause standard.¹¹⁸

¹¹⁰ See *Berner*, 2001 WL 1674981.

¹¹¹ See *Appeal of Estate of Anna Armstrong*, 64-SBE-068 (Cal. State Bd. Eq. Oct. 27, 1964), 1964 WL 1473, at *3.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.* at *3.

¹¹⁶ See *Appeal of Raymond H. & Margaret R. Berner*, 01-SBE-006-A (Cal. State Bd. Eq. Aug. 1, 2002), 2002 WL 1884256, at *6; *Appeal of Amyas & Evelyn P. Ames*, 87-SBE-042 (Cal. State Bd. Eq. June 17, 1987), 1987 WL 50165, at *5; *Armstrong*, 1964 WL 1473, at *3.

¹¹⁷ See *Berner*, 2002 WL 1884256, at *6; *Ames*, 1987 WL 50165, at *3; *Armstrong*, 1964 WL 1473, at *3. See generally *Choose Your Tax Preparer Wisely*, IRS (Jan. 26, 2016), <https://www.irs.gov/uac/Choose-Your-Tax-Preparer-Wisely> (offering tips on what to consider when choosing a tax preparer).

¹¹⁸ See *Berner*, 2002 WL 1884256, at *6; *Ames*, 1987 WL 50165, at *5; *Armstrong*, 1964 WL 1473, at *3.

3. Formal Opinions and Summary Decisions Sustaining Penalties Provide Limited Explanations of Reasonable Cause

There are many summary decisions, but only a few formal opinions addressing reasonable cause and the guidance those formal opinions provide have limited relevance for taxpayers today.¹¹⁹ Additionally, summary decisions only indicate how the BOE is likely to decide an appeal with similar facts and cannot be relied on by taxpayers for general guidance.¹²⁰ The following BOE formal opinions and summary decisions represent the limited explanations of reasonable cause that are typical in BOE determinations.¹²¹

In *Appeal of Samuel R. and Eleanor H. Walker*, the BOE held that the appellants failed to exercise even ordinary care by relying on a secretary to mail their return.¹²² Dr. Samuel Walker was undergoing a “hectic” relocation of his offices when he instructed his secretary to mail his return, but she failed to do so.¹²³ When Dr. Walker became aware of the situation he filed his late return and appealed the late filing penalty.¹²⁴ However, the BOE sustained the penalty and asserted that relying on a secretary to handle critical papers without follow-up failed to meet the ordinary care standard.¹²⁵

This formal opinion clearly shows that taxpayers are personally responsible for filing their return, but its application is limited.¹²⁶ Without further explanation in subsequent formal opinions, this guidance is less helpful today because most taxpayers electronically file (“e-file”) their returns.¹²⁷ Today, *Walker* probably suggests that

¹¹⁹ See *Legal Opinions Index*, *supra* note 88 (containing formal opinions listed by key words); Online legal database search, LEXIS ADVANCE, <https://advance.lexis.com> (search conducted Oct. 9, 2015) (searched “19131 or 19132 or 19133” within “Administrative Materials;” narrowed by “California,” “Bd. of Equalization,” “reasonable cause,” and “summary decision”).

¹²⁰ See CAL. CODE REGS. tit. 18, §§ 5452, 5552 (2017).

¹²¹ See *Appeal of F.J.A. Winery, Inc.*, Case No. 303607 (Cal. State Bd. Eq. June 13, 2006), 2006 WL 1688132, at *1 (summary decision); *Appeal of Loew’s S.F. Hotel Corp.*, 73-SBE-050 (Cal. State Bd. Eq. Sept. 17, 1973), 1973 WL 2783, at *1-*2; *Appeal of Samuel R. & Eleanor H. Walker*, 73-SBE-020 (Cal. State Bd. Eq. Mar. 27, 1973), 1973 WL 2752, at *1.

¹²² See *Walker*, 1973 WL 2752, at *1.

¹²³ *Id.*

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ See *id.*

¹²⁷ See ROGER LACKEY & ALLEN WILSON, FILING SEASON OVERVIEW (2015), <https://www.ftb.ca.gov/law/meetings/07212015/3.pdf> (86% of 2014 personal income tax returns were e-filed).

taxpayers cannot rely on third parties or e-filing software to ensure that their returns are submitted.¹²⁸ But the BOE has not issued a formal opinion saying so. Additionally, what happens if a technological glitch or other problem outside of a taxpayer's control prevents the taxpayer from filing a timely return?¹²⁹ Must taxpayers follow-up with the FTB to ensure that it receives their returns? How would taxpayers prove that a glitch prevented them from filing their returns to satisfy their burden of proof for reasonable cause? The BOE can answer these questions through formal opinions when the issues appear before it, but has yet to do so.¹³⁰

In *Appeal of Loew's San Francisco Hotel Corp.*, the BOE held that the appellant failed to exercise ordinary business care and prudence because "being too busy" does not relieve the duty to file a timely return.¹³¹ Loew's experienced "abnormal conditions" after undergoing a merger that required consolidating returns, adopting a new fiscal year, physically relocating its tax department, and developing a new work pattern.¹³² The BOE sustained the late filing penalty by relying on precedent, which asserted that if an "appellant chooses to sacrifice the timeliness of one aspect of its business affairs in order to pursue other endeavors, it must bear the consequences."¹³³ This BOE interpretation of the taxpayer's duty originated in *Appeal of William T. and Joy P. Orr*,¹³⁴ but closely resembles the tax court's approach to analyzing how taxpayers conduct their business affairs.¹³⁵ In *Logan*

¹²⁸ See *United States v. Boyle*, 469 U.S. 241, 252 (1985) (holding that failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent).

¹²⁹ See generally *First Am. Commercial Real Estate Servs., Inc. v. County of San Diego*, 126 Cal. Rptr. 3d 630, 635-36 (Ct. App. 2011) (taxpayer's agent failing to transmit payment because of clerical error was not "circumstances beyond the taxpayer's control"); *Appeal of Donahue Marital Tr.*, Case No. 477472 (Cal. State Bd. Eq. Oct. 19, 2010), 2010 WL 5626959, at *3 (summary decision not to be cited as precedent) (finding that coding error that left off sale proceeds from partnership interest was not reasonable cause).

¹³⁰ See CAL. REV. & TAX. CODE § 40 (2017) (stating that formal opinions adopted by the BOE may be cited as precedent); *Formal & Memorandum Opinions*, *supra* note 68 (containing all the formal opinions issued by the BOE by year).

¹³¹ *Appeal of Loew's S.F. Hotel Corp.*, 73-SBE-050 (Cal. State Bd. Eq. Sept. 17, 1973), 1973 WL 2783, at *1.

¹³² *Id.*

¹³³ *Id.* at *2.

¹³⁴ See *Appeal of William T. & Joy P. Orr*, 68-SBE-010 (Cal. State Bd. Eq. Feb. 5, 1968), 1968 WL 1640.

¹³⁵ See *Dustin v. Comm'r*, 53 T.C. 491, 507 (1969), *aff'd*, 467 F.2d 47 (9th Cir. 1972) (holding that working 7 days a week and 5 nights a week does not excuse a

Lumber Company v. Commissioner, the Fifth Circuit affirmed the tax court's finding that reasonable cause was lacking and stated that "[if] every taxpayer who forgot to file a return or was too busy to file a return escaped the penalty for failure to file, our tax system would soon collapse."¹³⁶ The BOE followed the tax court in *Orr*, but also like the tax court, has not explained what would be reasonable cause absent certain illnesses.¹³⁷

Loew's suggests that even an extreme business circumstance due to abnormal conditions is not an excuse for filing a late return.¹³⁸ However, the opinion does not explain what *Loew's* could have done to exercise ordinary business care and prudence.¹³⁹ The BOE did not discuss whether *Loew's* should have asked for extensions or postponed the merger, nor did the BOE issue any other formal opinions addressing the issue.¹⁴⁰ Taxpayers still do not know how an "ordinarily intelligent and prudent businessman" is supposed to act.¹⁴¹

In a summary decision, *Appeal of F.J.A. Winery, Inc.*, the BOE held that a trustee's carelessness did not constitute reasonable cause to abate a late filing penalty imposed on the trust.¹⁴² Bank of America ("BoA") was the trustee for the Aves trust after the owner of F.J.A. Winery died.¹⁴³ The BoA personnel responsible for filing compliance were in a turnover phase and left the trust off a to-do list.¹⁴⁴ The FTB

person from fulfilling "legal obligations within the required time").

¹³⁶ *Logan Lumber Co. v. Comm'r*, 365 F.2d 846, 854 (5th Cir. 1966).

¹³⁷ *See, e.g., Tabbi v. Comm'r*, 70 T.C.M. (CCH) 836 (1995) (finding reasonable cause for filing a return two months after the taxpayers' son's death where their son had heart surgery and the taxpayers spent four months continuously in the hospital with him); *Harris v. Comm'r*, 28 T.C.M. (CCH) 272 (1969) (finding that the IRS failed to meet its burden to rebut reasonable cause where the taxpayer was in and out of hospitals because of various severe medical ailments, including stroke, paralysis, heart attack, bladder trouble, and breast cancer). The tax court agrees that filing timely returns is as important as other business matters, but has not addressed a situation in which the failure to file a timely return was due to "abnormal conditions" related to the taxpayer's business. *See, e.g., Calvert Iron Works, Inc. v. Comm'r*, 26 T.C. 770, 782 (1956) (holding that attorney's failure to file timely returns after receiving them from the petitioner's President and Comptroller was not reasonable cause).

¹³⁸ *See Loew's S.F. Hotel Corp.*, 1973 WL 2783, at *1-2.

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *Id.* at *1.

¹⁴² *See Appeal of F.J.A. Winery, Inc.*, Case No. 303607 (Cal. State Bd. Eq. June 13, 2006), 2006 WL 1688132, at *1-2 (summary decision).

¹⁴³ *See id.*

¹⁴⁴ *See id.*

argued that a reasonable businessperson would not have overlooked the error, and the BOE agreed by sustaining the penalty.¹⁴⁵

This non-binding summary decision focuses on BoA's actions, but F.J.A. Winery, owned by the Aves trust, was the appellant.¹⁴⁶ Usually, the duty to file a timely return is on a taxpayer, not an agent (or trustee).¹⁴⁷ However, if the action of an agent with control over a taxpayer's return is reviewed in an appeal or trial, then the BOE or court, respectively, examines whether the taxpayer's agent satisfied the relevant standard.¹⁴⁸ In *F.J.A. Winery*, the duty to file the return was delegated to the trustee, so the trustee's actions were evaluated.¹⁴⁹ As a result, the trust was penalized for the trustee's actions, which respects the clearly established non-delegable duty rule from *United States v. Boyle* and repeated in BOE formal opinions.¹⁵⁰ But penalizing a trust for the actions of a trustee means that the trust itself can never exercise reasonable cause.¹⁵¹ Taxpayers can generally change tax preparers that they aren't satisfied with, but the deceased owner of the then trust-owned F.J.A. Winery could not change trustees, so penalizing the trust for the trustee's actions presented an issue that the BOE declined to formally address.¹⁵²

Overall, there is not enough guidance in BOE formal opinions for taxpayers to know what satisfies the ordinarily intelligent and prudent businessperson standard, regardless of whether those opinions abate or sustain penalties.¹⁵³ Taxpayers know that filing a timely return is

¹⁴⁵ See *id.* at *1-2.

¹⁴⁶ See *id.* at *1.

¹⁴⁷ See, e.g., Appeal of Thomas K. & Gail G. Boehme, 85-SBE-134 (Cal. State Bd. Eq. Nov. 6, 1985), 1985 Cal. Tax LEXIS 10, at *9 (holding that the duty to timely file is on the taxpayer).

¹⁴⁸ See *First Am. Commercial Real Estate Servs., Inc. v. County of San Diego*, 126 Cal. Rptr. 3d 630, 635 (Ct. App. 2011); *F.J.A. Winery, Inc.*, 2006 WL 1688132, at *1.

¹⁴⁹ See *F.J.A. Winery, Inc.*, 2006 WL 1688132, at *1.

¹⁵⁰ See *United States v. Boyle*, 469 U.S. 241, 252 (1985); *F.J.A. Winery, Inc.*, 2006 WL 1688132, at *1; see, e.g., *Boehme*, 1985 Cal. Tax LEXIS 10, at *9-10 (applying the non-delegable duty rule established in *Boyle*).

¹⁵¹ See *Boyle*, 469 U.S. at 252 (establishing the non-delegable duty rule); *F.J.A. Winery, Inc.*, 2006 WL 1688132, at *1 (evaluating the trustee's actions to determine whether reasonable cause existed to abate a late filing penalty for the trust).

¹⁵² See *F.J.A. Winery, Inc.*, 2006 WL 1688132, at *1; *Choosing the Executor or Trustee*, AMERICANBAR.ORG 10-17, http://www.americanbar.org/content/dam/aba/migrated/publiced/practical/books/wills/chapter_10.authcheckdam.pdf (last visited Mar. 27, 2016) (discussing how a trustee is chosen and procedures for removing a trustee).

¹⁵³ See, e.g., *F.J.A. Winery, Inc.*, 2006 WL 1688132, at *1; Appeal of Raymond H. & Margaret R. Berner, 01-SBE-006-A (Cal. State Bd. Eq. Aug. 1, 2001), 2002 WL

possibly the most important business affair, but they do not always know what constitutes reasonable cause when they are unable to file on time.¹⁵⁴ Thus, the BOE has not adequately explained reasonable cause for California taxpayers.¹⁵⁵

4. More Formal Opinions on Reasonable Cause Are Needed

The BOE's guidance for reasonable cause fails to conform to the standards of the Legislature and Regulations.¹⁵⁶ Notably, a legislative report from 1955 concluded that California's tax system should be restructured to provide more efficient and understandable administration of tax laws.¹⁵⁷ The report found that the BOE lacks uniformity in tax administration, lacks consistency in interpretation, and is reluctant to issue definitive regulations.¹⁵⁸ These deficiencies contribute to the lack of adequate interpretations and applications of reasonable cause.¹⁵⁹

The BOE has ignored the Regulations' factors for issuing formal opinions, which if followed would increase precedent that taxpayers can rely on.¹⁶⁰ Professor Daniel L. Simmons describes taxpayer reliance on the BOE as, "impossible in the absence of [BOE] opinions

1884256, at *6; Appeal of Amyas & Evelyn P. Ames, 87-SBE-042 (Cal. State Bd. Eq. June 17, 1987), 1987 WL 50165, at *5; Appeal of Loew's S.F. Hotel Corp., 73-SBE-050 (Cal. State Bd. Eq. Sept. 17, 1973), 1973 WL 2783, at *1-2; ; Appeal of Samuel R. & Eleanor Walker, 73-SBE-020 (Cal. State Bd. Eq. Mar. 27, 1973), 1973 WL 2752, at *1; Appeal of Estate of Anna Armstrong, 64-SBE-068 (Cal. State Bd. Eq. Oct. 27, 1964), 1964 WL 1473, at *3.

¹⁵⁴ See *Loew's S.F. Hotel Corp.*, 1973 WL 2783, at *1; Appeal of William T. & Joy P. Orr, 68-SBE-010 (Cal. State Bd. Eq. Feb. 5, 1968), 1968 WL 1640, at *2.

¹⁵⁵ Compare *Berner*, 2002 WL 1884256, at *6 (reasonable cause to abate demand penalty), *Armstrong*, 1964 WL 1473, at *3 (California nonresident return at issue), and *Orr*, 1968 WL 1640, at *1-2 (sacrificing the timeliness of one aspect of business affairs to pursue other endeavors is not reasonable cause), with *Boyle*, 469 U.S. at 249 & n.8 (burden of prompt filing is on the taxpayer, not on some agent or employee), *McKenna v. Comm'r, T.C. Summ. Op.* 2010-58, 2010 WL 1780876, at *2 (May 4, 2010) (late filing and late payment penalties assessed), and *Meanley v. McColgan*, 121 P.2d 45, 48 (Cal. Dist. Ct. App. 1942) (noting that court interpretations of the federal statute are not binding authority for the proper interpretation of the state statute).

¹⁵⁶ See CAL. CODE REGS. tit. 18, § 5452 (2017) (describing reasons for issuing a formal opinion); SUBCOMM. OF THE ASSEMBLY INTERIM COMM. ON GOV'T ORG., *supra* note 2, at 12 (1955) (noting the lack of uniformity in states' tax administration).

¹⁵⁷ See SUBCOMM. OF THE ASSEMBLY INTERIM COMM. ON GOV'T ORG., *supra* note 2.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

¹⁶⁰ See CAL. CODE REGS. tit. 18, § 5452.

explaining the [BOE]’s interpretation of the law.”¹⁶¹ Although the BOE is required to adopt a formal opinion for appeals with at least \$500,000 in controversy,¹⁶² this requirement does not result in a sufficient number of formal opinions addressing important issues. However, the Regulations do prescribe four non-exclusive factors for the BOE to consider when deciding whether to issue a formal opinion.¹⁶³ The factors are:

- (1) Whether the Opinion would establish a new rule of law, apply an existing rule to a set of facts significantly different from those stated in published opinions, or modify or repeal an existing rule;
- (2) Whether the Opinion would resolve or create an apparent conflict in the law;
- (3) Whether the Opinion would involve a legal issue of continuing public interest; and
- (4) Whether the Opinion would make a significant contribution to the law by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.¹⁶⁴

The BOE has only issued ten formal opinions since 2006 despite the Regulation factors weighing towards the necessity for more formal opinions explaining reasonable cause.¹⁶⁵ The BOE issued seventy-two formal opinions in the ten-year period prior to 2006, but no fewer than two hundred in each of the previous ten-year periods going back to 1930, indicating that it has the ability to issue more formal opinions.¹⁶⁶ The BOE website lists just twenty-five distinct formal opinions categorized as “Reasonable Cause — Penalty Abatement,” sixteen as “Reasonable Cause,” and four as “Reasonable Cause — Penalty Assessment.”¹⁶⁷ The most recent reasonable cause formal opinion was issued on November 20, 1997.¹⁶⁸ In comparison, there

¹⁶¹ Simmons, *supra* note 2, at 323.

¹⁶² See 18 CAL. CODE REGS. tit. 18, § 5552.

¹⁶³ See *id.* § 5452.

¹⁶⁴ *Id.*

¹⁶⁵ See *Formal & Memorandum Opinions*, *supra* note 68 (showing the BOE issued six opinions in 2007; no opinions in 2008, 2011, 2013, and 2014; and only one opinion in 2009, 2010, 2012, and 2015).

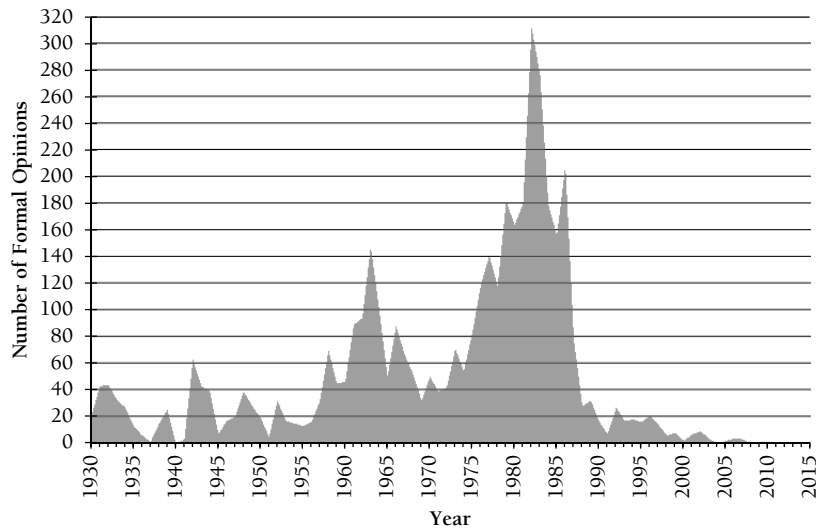
¹⁶⁶ See *id.* (containing all the formal opinions issued by the BOE by year); *infra* Figure 1.

¹⁶⁷ Several opinions appear in multiple sections and I only counted repeats for one section. See *Legal Opinions Index*, *supra* note 88 (containing formal opinions listed by key words).

¹⁶⁸ See *id.*

have been over five hundred summary decisions involving reasonable cause and late filing, late payment, or demand penalties since 1997.¹⁶⁹ If the BOE properly considered the Regulation factors, it should have issued more formal opinions on reasonable cause over the last eighteen years.¹⁷⁰

Figure 1: BOE Formal Opinions Over Time



The BOE issued few formal opinions (even none) in past periods, but the recent dearth is significant.¹⁷¹ During the first twenty-five years that the BOE issued formal opinions only one year had no formal opinions, and only five others had fewer than ten formal opinions.¹⁷² By contrast, in recent years, issuing few, if any, formal opinions is the norm. In the last fifteen years, six had no formal opinions, which was unprecedented.¹⁷³ The BOE issued the bulk of its formal opinions after a critical legislative report in 1955, but the uptick only lasted until the

¹⁶⁹ See search described *supra* note 119.

¹⁷⁰ Compare *id.*, with CAL. CODE REGS. tit. 18, § 5452 (2017).

¹⁷¹ See *Formal & Memorandum Opinions*, *supra* note 68 (showing BOE issued a total of 10 formal opinions over the last 10 years: six in 2007; zero in 2008, 2011, 2013, 2014; and one in 2009, 2010, 2012, 2015); *supra* Figure 1.

¹⁷² See *Formal & Memorandum Opinions*, *supra* note 68 (containing all the formal opinions issued by the BOE by year); *supra* Figure 1.

¹⁷³ See *Formal & Memorandum Opinions*, *supra* note 68; *supra* Figure 1.

1990s.¹⁷⁴ The first year that the BOE issued summary decisions seems to be 1991, and the popularity of its use may have caused the recent decline in formal opinions. However, distinguishing cause from correlation is difficult because it is unclear how the BOE handled appeals that were not decided by formal opinions before 1991.¹⁷⁵ Regardless, the BOE has shown the ability to issue more formal opinions, and arguably it should.¹⁷⁶ The Legislature and Regulations require tax administration to be understandable and the BOE is not fulfilling this duty.¹⁷⁷

B. The Non-Delegable Duty Rule for Filing a Timely Return Is Inconsistent with the Reality of Tax Return Preparation

Taxpayers should be able to rely on tax counsel for “substantive” advice and to timely file their returns because taxpayers often hire tax counsel to do both.¹⁷⁸ Currently, taxpayers may only reasonably rely on the advice of tax counsel for substantive advice, but not for filing a timely return.¹⁷⁹ Taxpayers can also rely on written advice from the

¹⁷⁴ See *Formal & Memorandum Opinions*, *supra* note 68; *supra* Figure 1.

¹⁷⁵ See Online legal database search, LEXIS ADVANCE, <https://advance.lexis.com/> (search conducted Oct. 9, 2015) (searched “summary decision” within “Administrative Materials;” narrowed by “California,” “Bd. of Equalization”). There does not appear to be a statutory distinction between a formal opinion and any other BOE decision until 2012. Compare California Bank and Corporation Franchise Tax Act § 25, ch. 13, 1929 Cal. Stat. 19, 30 (adding Bank and Corporation Franchise Tax Act § 25, describing the procedures for the BOE to notify taxpayers of its appeal decisions), with Act of Sept. 29, 2012, ch. 788, 2012 Cal. Stat. (adding CAL. REV. & TAX. CODE § 40, requiring the BOE to publish a written formal opinion, memorandum opinion or summary decision).

¹⁷⁶ See Anderson et al., *supra* note 54, at ¶ 703.4 (arguing that “[m]any California tax cases are resolved without any published rationale” and “California cases seem to produce much less precedent ‘per capita’ than the federal Tax Court system”). See generally CAL. CODE REGS. tit. 18, § 5452 (2017) (listing reasons for issuing a formal opinion); SUBCOMM. OF THE ASSEMBLY INTERIM COMM. ON GOV’T ORG., *supra* note 2 (noting that uniformity in tax administration is lacking).

¹⁷⁷ See CAL. CODE REGS. tit. 18, § 5452 (reasons for issuing a formal opinion); SUBCOMM. OF THE ASSEMBLY INTERIM COMM. ON GOV’T ORG., *supra* note 2 (noting that uniformity in tax administration is lacking).

¹⁷⁸ See *United States v. Boyle*, 469 U.S. 241, 251-52 (1985) (holding that taxpayers can rely on accountants or attorneys for substantive advice, but not for a filing deadline); Angela M. Wheeland, *Responsibilities of a Tax Preparer*, HOUS. CHRON., <http://work.chron.com/responsibilities-tax-preparer-1065.html> (last visited Feb. 3, 2017) (stating that tax preparers complete returns and file forms, usually electronically, for clients).

¹⁷⁹ See *Boyle*, 469 U.S. at 251-52; Appeal of William T. & Joy P. Orr, 68-SBE-010 (Cal. State Bd. Eq. Feb. 5, 1968), 1968 WL 1640, at *1 (“It is the duty of the taxpayer

FTB, including “Chief Counsel Rulings,” “Legal Rulings,” and “FTB Notices,” but news releases and oral advice from the FTB are not considered reliable substantive interpretations of the law.¹⁸⁰ However, a discussion of these sources is outside the scope of this Note and are only mentioned as examples of “substantive interpretations.” Under the current reasonable cause standard, whether a taxpayer is seeking substantive advice is unnecessarily critical for establishing reasonable cause.¹⁸¹

1. The Non-Delegable Duty Rule

In *United States v. Boyle*, the Supreme Court established the non-delegable duty rule by stating that a taxpayer’s reliance on tax counsel to timely file his return is not a substitute for compliance with an unambiguous statute.¹⁸² The wording of this rule suggests that reliance may only be reasonable when a statute is ambiguous.¹⁸³ Although the due date for income tax returns is not ambiguous under the R&TC, what constitutes reasonable cause for failing to meet the deadline is ambiguous.¹⁸⁴ In *Boyle*, the Supreme Court relied on the government’s substantial interest in ensuring that taxpayers file timely returns to justify the non-delegable duty rule.¹⁸⁵ In accordance with *Boyle*, the Ninth Circuit concluded that filing deadlines were non-substantive.¹⁸⁶ The Ninth Circuit justified its decision on the premise that categorizing filing deadlines as substantive would incentivize tax counselors to claim that they gave taxpayers erroneous advice.¹⁸⁷ Thus, according to the Ninth Circuit, if taxpayers could delegate the

to see that a timely return is filed, and the delegation of this responsibility will not serve to excuse late filing.”).

¹⁸⁰ See *FTB Notice 2009-08: Franchise Tax Board Ruling Guidelines*, STATE OF CAL. FRANCHISE TAX BD. (Oct. 12, 2009), https://www.ftb.ca.gov/law/notices/2009/2009_08.pdf (stating that taxpayers can rely on advice from Chief Counsel Rulings, Legal Rulings, and FTB Notices).

¹⁸¹ See generally *Boyle*, 469 U.S. at 251-52.

¹⁸² *Id.* at 251 (“[R]eliance cannot function as a substitute for compliance with an unambiguous statute.”).

¹⁸³ See *id.*

¹⁸⁴ See CAL. REV. & TAX. CODE §§ 18566, 18567 (2017) (describing due dates for returns and extensions); see also *id.* §§ 19131, 19132, 19133 (describing reasonable cause for abating late filing, late payment, and demand penalties).

¹⁸⁵ See *Boyle*, 469 U.S. at 249.

¹⁸⁶ See *Knappe v. United States*, 713 F.3d 1164, 1173-75 (9th Cir.), *cert. denied*, 134 S. Ct. 422 (2013).

¹⁸⁷ *Id.* at 1774.

duty to timely file, then counselors would claim that they misinformed taxpayers about deadlines to help taxpayers escape penalties.¹⁸⁸

2. An Alternative View on the Duty to Timely File

In comparison, case law prior to *Boyle* supports the view that reliance on the advice of tax counsel may constitute reasonable cause to abate a late filing penalty.¹⁸⁹ In *Armstrong's, Inc. v. Iowa Dept. of Revenue*, the Iowa Supreme Court asserted that the exercise of ordinary business care and prudence should be determined based on the facts of a particular case, and not a *per se* non-delegable duty rule.¹⁹⁰ In *Rohrbaugh v. United States*, the Seventh Circuit applied a three-factor test for whether reliance on tax counsel is reasonable.¹⁹¹ The factors are whether:

- (1) the taxpayer is unfamiliar with the tax law;
- (2) the taxpayer makes full disclosure of all relevant facts to the attorney or accountant he or she relies upon; and
- (3) the taxpayer has exercised ordinary business care and prudence.¹⁹²

In *Haywood Lumber & Mining Co. v. Commissioner*, the Second Circuit elaborated on how to satisfy the third factor, stating that a “taxpayer has done all that ordinary business care and prudence can reasonably demand” when he selects competent tax counsel, supplies all necessary information, and asks counsel to prepare a proper return.¹⁹³ The court explained that requiring a taxpayer to specifically ask about the relevant legal principles nullifies the purpose of consulting an expert.¹⁹⁴ In *Genex/London, Inc. v. Kentucky Bd. of Tax Appeals*, the Supreme Court of Kentucky also found that reliance on the advice of tax counsel constituted reasonable cause.¹⁹⁵ The court

¹⁸⁸ See *id.*

¹⁸⁹ See *Armstrong's, Inc. v. Iowa Dep't of Revenue*, 320 N.W.2d 623, 628 (Iowa 1982) (finding nothing to support that a taxpayer's duty to file was non-delegable); *Genex/London, Inc. v. Ky. Bd. of Tax Appeals*, 622 S.W.2d 499, 501 (Ky. 1981) (“[G]ood faith reliance on the advice of impartial competent tax counsel to whom all relevant facts have been revealed constitutes reasonable cause for failure to file a use tax return.” (quoting Court of Appeals decision)); *Du Mont Ventilation Co. v. Dep't of Revenue*, 425 N.E.2d 606, 607 (Ill. App. Ct. 1981) (abating late payment penalty because taxpayer consulted with an accounting firm regarding payment's due date).

¹⁹⁰ See *Armstrong's*, 320 N.W.2d at 628.

¹⁹¹ See *Rohrbaugh v. United States*, 611 F.2d 211, 215 (7th Cir. 1979).

¹⁹² *Id.*

¹⁹³ *Haywood Lumber & Mining Co. v. Comm'r*, 178 F.2d 769, 771 (2d Cir. 1950).

¹⁹⁴ See *id.*

¹⁹⁵ See *Genex/London, Inc. v. Ky. Bd. of Tax Appeals*, 622 S.W.2d 499, 501 (Ky.

explained that such reliance must be in good faith, and the tax counsel must be impartial and aware of all relevant facts.¹⁹⁶ This case law is more realistic than the *per se* rule in *Boyle* because it recognizes that taxpayers have a duty to timely file *and* that reliance on tax counsel may constitute reasonable cause.¹⁹⁷

3. The BOE's Application of the Non-Delegable Duty Rule

The BOE should apply the reasonable cause standard based on the facts of an individual case, as suggested in *Armstrong's*, rather than a *per se* non-delegable duty rule.¹⁹⁸ Although IRC interpretations (e.g., *Boyle*) and IRS determinations guide the BOE's analysis, those federal determinations are not binding on the BOE's interpretations of the R&TC.¹⁹⁹ The BOE and courts give great weight to the Supreme Court's decision in *Boyle* when interpreting R&TC penalties, but they should not where the IRC and R&TC differ.²⁰⁰ The BOE should apply the factors in *Rohrbaugh*, *Haywood*, and *Genex/London* for what constitutes reasonable reliance.²⁰¹ Despite the Ninth Circuit's concern, tax counselors would not be incentivized to assert that they gave erroneous advice if full disclosure and good faith were required for taxpayers to claim reasonable reliance on tax counsel.²⁰² The Supreme Court correctly stated that taxpayers do not always have to be tax

1981).

¹⁹⁶ See *id.*

¹⁹⁷ See *Rohrbaugh v. United States*, 611 F.2d 211, 215 (7th Cir. 1979); *Haywood*, 178 F.2d at 771; *Armstrong's, Inc. v. Iowa Dep't of Revenue*, 320 N.W.2d 623, 628 (Iowa 1982); *Genex/London*, 622 S.W.2d at 501.

¹⁹⁸ *Armstrong's*, 320 N.W.2d at 628 (finding that reasonable cause should be based on the facts of a particular case).

¹⁹⁹ See *Meanley v. McColgan*, 121 P.2d 45, 48 (Cal. Ct. App. 1942) (determining that interpretations of federal statutes are non-binding with respect to state statute interpretations); *Appeal of Der Wienerschnitzel Int'l, Inc.*, 79-SBE-063 (Cal. State Bd. Eq. Apr. 10, 1979) (stating that no R&TC section "binds [FTB] to follow Internal Revenue Service decisions"); see also CAL. REV. & TAX. CODE § 18622 (2017) (stating that FTB shall concede determinations based on changes, corrections, or renegotiations by the Commissioner of Internal Revenue).

²⁰⁰ See *United States v. Boyle*, 469 U.S. 241, 242-43 (1985) (considering the IRC's late filing penalty in reaching decision); *Meanley*, 121 P.2d at 48.

²⁰¹ See *Rohrbaugh*, 611 F.2d at 215; *Haywood*, 178 F.2d at 771; *Genex/London*, 622 S.W.2d at 501.

²⁰² See *Knappe v. United States*, 713 F.3d 1164, 1173-75 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 422 (2013) (citing concern that tax counsel will be incentivized to give erroneous advice without the non-delegable duty rule). *But see Rohrbaugh*, 611 F.2d at 215; *Haywood*, 178 F.2d at 771; *Genex/London*, 622 S.W.2d at 501.

experts to learn about filing deadlines, but a *per se* rule rejecting reasonable cause for delegating the task leads to unfair results.²⁰³

In *Appeal of Yvonne M. Goodwin*, the BOE upheld a penalty based on a Demand sent in 1983, which the appellant's mother did not receive until 1987, and the appellant did not receive until 1994.²⁰⁴ The appellant paid the balance assessed by the FTB and filed a refund claim, arguing that reasonable cause existed because she relied on her parents to file her return since she was a minor in 1982, the year of the return.²⁰⁵ The BOE followed *Bassett v. Commissioner's* holding that reasonable cause analysis for a minor focuses on the parents' conduct.²⁰⁶ In doing so, it overruled its opinion in *Appeal of Marguerite Langtry*, which held that a minor appellant was entitled to rely on her parents.²⁰⁷ The BOE ultimately determined that it could not evaluate the parents' conduct because there was not enough information provided by the appellant.²⁰⁸

However, part of the BOE's reasoning for rejecting the appellant's argument was an overbroad concern about the potential for abuse by "child actors represented by savvy agents."²⁰⁹ This heavy-handed application of the non-delegable duty rule from *Boyle* led to the unfair result of penalizing a minor taxpayer for her parents' failure to file a return.²¹⁰ Instead, the BOE should have followed the factors in *Rohrbaugh*, *Haywood*, and *Genex/London* and reaffirmed its *Langtry* opinion.²¹¹ Justice Brennan's concurrence in *Boyle* suggested that if a

²⁰³ See *Boyle*, 469 U.S. at 251 ("[O]ne does not have to be a tax expert to know that tax returns have fixed filing dates . . ."); see also *Armstrong's*, 320 N.W.2d at 628 ("[R]easonable cause should be determined on the basis of the facts of the particular case, rather than on the basis of a *per se* rule.").

²⁰⁴ *Appeal of Yvonne M. Goodwin*, 97-SBE-003 (Cal. State Bd. Eq. Mar. 19, 1997) 1997 WL 258474.

²⁰⁵ *Id.*

²⁰⁶ *Id.* (citing *Bassett v. Comm'r*, 100 T.C. 650, 655-56 (1993) ("[P]etitioner is liable for the addition to tax for failure to timely file because her parents' failure to file a return for her was not shown to be due to reasonable cause rather than willful neglect.")).

²⁰⁷ *Goodwin*, 1997 WL 258474; see *Appeal of Marguerite Langtry*, 60-SBE-041 (Cal. State Bd. Eq. Dec. 13, 1960), 1960 WL 1419.

²⁰⁸ *Goodwin*, 1997 WL 258474.

²⁰⁹ *Id.*

²¹⁰ See *id.* ("[O]ur predecessors drafted [the *Langtry*] opinion without the benefit of the more recent decisions in *Boyle* and *Bassett*.").

²¹¹ See *Rohrbaugh v. United States*, 611 F.2d 211, 215 (7th Cir. 1979); *Haywood Lumber & Mining Co. v. Comm'r*, 178 F.2d 769, 771 (2d Cir. 1950); *Genex/London, Inc. v. Ky. Bd. of Tax Appeals*, 622 S.W.2d 499, 501 (Ky. 1981); *Langtry*, 1960 WL 1419.

taxpayer “reasonably was unable to exercise ordinary business care,” then a penalty should not apply.²¹² In *Goodwin*, the appellant’s status as a minor should have been sufficient to show that she was reasonably unable to exercise ordinary business care.²¹³

As shown, the BOE’s application of the *per se* non-delegable duty rule in *Goodwin* led to an unfair result.²¹⁴ A taxpayer should not be penalized for failing to respond to an eleven-year-old Demand that her parents were responsible for.²¹⁵ Although the taxpayer in *Goodwin* was relying on her parents, rather than tax counsel, the application of the non-delegable duty rule was just as harsh.²¹⁶ For a fairer result, the BOE should have applied the factors in *Rohrbaugh*, *Haywood*, and *Genex/London*, and reaffirmed the rule in *Langtry*.²¹⁷ Overall, the distinction between “substantive” matters and filing deadlines for whether reliance on tax counsel may constitute reasonable cause is unrealistic and some of its justifications are misguided.²¹⁸

²¹² *United States v. Boyle*, 469 U.S. 241, 254 (1985) (Brennan, J., concurring) (“Thus a substantial argument can be made that the draconian penalty provision should not apply where a taxpayer convincingly demonstrates that, for whatever reason, he reasonably was unable to exercise ordinary business care.”).

²¹³ *See id.*; *Goodwin*, 1997 WL 258474.

²¹⁴ *See Boyle*, 469 U.S. at 251-52 (establishing the non-delegable duty doctrine); *Armstrong’s, Inc. v. Iowa Dep’t of Revenue*, 320 N.W.2d 623, 628 (Iowa 1982) (stating that reasonable cause should be based on the facts of a particular case); *Goodwin*, 1997 WL 258474 (sustaining penalty for failing to timely file when appellant was a minor).

²¹⁵ *Goodwin*, 1997 WL 258474.

²¹⁶ *See id.* Had her parents hired tax counsel to prepare her return and that person failed to file a timely return, reasonable cause should arguably have existed. *See also* *Wheeland*, *supra* note 178 (stating that tax preparers complete returns and file the forms, usually electronically, for clients). *But see Boyle*, 469 U.S. at 251-52 (holding that taxpayers can rely on accountants or attorneys for substantive advice, but not for a filing deadline).

²¹⁷ *See Rohrbaugh v. United States*, 611 F.2d 211, 215 (7th Cir. 1979); *Haywood Lumber & Mining Co. v. Comm’r*, 178 F.2d 769, 771 (2d Cir. 1950); *Genex/London, Inc. v. Ky. Bd. of Tax Appeals*, 622 S.W.2d 499, 501 (Ky. 1981); *Langtry*, 1960 WL 1419.

²¹⁸ *See Knappe v. United States*, 713 F.3d 1164, 1173-75 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 422 (2013); *Goodwin*, 1997 WL 258474 (justifying the non-delegable duty based on potential for abuse by “child actors represented by savvy agents”). *But see Boyle*, 469 U.S. at 249 (justifying the non-delegable duty based on the government’s substantial interest in ensuring that returns are timely filed).

C. *BOE Deference to the FTB Leads to Incorrect Applications of the Law*

When the BOE hears appeals it generally defers to the FTB's fact-findings and sometimes even its legal interpretations.²¹⁹ The FTB's legal interpretations are contained in several "Law Summaries," which are designed to assist taxpayers, but are not entirely trustworthy because they occasionally misinterpret the law.²²⁰ Additionally, the Law Summaries are not binding authority.²²¹ However, when the BOE defers to the FTB's Law Summaries, the BOE improperly gives them binding effect.²²²

²¹⁹ See STAFF OF JOINT COMM. ON TAX'N, 106TH CONG., STUDY OF PRESENT-LAW TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS AS REQUIRED BY SECTION 3802 OF THE INTERNAL REVENUE SERVICE RESTRUCTURING AND REFORM ACT OF 1998, at 261 (Comm. Print 2000) (stating that FTB's findings are given deference by the BOE, so there is no incentive for the FTB to be accurate or fair in its audits); see, e.g., Appeal of Jacqueline Taylor, 95R-0771 (Cal. State Bd. Eq. Aug. 22, 1996), 1996 WL 768327 (summary decision not to be cited as precedent) (citing the "credible and competent proof" burden language in the FTB Law Summary, which cites a formal opinion that doesn't stand for the quoted language). For background on the current appeal process to the BOE after failed attempts to change it, see generally Craig B. Fields, *The State Tax Appeals Process: Where We Are and Where We Should Be Striving to Go*, 2006-11 N.Y.U. INST. ON ST. & LOC. TAX'N § 11.05 (2006) (noting that a taxpayer's protest begins with an FTB protest hearing officer, who determines if the audit's findings were correct, then the taxpayer appeals to the BOE, which consists of elected members who "cross-pollinate" the FTB and BOE).

²²⁰ See *FTB Legal Documents, Regulations, and Litigation*, STATE OF CAL. FRANCHISE TAX BD., <https://www.ftb.ca.gov/law/documents.shtml#L1> (last visited Nov. 29, 2015) (containing law summaries on several issues, including "Reasonable Cause — Penalty Abatement," which asserts that a taxpayer must show "credible and competent proof" and that each taxpayer has a non-delegable duty to file by the due date, respond to a Demand, and furnish information requested by the FTB); cf. Appeal of Michael J. & Diane M. Halaburka, 85-SBE-025 (Cal. State Bd. Eq. Apr. 9, 1985), 1985 WL 15809 (using "prevented" not "completely prevented" language); Appeal of Thomas K. & Gail G. Boehme, 85-SBE-134 (Cal. State Bd. Eq. June 30, 1979), 1979 WL 4224 (saying only that reliance on an agent does not excuse a late filing penalty, not failing to respond to a Demand, or furnish requested information); Appeal of David A. & Barbara L. Beadling, 77-SBE-021 (Cal. State Bd. Eq. Feb. 3, 1977), 1977 WL 3831 (saying only that an "appellants' unsupported statement [is] insufficient to carry their burden of proof").

²²¹ Amy L. Silverstein & Prentiss Wilson Jr., *California's Tax Shelter Law: A Guide to Disclosure and Penalties for Corporate Taxpayers*, 100 J. TAX'N 288, 288 n.2 (2004) (warning that FTB's informal guidance on its website is not binding authority and should only be relied on with considerable caution).

²²² See, e.g., Appeal of Castle Sec. Co., No. 182971 (Cal. State Bd. Eq. May 28, 2003), 2003 WL 21403265 (summary decision not to be cited as precedent) (applying the non-delegable duty to Demands, and furnishing information requested by the FTB as the Law Summary does, even though no precedent stands for that assertion); Appeal of Susan Stoetzel, 95R-0635 (Cal. State Bd. Eq. Nov. 13, 1996), 1996 WL

1. The BOE Mistakenly Applies the Completely Prevented Standard and the Credible and Competent Evidence Burden of Proof in Its Summary Decisions

The BOE follows the tax court's ruling that if a taxpayer can show that an illness prevented him from filing a timely return, then reasonable cause is satisfied.²²³ The BOE follows that ruling in all relevant formal opinions and quotes the standard as "prevented."²²⁴ However, despite its own formal opinions, the BOE incorrectly cited and applied the standard as "completely prevented" in multiple summary decisions.²²⁵ The "completely prevented" language likely resulted from BOE staff copying the FTB's "Reasonable Cause Abatement" Law Summary, which states the standard as such.²²⁶ If the BOE wants to change the standard from "prevented" to "completely prevented," then it should issue a formal opinion announcing and explaining the new standard, rather than incorrectly citing precedent, even if the BOE would reach the same conclusion in any given appeal under either terminology.²²⁷

The Reasonable Cause Abatement Law Summary contains another instance where the FTB misinterprets the law. The Law Summary claims that a taxpayer must provide "credible and competent evidence" to support reasonable cause despite BOE formal opinions indicating that the burden of proof is by a preponderance of the evidence.²²⁸ Like "completely prevent," the BOE copied the "credible

777121 (summary decision not to be cited as precedent) (applying "completely prevent" instead of "prevent"); *Taylor*, 1996 WL 768327 (summary decision not to be cited as precedent) (applying the FTB created "credible and competent proof" burden).

²²³ *Hayes v. Comm'r*, 26 T.C.M. (CCH) 393 (1967); *Halaburka*, 1985 WL 15809.

²²⁴ See, e.g., *Halaburka*, 1985 WL 15809; Appeal of Kerry & Cheryl James, 83-SBE-009 (Cal. State Bd. Eq. Jan. 3, 1983), 1983 WL 15396; Appeal of Allen L. & Jacqueline M. Seaman, 75-SBE-080 (Cal. State Bd. Eq. Dec. 16, 1975), 1975 WL 3564.

²²⁵ See, e.g., *Stoetzel*, 1996 WL 777121 (summary decision not to be cited as precedent); *Taylor*, 1996 WL 768327 (summary decision not to be cited as precedent); Appeal of Ray & Marie E. Contreras, 95R-0717 (Cal. State Bd. Eq. Aug. 22, 1996), 1996 WL 767518 (summary decision not to be cited as precedent).

²²⁶ STATE OF CAL. FRANCHISE TAX BD., LAW SUMMARY REASONABLE CAUSE ABATEMENT, https://www.ftb.ca.gov/Law/summaries/penalty_abatement.pdf (last revised June 27, 2006) ("In order to show reasonable cause, the taxpayer must present credible and competent proof that the circumstances of the illness or other personal difficulty completely prevented the taxpayer from filing a timely return and/or complying with the notice and demand or request for information.").

²²⁷ See CAL. CODE REGS. tit. 18, § 5452 (2017) (listing one factor for whether the BOE should issue a formal opinion as whether it would modify or appeal an existing rule).

²²⁸ See Appeal of James A. Alyn & Lisa E. Alyn, 2009-SBE-001 (Cal. State Bd. Eq.

and competent evidence” language from the Law Summary in multiple summary decisions, instead of accurately citing precedent.²²⁹ Here too, the BOE should issue a formal opinion if it wants to establish a new burden of proof.²³⁰ Ultimately, the BOE’s deference to the FTB’s untrustworthy Law Summaries is improper because the Summaries get the law wrong and because the BOE is supposed to provide impartial hearings.²³¹

2. The BOE Mistakenly Follows the FTB Law Summary Asserting that the Non-Delegable Duty Rule Applies to the Demand Penalty

The non-delegable duty rule created in *Boyle* does not apply to responding to a Demand in California because *Boyle* is an interpretation of the IRC, while the demand penalty is exclusive to the R&TC and does not have a federal counterpart.²³² The FTB’s Reasonable Cause Abatement Law Summary asserts that taxpayers

May 27, 2009), 2009 WL 2340 (“[T]axpayer must meet his burden by a preponderance of the evidence.”); STATE OF CAL. FRANCHISE TAX BD., *supra* note 226 (“In order to show reasonable cause, the taxpayer must present credible and competent proof”); *see also* Anderson et al., *supra* note 54, at ¶ 703.4 (“Although tax questions are matters for which ‘preponderance of the evidence’ is the standard, many FTB auditors seem to require proof ‘beyond a reasonable doubt.’”).

²²⁹ *See* STATE OF CAL. FRANCHISE TAX BD., *supra* note 226 (“In order to show reasonable cause, the taxpayer must present credible and competent proof that the circumstances of the illness or other personal difficulty completely prevented the taxpayer from filing a timely return and/or complying with the notice and demand or request for information.”); *see, e.g., Taylor*, 1996 WL 768327 (summary decision not to be cited as precedent) (“In order to show reasonable cause, the taxpayer must present credible and competent proof”); Appeal of Stephen C. Bieneman, 82-SBE-148 (Cal. State Bd. Eq. July 26, 1982), 1982 WL 11825 (“[M]erely asserting that certain records were unavailable is insufficient to prove reasonable cause.”).

²³⁰ *See* CAL. CODE REGS. tit. 18, § 5452 (listing one factor for whether the BOE should issue a formal opinion as whether it would modify or repeal an existing rule).

²³¹ *See* COUNCIL ON STATE TAXATION, *supra* note 36 (stating that an appeals forum must be truly independent). However, the nature of the relationship between the BOE and FTB allows for impartial hearings. *See* Act of July 25, 1949, ch. 1188, 1949 Cal. Stat. 2108 (abolishing the Franchise Tax Commissioner and replacing it with the FTB, which includes the State Controller and chairman of the BOE); Simmons, *supra* note 2, at 290-91 (describing the structure of the FTB and its flaws); *Annual Report 2011–2012*, *supra* note 23 (describing the BOE’s role as the administrative appeal body over final actions by the FTB).

²³² *See* United States v. Boyle, 469 U.S. 241, 251 (1985) (“Reliance by a lay person on a lawyer is of course common; but that reliance cannot function as a substitute for compliance with an unambiguous statute.”). *Compare* CAL. REV. & TAX. CODE §§ 19131, 19132, 19133 (2017), with I.R.C. § 6651 (2012).

have a non-delegable duty to respond to a Demand from the FTB.²³³ However, the BOE formal opinions cited by the FTB in its Law Summary do not support this assertion.²³⁴ This erroneous assertion is problematic because the BOE has copied it in many summary decisions.²³⁵ However, one BOE summary decision recognized that the Law Summary was incorrect.²³⁶ This summary decision recognized that *Boyle* was only authority for applying the non-delegable duty rule to filing a timely return, not to responding to Demands.²³⁷ *Boyle*, which only addressed IRC penalties, does not apply to Demands under the R&TC because there is no federal demand penalty under the IRC that *Boyle* could apply to.²³⁸ Unfortunately, the BOE issued a summary decision, rather than a formal opinion, so the mistaken application of the non-delegable duty rule continued.²³⁹ Taxpayers will continue to

²³³ STATE OF CAL. FRANCHISE TAX BD., *supra* note 226 (“Each taxpayer has a personal, non-delegable obligation to file the tax return by the due date, to respond to a notice and demand from the FTB that a return be filed, and to furnish information requested by the FTB.”).

²³⁴ *Compare* Appeal of Roger D. & Mary Miller, 86-SBE-057 (Cal. State Bd. Eq. Mar. 4, 1986), 1986 WL 22789 (finding that reliance on professional assistance to prepare and file a return does not constitute reasonable cause to abate a late filing penalty), *and* Appeal of Thomas K. & Gail G. Boehme, 85-SBE-134 (Cal. State Bd. Eq. June 30, 1979), 1979 WL 4224 (finding that reliance on an agent does not excuse a late filing penalty), *with* STATE OF CAL. FRANCHISE TAX BD., *supra* note 226 (“Each taxpayer has a personal, non-delegable obligation to file the tax return by the due date, to respond to a notice and demand from the FTB that a return be filed, and to furnish information requested by the FTB.”).

²³⁵ *See, e.g.*, Appeal of Castle Sec. Co., No. 182971 (Cal. State Bd. Eq. May 28, 2003), 2003 WL 21403265 (summary decision not to be cited as precedent) (“Each taxpayer has a personal, non-delegable obligation to file a tax return by the due date, to respond to a notice and demand from the FTB that a return be filed, and to furnish information requested by the FTB.”); Appeal of Renee & Alberto Hidalgo, 97R-0841 (Cal. State Bd. Eq. Nov. 19, 1998), 1998 WL 902603 (summary decision not to be cited as precedent) (“Each taxpayer has a personal, non-delegable obligation to take care of their tax matters.”); Appeal of Carol S. Benson, 96R-1058 (Cal. State Bd. Eq. Oct. 9, 1997), 1997 WL 693839 (summary decision not to be cited as precedent) (“[E]ach taxpayer has personal, non-delegable obligation to furnish the information requested by respondent.”).

²³⁶ *See* Appeal of Brad Sweeney & Stephanie Johnson, 96R-0658 (Cal. State Bd. Eq. Feb. 26, 1998), 1998 WL 98943 (summary decision not to be cited as precedent) (observing that the FTB Law Summary was overreaching).

²³⁷ *See id.* (noting that *Boehme*, *Miller* and *Boyle* “do not provide direct authority for [FTB’s] position with respect to notice and demand penalties”).

²³⁸ *See* United States v. Boyle, 469 U.S. 241, 242 (1985) (referring to I.R.C. § 6651 as the relevant statute in the action). *Compare* CAL. REV. & TAX. CODE §§ 19131, 19132, 19133 (2017), *with* I.R.C. § 6651 (2012).

²³⁹ *See Sweeney & Johnson*, 1998 WL 98943 (summary decision not to be cited as precedent). At least two summary decisions after the *Appeal of Brad Sweeney and*

receive biased hearings if the BOE continues to defer to the FTB like in this example and the ones described above.²⁴⁰

D. The Last-Known Address Rule Conflicts with the Purpose of the Demand Penalty

Timeliness penalties prescribed in the R&TC and IRC both rely on the last-known address rule to assume that taxpayers receive notices.²⁴¹ Because the purpose of the demand penalty is different from that of timeliness penalties, the demand penalty should be treated differently.²⁴² Assuming that taxpayers receive the FTB's Demands is inappropriate because taxpayers must actually receive Demands in order to reply and avoid demand penalties.²⁴³

1. The Last-Known Address Rule

The last-known address rule states that notices may be given by first-class mail and are sufficient if mailed to the taxpayer's last known address.²⁴⁴ This rule is based on a similar IRC provision,²⁴⁵ which

Stephanie Johnson applied the non-delegable duty rule to the demand penalty. See *Castle Securities Co.*, 2003 WL 21403265 (summary decision not to be cited as precedent) ("Each taxpayer has a personal, non-delegable obligation to file a tax return by the due date, to respond to a notice and demand from the FTB that a return be filed, and to furnish information requested by the FTB."); *Hidalgo*, 1998 WL 902603 (summary decision not to be cited as precedent) ("Each taxpayer has a personal, non-delegable obligation to take care of their tax matters.").

²⁴⁰ See *supra* Part II.C.

²⁴¹ See I.R.C. §§ 6212, 6303, 6651; CAL. REV. & TAX. CODE §§ 18416, 19131, 19132, 19133.

²⁴² Compare Appeal of Frank E. & Lilia Z. Hublou, 77-SBE-102 (Cal. State Bd. Eq. July 26, 1977), 1977 WL 4093 (stating that the demand penalty is designed to penalize the failure of a taxpayer to respond to the Demand and not failure to pay the proper tax), with *Helvering v. Mitchell*, 303 U.S. 391, 401 (1938) ("[S]anctions imposing additions to a tax . . . are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."), *Kirk v. Comm'r*, 179 F.2d 619, 621 (1st Cir. 1950) ("[T]he statutory addition for fraud was intended to be remedial rather than punitive."), *Lee v. Comm'r*, 227 F.2d 181, 184 (5th Cir. 1955), *cert. denied*, 351 U.S. 982 (1956) (holding that if a fraud penalty may be imposed, a late filing penalty may be as well), and Appeal of Estate of Samuel L. Lewis, 61-SBE-021 (Cal. State Bd. Eq. Apr. 6, 1961), 1961 WL 1411 (determining that the R&TC's use of "penalty" does not in itself establish that the sanction is intended as punishment for wrongdoing rather than a remedy to protect the revenue and reimburse the government for expenses).

²⁴³ See CAL. REV. & TAX. CODE §§ 18416, 19131, 19132, 19133.

²⁴⁴ *Id.* § 18416.

courts interpret as applying to timeliness penalties.²⁴⁶ Although a separate R&TC provision from the last-known address rule allows certified mail to suffice when first class mail is required, the provision does not require certified mail for Demands or any other form of notice.²⁴⁷ Under both the R&TC and the IRC, a taxpayer's last-known address is the one listed on the taxpayer's most recent return, unless the taxpayer communicates a "clear and concise" notice of change of address.²⁴⁸ Additionally, notices are valid even if not received by the taxpayer, so long as they meet the statutory requirements.²⁴⁹

2. Comparing the Purpose of Timeliness Penalties and the Demand Penalty

In general, penalties are not intended as punishments for wrongdoing.²⁵⁰ Specifically, timeliness penalties under the R&TC and the IRC are remedial, meaning their purpose is to protect revenue collection and reimburse the government for expenses related to investigating taxpayers' failures to file or pay.²⁵¹ However, the demand penalty is an exception because it is designed to penalize a taxpayer's

²⁴⁵ See I.R.C. § 6212 ([N]otice of a deficiency in respect of a tax imposed . . . if mailed to the taxpayer at his last known address, shall be sufficient . . .").

²⁴⁶ See I.R.C. § 6651; CAL. REV. & TAX. CODE §§ 19131, 19132, 19133; *United States v. Zolla*, 724 F.2d 808, 810 (9th Cir. 1984) ("The IRS must send a notice of deficiency before it may assess, collect, or reduce to judgment most income tax liabilities. The notice is valid even if not received by the taxpayer, if it is mailed to the taxpayer's last known address.").

²⁴⁷ See CAL. REV. & TAX. CODE § 36 ("Whenever any notice or other communication is required by this code to be mailed by registered mail, the mailing of such notice or other communication by certified mail shall be deemed to be sufficient compliance with the requirements of law.").

²⁴⁸ See *Zolla*, 724 F.2d at 810; see also *Appeal of Ronald A. Floria*, 83-SBE-003 (Cal. State Bd. Eq. Jan. 3, 1983), 1983 WL 15390 (discussing taxpayer's failure to notify FTB of his new address or take any other steps to ensure he would receive his mail).

²⁴⁹ See *Zolla*, 724 F.2d at 810; see also *Floria*, 1983 WL 15390 (finding that notice sent to the taxpayer's last known address is effective even if not received).

²⁵⁰ See *Appeal of Estate of Samuel L. Lewis*, 61-SBE-021 (Cal. State Bd. Eq. Apr. 6, 1961), 1961 WL 1411.

²⁵¹ See *Helvering v. Mitchell*, 303 U.S. 391, 401 (1938) ("[S]anctions imposing additions to a tax . . . are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."); *Lewis*, 1961 WL 1411 ("The use in a statute of the label 'penalty,' however, does not in itself establish that the sanction thus described is intended as punishment for wrongdoing rather than as a remedy to protect the revenue and to reimburse the government for expenses resulting from the dereliction.").

failure to respond to a Demand.²⁵² Thus, its purpose is not to reimburse the government for investigation, but rather to discourage taxpayers from ignoring their duty to respond to Demands.²⁵³

3. The BOE's Application of the Last-Known Address Rule

The last-known address rule conflicts with the purpose of the demand penalty because taxpayers cannot respond to a Demand that they did not receive.²⁵⁴ The R&TC only requires that the FTB send notices by first-class mail and presumes receipt if the notice is not returned by the postal service.²⁵⁵ Taxpayers have difficulty proving non-receipt, and further, the BOE has never clarified whether receipt under the last-known address rule is a rebuttable presumption or not.²⁵⁶ The presumption of receipt and the difficulty, or perhaps inability, to prove non-receipt of a Demand conflicts with the purpose of penalizing taxpayers for failing to respond.²⁵⁷

²⁵² See Appeal of Frank E. & Lilia Z. Hublou, 77-SBE-102 (Cal. State Bd. Eq. July 26, 1977), 1977 WL 4093.

²⁵³ See *id.*

²⁵⁴ See *id.* (noting that demand penalty is designed to penalize taxpayer's failure to respond to the Demand and not failure to pay the proper tax); Appeal of Winston R. Schwyhart, 75-SBE-035 (Cal. State Bd. Eq. Apr. 22, 1975), 1975 WL 3519 (discussing appellant's argument that he should not be liable for the demand penalty because he did not receive it).

²⁵⁵ Compare CAL. REV. & TAX. CODE § 18416 (2017) (“[A]ny notice may be given by first-class mail postage prepaid.”), with I.R.C. § 6212 (2012) (“[The Secretary] is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.”). See also Appeal of Yvonne M. Goodwin, 97-SBE-003 (Cal. State Bd. Eq. Mar. 19, 1997), 1997 WL 3519 (stating that notice is valid when mailed to the taxpayer's last known address and not returned by the postal service).

²⁵⁶ See, e.g., Appeal of Amber T.L. Weingartner, 96R-1377 (Cal. State Bd. Eq. May 1, 1998), 1998 WL 289332 (summary decision not to be cited as precedent) (finding that appellant's attempts to locate a missing Demand — i.e., calling or visiting all relevant post office and distribution centers and calling the FTB to obtain information on how to avoid a penalty — satisfied the BOE that she failed to receive the Demand). *Weingartner* rebutted the presumption of receipt, but as a summary decision, it has no authority as a formal opinion. *Id.* In one instance, a taxpayer was accused of not filing a return, but the taxpayer was able to satisfy reasonable cause for the failure, essentially rebutting the presumption by the FTB that a return was not filed. The BOE did not provide adequate reasoning in finding that the taxpayer paid its tax liability on time. Appeal of Dorothy Chandler, 79-SBE-087 (Cal. State Bd. Eq. May 9, 1979), 1979 WL 4128 (stating that the BOE was “impressed . . . with appellant's firm conviction that she paid” and found her failure was due to reasonable cause, without explaining further).

²⁵⁷ See *Goodwin*, 1997 WL 258474 (stating that notice is valid when mailed to the taxpayer's last known address and not returned by the postal service); see also *Schwychart*, 1975 WL 3519 (discussing appellant's argument that he should not be

If the R&TC required certified mail, then taxpayers and the FTB could easily prove receipt or non-receipt because the postal service keeps proof of delivery records for certified mail, unlike for first-class mail.²⁵⁸ Unfortunately, the R&TC only permits, but does not require the FTB to send Demands by certified mail.²⁵⁹ Although certified mail is more expensive, the proof of delivery feature would harmonize the last-known address rule with the purpose of the demand penalty to increase responses to Demands, arguably justifying the expense.²⁶⁰ The current application of the last-known address rule even led the BOE to sustain a demand penalty when the FTB sent Demands to the wrong address.²⁶¹

In *Appeal of Anthony R. Doyle and Ilona N. Koti-Doyle*, the FTB sent a Demand to an address obtained from Mr. Doyle's employer after the postal service returned previous Demands as undeliverable.²⁶² The Doyles argued that they were unable to respond to the January 3, 2005 Demand by the deadline, February 2, 2005, because the FTB got the wrong address from Mr. Doyle's employer.²⁶³ The FTB argued that the Doyles would not have received the Demand in time to respond even if it was sent to the correct address because the Doyles moved without updating their address.²⁶⁴ Although the Doyles provided the post office with their new address, the FTB argued that the post office would still have delayed delivering the Demand because of the time involved in forwarding mail to a new address.²⁶⁵ The BOE held that the Doyles did not exercise ordinary business care and prudence because they failed

liable for the demand penalty because he did not receive it).

²⁵⁸ See I.R.C. § 6212; *Insurance & Extra Services*, USPS, <https://www.usps.com/ship/insurance-extra-services.htm> (last visited Nov. 11, 2015) ("Prove you sent it. See when it was delivered or that a delivery attempt was made, and get the signature of the person who accepts the mailing when combined with Return Receipt.").

²⁵⁹ See CAL. REV. & TAX. CODE § 18416. However, the R&TC does say that whenever communication is required to be registered mail, certified mail is also sufficient to comply with the law. *Id.* § 36.

²⁶⁰ See *Appeal of Frank E. & Lilia Z. Hublou*, 77-SBE-102 (Cal. State Bd. Eq. July 26, 1977), 1977 WL 4093 (noting that the demand penalty is designed to penalize the failure of a taxpayer to respond to the Demand); see also *Insurance & Extra Services*, *supra* note 258 (citing cost of certified mail as \$3.35).

²⁶¹ See *Appeal of Anthony R. Doyle and Ilona N. Koti-Doyle*, No. 349001 (Cal. State Bd. Eq. Apr. 8, 2008), 2008 WL 1813192 (summary decision not to be cited as precedent).

²⁶² See *id.*

²⁶³ See *id.*

²⁶⁴ See *id.*

²⁶⁵ See *id.*

to update their address with the FTB and respond to the Demand in a timely manner.²⁶⁶

This ruling leaves out key information that would either justify or contradict the BOE's decision.²⁶⁷ The Doyles apparently received the Demand at some point, but the decision does not explicitly say when it was received.²⁶⁸ A footnote stated that the Doyles did not provide a copy of the change of address to the FTB or prove when they provided that information to the post office.²⁶⁹ But the Doyles probably provided that information to the post office before the Demand was sent, given that the post office forwarded the Demand to the Doyles' new address.²⁷⁰ The BOE's conclusion that the Doyles did not demonstrate reasonable cause is partially contradicted if they did notify the post office of their change of address before the Demand.²⁷¹ Essentially, the Doyles were penalized for moving and for the post office's delay in forwarding mail.

Additionally, the BOE did not clarify whether Mr. Doyle's employer provided the FTB with the wrong address or if the FTB made the mistake.²⁷² The BOE stated that Mr. Doyle's employer was required to show him an "earnings withholding order" issued by the FTB before his filing deadline, which would have revealed that the FTB had the wrong address.²⁷³ However, that does not answer whether his employer provided the wrong address or if the FTB recorded the address incorrectly.²⁷⁴ If the FTB was at fault, then the demand penalty should have been abated, as in *Berner and Ames*.²⁷⁵ Ultimately, the

²⁶⁶ See *id.*

²⁶⁷ See *id.*

²⁶⁸ See *id.*

²⁶⁹ See *id.*

²⁷⁰ See *id.*

²⁷¹ See *id.*

²⁷² See *id.*

²⁷³ See *id.* An earnings withholding order is a "wage garnishment that continuously seizes a percentage of a taxpayer's earnings . . . for employees who owe a state tax liability," and employers are responsible for delivering the order to its employee. *Earnings Withholding Orders for Taxes (EWOT) — Employer Information*, STATE OF CAL. FRANCHISE TAX BD., <https://www.ftb.ca.gov/individuals/ewot.shtml> (last visited Jan. 10, 2016).

²⁷⁴ See Appeal of Anthony R. Doyle & Ilona N. Koti-Doyle, Case No. 349001 (Cal. State Bd. Eq. Apr. 8, 2008), 2008 WL 1813192 (summary decision not to be cited as precedent).

²⁷⁵ See Appeal of Raymond H. & Margaret R. Berner, 01-SBE-006 (Cal. State Bd. Eq. Dec. 20, 2001), 2002 WL 1884256, at *6 (ordering abatement of a demand penalty due to the FTB's incorrect contention that the Berners never left California); Appeals of Amyas & Evelyn P. Ames, 87-SBE-042 (Cal. State Bd. Eq. June 17, 1987),

Doyles were penalized for failing to respond to a Demand that they did not receive until after the deadline to respond.²⁷⁶

Although the Doyles are at fault for not communicating a “clear and concise” change of address to the FTB, the purpose of the demand penalty still does not justify penalizing them.²⁷⁷ The demand penalty was designed to penalize a failure to respond, and since the Doyles responded and filed their return once they received the Demand, the Demand served its purpose.²⁷⁸ No one will ever respond to a Demand that they did not receive.²⁷⁹ The last-known address rule is appropriate for deficiency notices related to timeliness penalties because there is no additional duty to respond to the notice.²⁸⁰ But the rule is inappropriate for Demands, which imposes an additional duty to respond.²⁸¹

III. SOLUTION

The main concerns with the reasonable cause standard under the R&TC are a lack of formal opinions explaining the standard, the application of the non-delegable duty and last-known address rules, and the BOE’s deference to the FTB.²⁸² These problems can be cured by the BOE or the Legislature.²⁸³ The BOE can amend or create common law through formal opinions, and the Legislature can amend or create new sections of the R&TC.²⁸⁴

1987 WL 50165, at *5-6 (ordering abatement of a demand penalty due to the FTB’s mistaken assertion that the appellants acquired a business situs in California).

²⁷⁶ See *Doyle*, 2008 WL 1813192, at *2 (summary decision not to be cited as precedent).

²⁷⁷ See *id.*; Appeal of Frank E. & Lilia Z. Hublou, 77-SBE-102 (Cal. State Bd. Eq. July 26, 1977), 1977 WL 4093, at *2 (stating that the demand penalty is designed to penalize taxpayer’s failure to respond to the Demand).

²⁷⁸ See *Doyle*, 2008 WL 1813192, at *2 (summary decision not to be cited as precedent); *Hublou*, 1977 WL 4093, at *2.

²⁷⁹ See, e.g., *Doyle*, 2008 WL 1813192, at *1 (summary decision not to be cited as precedent) (discussing appellants’ inability to respond to a Demand because they did not receive it until after the date required for a response).

²⁸⁰ See CAL. REV. & TAX. CODE §§ 18416, 19131, 19132 (2017).

²⁸¹ See *id.* §§ 18416, 19133.

²⁸² See discussion *supra* Part II.

²⁸³ See CAL. CONST. art. IV, § 1 (“[L]egislative power of this State is vested in the California Legislature which consists of the Senate and Assembly.”); CAL. REV. & TAX. CODE § 40 (allowing formal opinions adopted by the BOE to be cited as precedent).

²⁸⁴ See CAL. CONST. art. IV, § 1; CAL. REV. & TAX. CODE § 40.

A. *The BOE Should Issue More Formal Opinions*

The simplest way to clarify the reasonable cause standard is through meaningful BOE formal opinions.²⁸⁵ The FTB may withdraw an assessment at any stage of a taxpayer's appeal, but otherwise an appeal rests on the BOE's decision.²⁸⁶ Although the BOE must explain its decision in a formal opinion or summary decision, only formal opinions develop common law.²⁸⁷ Taxpayers cannot rely on summary decisions, and cannot learn from formal opinions with limited legal analysis.²⁸⁸ The Regulations' four factors for the BOE to consider when deciding whether to issue a formal opinion suggest that more are needed.²⁸⁹ And there have been ample opportunities for the BOE to make significant contributions to the reasonable cause common law since the last formal opinion addressing the issue in 1997.²⁹⁰ Specifically, future BOE formal opinions should clarify the extent of reasonable cause for contemporary circumstances and change the application of the non-delegable duty and last-known address rules as discussed above.²⁹¹ Additionally, BOE summary decisions should not defer to the FTB's Law Summaries.²⁹²

Although the non-delegable duty rule is rooted in Supreme Court jurisprudence, the BOE is responsible for its application to R&TC penalties.²⁹³ The BOE carved out an exception for nonresident returns,

²⁸⁵ See CAL. REV. & TAX. CODE § 40 (requiring both formal opinions and summary decisions to include findings of fact, legal issue(s) presented, applicable law, analysis, disposition, and names of adopting board members); *Formal & Memorandum Opinions*, *supra* note 68 (containing all BOE's formal opinions by year).

²⁸⁶ See CAL. REV. & TAX. CODE §§ 19044, 19048 (allowing FTB to act on a protest in whole or in part and stating that the BOE's determination becomes final 30 days after the determination).

²⁸⁷ See *id.* § 40 (requiring both formal opinions and summary decisions to include findings of fact, legal issue(s) presented, applicable law, analysis, disposition, and names of adopting board members, but only allowing formal opinions to be cited as precedent).

²⁸⁸ See *id.* § 40.

²⁸⁹ See CAL. CODE REGS. tit. 18, § 5452 (2017) (listing the four factors as: whether the opinion would establish a new rule or modify an existing rule, whether the opinion would resolve a conflict in the law, whether the opinion involves a legal issue of public interest, and whether the opinion would make a significant contribution to the law).

²⁹⁰ See search described *supra* note 119 (indicating 532 summary decisions involving reasonable cause for demand and timeliness penalties since 1997).

²⁹¹ See discussion *supra* Part II.A–D.

²⁹² See discussion *supra* Part II.A–D.

²⁹³ See CAL. REV. & TAX. CODE § 40 (requiring the BOE to issue a formal opinion or summary decision for income tax appeals and explain its decision); *United States v.*

and it can create more exceptions through formal opinions.²⁹⁴ For instance, the BOE should issue a formal opinion adopting the factors in *Rohrbaugh*, *Haywood*, and *Genex/London* for a more equitable application of the non-delegable duty rule.²⁹⁵ Additionally, the BOE has yet to formalize the relationship between the non-delegable duty rule and the demand penalty, which *Boyle* does not cover.²⁹⁶ A decisive formal opinion can end the inequitable practice of the BOE issuing various summary decisions with differing applications of the non-delegable duty rule to Demands.²⁹⁷

The BOE should also issue a formal opinion clarifying that the last-known address rule does not apply to Demands.²⁹⁸ The BOE's current application of the last-known address rule to Demands conflicts with the demand penalty's purpose to discourage taxpayers from failing to respond to Demands.²⁹⁹ A formal opinion requiring certified mail, rather than first-class mail for Demands would resolve the problem.³⁰⁰ Certified mail allows the FTB and taxpayers to prove when a Demand

Boyle, 469 U.S. 241, 251-52 (1985) (holding that taxpayers cannot rely on accountants or attorneys for filing deadlines).

²⁹⁴ See Appeal of Estate of Anna Armstrong, 64-SBE-068 (Cal. State Bd. Eq. Oct. 27, 1964), 1964 WL 1473, at *3 (finding that executor exercised reasonable cause to abate penalties by seeking competent advice for the requirement to file a nonresident return).

²⁹⁵ See *Rohrbaugh v. United States*, 611 F.2d 211, 215 (7th Cir. 1979); *Haywood Lumber & Mining Co. v. Comm'r*, 178 F.2d 769, 771 (2d Cir. 1950); *Genex/London, Inc. v. Ky. Bd. of Tax Appeals*, 622 S.W.2d 499, 501 (Ky. 1981).

²⁹⁶ See *Boyle*, 469 U.S. at 251-52 (non-delegable duty rule for timeliness penalties); Appeal of Brad Sweeney & Stephanie Johnson, 96R-0658 (Cal. State Bd. Eq. Feb. 26, 1998), 1998 WL 98943, at *3 (summary decision not to be cited as precedent) (observing that the FTB Law Summary applying the non-delegable duty rule to Demands was overreaching).

²⁹⁷ See CAL. REV. & TAX. CODE § 40 (allowing formal opinions to be followed as precedent, but not summary decisions); see, e.g., Appeal of Castle Sec. Corp., Case No. 182971 (Cal. State Bd. Eq. May 23, 2003), 2003 WL 21403265, at *3 (summary decision not to be cited as precedent) ("Each taxpayer has a personal, non-delegable obligation to file a tax return by the due date, to respond to a notice and demand from the FTB that a return be filed, and to furnish information requested by the FTB."); *Sweeney*, 1998 WL 98943, at *2 (summary decision not to be cited as precedent) (observing that the FTB Law Summary was overreaching).

²⁹⁸ See CAL. REV. & TAX. CODE § 40; CAL. CODE REGS. tit. 18, § 5452 (2017).

²⁹⁹ See generally Appeal of Frank E. & Lilia Z. Hublou, 77-SBE-102 (Cal. State Bd. Eq. July 26, 1977), 1977 WL 4093, at *2 (noting that the demand penalty was designed to penalize the taxpayer's failure to respond to the demand and not failure to pay the proper tax); Appeal of Winston R. Schwyhart, 75-SBE-035 (Cal. State Bd. Eq. Apr. 22, 1975), 1975 WL 3519, at *2 (discussing appellant's argument that he should not be liable for the Demand penalty because he did not receive it).

³⁰⁰ See CAL. REV. & TAX. CODE § 40.

is actually received.³⁰¹ The BOE has the authority to require certified mail for Demands because the R&TC permits certified mail to satisfy any provision that requires a mailed notice, which includes Demands.³⁰² The common law approach to resolving these problems with new formal opinions is quicker and easier than waiting for (or expecting) the Legislature to amend the R&TC.³⁰³

The BOE's deference to the FTB by copying the language of Law Summaries has led to multiple misapplications of the law.³⁰⁴ The BOE must apply the correct law, and if it wants to overrule precedent then it should issue a formal opinion changing the law.³⁰⁵ Regardless, the BOE should not copy non-binding FTB Law Summaries because doing so inappropriately treats them as binding authority.³⁰⁶ The BOE has discretion to issue formal opinions, and as long as it does not

³⁰¹ See *Insurance & Extra Services*, *supra* note 258.

³⁰² See CAL. REV. & TAX. CODE § 36.

³⁰³ See generally CAL. CONST. art. IV, § 1 (“[L]egislative power of this State is vested in the California Legislature which consists of the Senate and Assembly.”); CAL. REV. & TAX. CODE § 40 (allowing formal opinions adopted by the BOE to be cited as precedent).

³⁰⁴ See, e.g., *FTB Legal Documents, Regulations, and Litigation*, *supra* note 220 (containing law summaries on several issues, including “Reasonable Cause — Penalty Abatement,” which asserts that a taxpayer must show “credible and competent proof” and that each taxpayer has a non-delegable duty to file by the due date, respond to a Demand, and furnish information requested by the FTB); Appeal of Thomas K. & Gail G. Boehme, Case No. 83A-963 (Cal. State Bd. Eq. June 30, 1979), 1979 WL 4224, at *3 (saying only that reliance on an agent does not excuse a late filing penalty, not failing to respond to a Demand, or furnish requested information); Appeal of Michael J. & Diane M. Halaburka, 85-SBE-025 (Cal. State Bd. Eq. Apr. 9, 1985), 1985 WL 15809, at *2-3 (using “prevented” not “completely prevented” language); Appeal of David A. & Barbara L. Beadling, 77-SBE-021 (Cal. State Bd. Eq. Feb. 3, 1977), 1977 WL 3831, at *2 (saying only that an “appellants’ unsupported statement is insufficient to carry their burden of proof”).

³⁰⁵ See CAL. REV. & TAX. CODE § 40 (allowing formal opinions to be followed as precedent, but not summary decisions); see also CAL. CODE REGS. tit. 18, § 5452 (2017) (listing the four factors for whether the BOE should issue a formal opinion). For examples of issues the BOE could overrule precedent for, see *Boehme*, 1979 WL 4224, at *3 (saying only that reliance on an agent does not excuse a late filing penalty, not failing to respond to a Demand, or furnish requested information); Appeal of Michael J. & Diane M. Halaburka, 85-SBE-025 (Cal. State Bd. Eq. Apr. 9, 1985), 1985 WL 15809, at *2-3 (using “prevented” not “completely prevented” language); Appeal of David A. & Barbara L. Beadling, 77-SBE-021 (Cal. State Bd. Eq. Feb. 3, 1977), 1977 WL 3831, at *2 (saying only that an appellants’ unsupported statement is insufficient to carry their burden of proof”).

³⁰⁶ See *Silverstein & Wilson*, *supra* note 221, at 288 n.2 (warning that FTB’s informal guidance on its website is not binding authority and should only be relied on with considerable caution).

contradict the R&TC, it can clarify or change the law more easily than the Legislature.³⁰⁷

B. *The Legislature Should Amend the R&TC and Overhaul the Tax System*

The Legislature should create a first-time abatement policy, amend how the non-delegable duty and last-known address rules apply, and codify the Regulation factors for what the BOE considers when deciding whether to issue formal opinions.³⁰⁸ However, the Legislature is unlikely to pass a bill making any of these changes.³⁰⁹ Previous bills to restructure the California tax system and create a first-time abatement policy have failed for various political reasons.³¹⁰ BOE board members and politicians seeking board positions oppose changes that would reduce the board's power, and major accounting firms and labor unions oppose changes that would reduce their ability to influence the board's decisions.³¹¹ Additionally, employees of the FTB, BOE, and EDD oppose consolidation of their employers because their jobs would be at risk.³¹² Despite these political pressures, the Legislature should act to make necessary changes to the California tax system.³¹³ Although the BOE can issue formal opinions more easily than the Legislature can pass a bill, changing the R&TC and the

³⁰⁷ See CAL. CODE REGS. tit. 18 § 5452 (granting BOE discretion to issue a formal opinion); Simmons *supra* note 2, at 301-02 (discussing political factors that bar Legislative reform to California's tax system).

³⁰⁸ See CAL. CONST. art. IV, § 1 (“[L]egislative power of this State is vested in the California Legislature which consists of the Senate and Assembly.”).

³⁰⁹ See Simmons, *supra* note 2, at 301-02 (discussing political factors that bar reform to California's tax system).

³¹⁰ See, e.g., Assemb. B. 1777, 2014 Leg. 2013–2014 Reg. Sess. (Cal. 2014) (the bill's history notes that it died after being put on the Appropriation Committee's “suspense file”).

³¹¹ See Anderson et al., *supra* note 54, ¶ 703.5 (arguing that BOE members are unlikely to support major reductions in their tax adjudication roles); Mahoney, *supra* note 54 (discussing that major accounting firms have hired contract lobbyists to work on accounting issues in the Legislature and labor unions representing public employees hold more political sway than taxpayers and practitioners); Simmons, *supra* note 2, at 301-02 (discussing political factors that bar reform to California's tax system).

³¹² See Mahoney, *supra* note 54.

³¹³ See Simmons, *supra* note 2, at 301-02 (“[S]ome improvement in California Tax administration might be achieved by providing an independent review mechanism of Board actions.”).

system as a whole would be more forceful than issuing formal opinions.³¹⁴

The Council On State Taxation (“COST”) regularly publishes a scorecard ranking each state on its tax appeals processes and administrative practices.³¹⁵ The scorecard evaluates the fairness of statutes of limitations, interest rates, and due dates that the state has adopted, as well as the transparency of its adjudicatory tribunal decisions.³¹⁶ California received the worst score of any state, mainly because of the BOE’s lack of independence as a tax administration and appeal body, the BOE board members’ lack of tax expertise, and that taxpayers have to pay amounts in dispute before receiving *de novo* review in Superior Court.³¹⁷ The Model State Administrative Tax Tribunal Act (“the Model Act”) recommends that each state legislature adopt its best practices to provide taxpayers with a fair means of resolving appeals.³¹⁸ The Model Act reports that basic fairness demands that taxpayers be allowed to present their case to an independent adjudicatory body with tax expertise before being required to pay amounts in dispute.³¹⁹ However, California failed to adopt these best practices.

The Legislature put forth a bill in 2004 to create an independent California Tax Court, but it was referred to and then suspended in the Committee on Appropriations.³²⁰ Opponents of an independent tax court argue that it would be more difficult for small claims taxpayers to receive hearings, and that creating and maintaining the additional tax court would be expensive.³²¹ However, the Model Act addresses that first concern with a provision calling for a small claims division

³¹⁴ Changing the R&TC is more forceful than a formal opinion because it is more difficult to change the R&TC than to overrule a formal opinion. See CAL. CODE REGS. tit. 18, § 5452 (2017) (allowing BOE discretion to issue a formal opinion); Simmons, *supra* note 2, at 301-02 (discussing political factors that bar reform to California’s tax system).

³¹⁵ Douglas L. Lindholm, Ferdinand S. Hogroian & Fredrick J. Nicely, *The Best and Worst of State Tax Administration: COST Scorecard on Tax Appeals & Procedural Requirements*, COUNCIL ON ST. TAX’N 1 (2013), <http://www.cost.org/WorkArea/DownloadAsset.aspx?id=85976>.

³¹⁶ *Id.* at 1-2.

³¹⁷ See *id.* at 2, 13.

³¹⁸ See MODEL STATE ADMIN. TAX TRIBUNAL ACT § 1 (AM. BAR ASS’N 2006), <http://www.ncsl.org/documents/standcomm/scomfc/Model-State-Administrative-Tax-Tribunal-Act.pdf>.

³¹⁹ See *id.* at Report.

³²⁰ See Assemb. B. 2472, 2004 Leg. 2003–2004 Reg. Sess. (Cal. 2004).

³²¹ See Simmons, *supra* note 2, at 343-44.

that hears cases with amounts in controversy up to \$25,000.³²² Addressing the second concern, California could reduce costs by consolidating all tax collection into the FTB and eliminating the BOE.³²³ Although eliminating the BOE would require a State Constitutional amendment, the Legislature has the ability to do so.³²⁴ Adopting the Model Act provisions and consolidating California's tax system would lead to a more efficient and equitable system for taxpayers.³²⁵

However, such large-scale change is unlikely to happen.³²⁶ Some smaller-scale changes may be more plausible because the FTB has previously succeeded in getting an "annual 'technical' bill approved by the legislature."³²⁷ Although the first-time abatement policy failed, the FTB could push to allow interest not to be paid prior to a refund action, or further limit campaign contributions to BOE board members from donators with interests in the outcome of an appeal.³²⁸ Given the political limitations and time it takes for any legislative changes, improvements are more likely to be achieved through BOE formal opinions.³²⁹

CONCLUSION

The reasonable cause standard of ordinary business care and prudence has multiple interpretations and applications, some of which the BOE does not adequately address and the Legislature ignores.³³⁰ A lack of formal opinions, misguided applications of the non-delegable duty and last-known address rules, and BOE deference to the FTB create unique problems for California taxpayers attempting to prove

³²² See MODEL STATE ADMIN. TAX TRIBUNAL ACT § 14.

³²³ See Simmons, *supra* note 2, at 347-48.

³²⁴ See *id.* at 347-49.

³²⁵ See *id.* at 350-51.

³²⁶ See *id.* at 300-02.

³²⁷ See Anderson et al., *supra* note 54, ¶ 703.5.

³²⁸ See *id.* ¶ 703.5 ("[T]he FTB might allow interest not to be paid prior to a refund action, so long as the taxpayer establishes financial responsibility and a plausible technical argument."); Mahoney, *supra* note 54 ("[T]he Kopp Act, setting a \$249 contribution limit for taxpayers or representatives with an interest in the outcome of a case, could apply to PAC contributions.").

³²⁹ See CAL. CODE REGS. tit. 18, § 5452 (2017) (allowing BOE discretion to issue a formal opinion); Simmons, *supra* note 2, at 301-02 (discussing political factors that bar reform to California's tax system).

³³⁰ See STATE OF CAL. FRANCHISE TAX BD., *supra* note 226 (summarizing some of the applications of reasonable cause in different situations); discussion *supra* Part II.A-D.

reasonable cause.³³¹ The Legislature can cure these problems by passing a bill, but the BOE can more easily resolve these problems by issuing more formal opinions.³³² California taxpayers should have a tax system that is accountable to them and applies the law fairly, and the BOE can help provide such a system by issuing more formal opinions.³³³

However, the current tax system in California as a whole is highly problematic.³³⁴ The result of this flawed system is an inconsistent reasonable cause standard and biased hearings.³³⁵ Without institutional changes from the Legislature, and a lack of independent appeals body, California taxpayers are left to deal with the BOE as it currently exists.³³⁶ California taxpayers deserve a better system, but for now, they must struggle with the limited guidance that is available.³³⁷

³³¹ See discussion *supra* Part II.B–D.

³³² See discussion *supra* Part III.A–B.

³³³ See Fields, *supra* note 219, § 11.03, 11.05 (describing the elements necessary for fair and effective tax appeals, and describing California’s failure to pass bills satisfying some of the elements).

³³⁴ See discussion *supra* Part I.A–C.

³³⁵ See discussion *supra* Part II.A–D.

³³⁶ See discussion *supra* Part III.A–B.

³³⁷ See Anderson et al., *supra* note 54, ¶ 703.4 (“Even [BOE] appeals which are pursued to judgment often produce no detailed opinion . . . the overall effect is that California cases seem to produce much less precedent ‘per capita’ than the federal Tax Court system.”).