

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
THOMAS M. OSERANSKY

) OTA Case No. 18010745
)
) Date Issued: September 24, 2018
)
)
)

OPINION

Representing the Parties:

For Appellant: Thomas M. Oseransky

For Respondent: Bradley J. Coutinho, Tax Counsel

ANGEJA, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,¹ Thomas M. Oseransky (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in denying appellant’s claim for a refund in the amount of \$1,729.25 for 2005.

Appellant waived his right to an oral hearing and therefore the matter is being decided based on the written record.

ISSUES

1. Whether appellant has established that the demand penalty should be abated.
2. Whether appellant has established that the collection cost recovery fee should be abated.
3. Whether appellant has established that the lien fee should be abated.

¹ Unless otherwise indicated, all statutory references are to sections of the California Revenue and Taxation Code. Section 19324 states that taxpayers have 90 days to appeal FTB’s action upon a taxpayer’s protest to the board (Board of Equalization). As relevant, Section 20(b) provides that for appeals transferred to the Office of Tax Appeals on or after January 1, 2018: “Unless the context requires otherwise, as used in this code or any other code, ‘board,’ with respect to an appeal, means the Office of Tax Appeals.”

FACTUAL FINDINGS

1. Appellant did not file a California income tax return for the 2005 tax year but had sufficient income to create a tax-filing obligation.
2. While not directly at issue herein, appellant also failed to file a tax return for 2001. On February 3, 2003, FTB issued a demand for appellant to file a 2001 tax return. Appellant did not timely respond to that demand, so FTB issued a Notice of Proposed Assessment (NPA) to appellant for that year on April 14, 2003.
3. On January 16, 2007, respondent issued a demand for a tax return (demand letter) to appellant requiring him to file a 2005 tax return, provide a copy of a previously filed return, or explain why no return was required. That demand letter specifically notified appellant that if a return was not filed by February 21, 2007, FTB would assess tax, a demand penalty, interest, and a cost recovery fee.
4. When FTB received no response to the demand letter, FTB issued an NPA on March 19, 2007, reflecting a proposed tax liability of \$455.00, a late-filing penalty of \$113.75, a demand penalty of \$1,753.50, and a \$125.00 filing enforcement fee, plus interest. Appellant did not timely protest the NPA, and it became a final assessment. FTB subsequently engaged in collection activities, including the imposition of a lien and fees (i.e., a collection cost recovery fee and a lien fee). Eventually, appellant fully paid the determined liability through an installment-payment agreement with the FTB.
5. On April 15, 2016, appellant filed a 2005 tax return, reporting tax of \$6,233 and an overpayment of \$326, for which appellant claimed a refund. FTB accepted the return, abated the late-filing penalty and filing enforcement fees, and reduced the demand penalty from \$1,753.50 to \$1,558.25. FTB did not reduce the cost recovery fee or lien fee. These adjustments resulted in an overpayment of \$677.20 that FTB intercepted via a Notice of Intercepted Funds dated December 19, 2016, and paid to the Internal Revenue Service (IRS), pursuant to Government Code section 926.8.²

² In relevant part, Government Code section 926.8 provides: “Whenever a governmental agency of the United States, in the collection of taxes or amounts owing to it, is authorized by federal law to levy administratively on credits owing to a debtor, it may avail itself of the provisions of this section and claim credits owing by the State to such debtor”

6. On March 17, 2017, appellant filed a claim for refund in which he objected to the imposition of the remaining penalties for 2005 because he “was due a refund.”
7. On April 5, 2017, FTB denied the claim for refund. This timely appeal followed.

DISCUSSION

Issue 1 - Whether appellant has established that the demand penalty should be abated.

California imposes a penalty for the failure to file a return or provide information upon FTB’s demand to do so, unless reasonable cause prevented the taxpayer from responding to the demand in a timely manner. (§ 19133.) The penalty is 25 percent of the total tax, determined without regard to payments and withholding credits. For individual taxpayers, FTB will impose the demand penalty upon a late or unfiled return if the taxpayer fails to respond to a demand for a tax return, and if FTB has issued an NPA in response to the taxpayer’s failure to respond to a similar demand within the four-taxable-year period preceding the year at issue. (Cal. Code Regs., tit. 18, § 19133(b).)³ The demand penalty is designed to penalize the failure of a taxpayer to respond to a notice and demand, and not a taxpayer’s failure to pay the proper tax. (*Appeal of Bryant*, 83-SBE-180, Aug. 17, 1983; *Appeal of Hublou*, 77-SBE-102, July 26, 1977.) To establish reasonable cause, a taxpayer must show that the failure to respond to a demand occurred despite the exercise of ordinary business care. (*Appeal of Bieneman*, 82-SBE-148, July 26, 1982.) The taxpayer’s reasons for failing to respond must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Tons*, 79-SBE-027, Jan. 9, 1979.)

Here, the demand penalty was properly imposed, and appellant has not disputed the amount or the method of computation. Appellant argues that once he became aware that his accountant had not filed appellant’s tax return, appellant promptly filed it and, therefore, he should “receive the refund that I am owed.” But, appellant did not file a tax return until April 15, 2016, more than 9 years *after* FTB’s January 28, 2007 letter demanding a tax return. Appellant has provided no evidence or argument explaining his failure to timely respond to FTB’s demand letter. Therefore, appellant has not established that the demand penalty should be abated.

³ This requirement is satisfied here because appellant failed to file a 2001 tax return in response to FTB’s demand for one, and FTB issued an NPA to appellant for that year on April 14, 2003.

Issue 2 - Whether appellant has established that the collection cost recovery fee should be abated.

Section 19254(a)(1) provides that if the FTB mails a formal legal demand for a tax liability to a taxpayer, and provides notice that such a fee may be imposed, a collection cost recovery fee is required to be imposed if the taxpayer continues to fail or refuses to pay the amount due. Once properly imposed, the statute provides no grounds upon which the collection cost recovery fee may be abated. (See § 19254(a)(1).)

Here, the record indicates that respondent provided notice that a collection cost recovery fee may be imposed, and appellant does not dispute that he received such notice. Appellant did not timely pay the tax liability in response to the notice. Therefore, FTB properly imposed the fee, and there is no basis for abating it.

Issue 3 - Whether appellant has established that the lien fee should be abated.

Section 19221(a) provides that any amount due from a taxpayer shall become an enforceable state tax lien if the taxpayer fails to pay the amount due at the time it becomes due and payable. Government Code section 7174 allows FTB to collect the various fees associated with recording and releasing the state tax lien. Once a lien fee is properly imposed, there is no language in the statute that will excuse the fee under any circumstances. Here, there is no evidence that the fee was improperly imposed. Accordingly, we have no basis upon which to abate the lien fee.

HOLDINGS

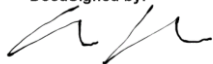
1. Appellant has not established that the demand penalty should be abated.
2. Appellant has not established that the collection cost recovery fee should be abated.
3. Appellant has not established that the lien fee should be abated.

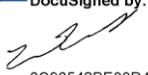
DISPOSITION

Respondent's action is sustained.

DocuSigned by:
Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

We concur:

DocuSigned by:

3CADA62FB4864CB...
Andrew J. Kwee
Administrative Law Judge

DocuSigned by:

0C90542BE88D4E7...
Tommy Leung
Administrative Law Judge