

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 18011431
)	
DAVID BROWN)	Date Issued: September 20, 2018
)	
)	

OPINION

Representing the Parties:

For Appellant: David Brown

For Franchise Tax Board: Gi Nam, Tax Counsel

For Office of Tax Appeals: Josh Lambert, Tax Counsel

D. BRAMHALL, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,¹ David Brown (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) denying appellant’s claim for refund of \$4,789.50 for the 2013 tax year.²

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

ISSUES

1. Did respondent properly impose the notice and demand penalty (demand penalty) upon appellant for the 2013 tax year?
2. Has appellant established reasonable cause for abatement of the demand penalty?

¹ Unless otherwise indicated, all statutory references are to sections of the Revenue and Taxation Code.

² In his appeal letter, appellant also disputed respondent’s denial of his alleged refund claim for the 2014 tax year. However, appellant had not previously filed a 2014 refund claim with respondent for that year. Accordingly, respondent treated appellant’s request for an appeal of the 2014 tax year as a refund claim. On February 22, 2017, respondent sent a letter to appellant denying his refund claim for the 2014 tax year and informing appellant of his obligation to separately appeal that denial. Appellant did not subsequently appeal respondent’s denial of his refund claim for the 2014 tax year, and thus, that matter is not before us in this appeal.

FACTUAL FINDINGS

1. Respondent obtained information from third-party payors indicating that appellant received sufficient income to require him to file a tax return in California for the 2013 tax year.
2. Because respondent did not receive appellant's tax return for the 2013 tax year, it mailed a Demand for Tax Return (Demand) dated January 21, 2015, to appellant's address in Laguna Beach, California. The Demand required that appellant file a return, provide a copy of the return if already filed, or explain why he was not required to file a return by February 25, 2015.
3. Because respondent did not receive a response by the due date, a Notice of Proposed Assessment (NPA) was issued on March 23, 2015. The NPA estimated appellant's income to be \$283,751, determined a total tax liability of \$23,844, and after crediting withholding tax, determined a tax balance due of \$1,565, a late-filing penalty of \$391.25, a demand penalty of \$5,961 and a filing enforcement fee of \$76, plus interest.
4. On January 22, 2014, respondent issued a Demand to appellant, requesting a return for the 2012 tax year. Appellant did not respond to the Demand by the date specified and respondent subsequently issued, on March 24, 2014, an NPA for 2012.
5. After issuing its NPA for 2013, respondent mailed multiple notices to appellant's Laguna Beach address requesting payment of the balance owed. Respondent's records indicate that on January 7, 2016, appellant contacted respondent and updated his mailing address to an address in Irvine, California.
6. On January 15, 2016, respondent sent a Final Notice Before Levy and Lien to appellant's Irvine address, indicating a balance due of \$8,472.68.
7. On May 4, 2016, appellant filed an untimely 2013 California Resident Income Tax Return, which respondent accepted as filed. Appellant reported taxable income of \$232,205, total tax of \$19,158, and withholding credits of \$22,280, resulting in an overpayment of \$3,122.
8. The reduction in tax for the 2013 tax year from the amount determined in respondent's NPA of \$23,844 to appellant's reported tax liability of \$19,158 resulted in a corresponding reduction of the 25-percent demand penalty from \$5,961 to \$4,789.50 ($\$19,158 \times .25$).

9. Respondent applied appellant's overpayment of \$3,122 from the 2013 tax year plus an overpayment of \$1,950.74 from appellant's 2015 tax year to pay the \$4,789.50 demand penalty.³
10. Subsequently, on June 6, 2016, respondent received appellant's claim for refund of \$4,789.50 for the 2013 tax year, requesting abatement of the demand penalty.
11. Respondent denied the claim for refund by letter dated August 19, 2016.
12. By letter dated October 21, 2016, appellant filed this timely appeal.

DISCUSSION

1. Did respondent properly impose the demand penalty upon appellant for the 2013 tax year?

Section 19133 provides that, if a taxpayer fails or refuses to make and file a return upon receipt of a Demand from respondent, then, unless the failure is due to reasonable cause and not willful neglect, respondent may add a penalty of 25 percent of the amount of tax determined pursuant to section 19087. For individual taxpayers, a demand penalty will only be imposed if the taxpayer fails to timely respond to a current Demand in the manner prescribed, and respondent has issued an NPA under the authority of section 19087, subdivision (a), after the taxpayer failed to timely respond to a Request for Tax Return or Demand at any time during the preceding four taxable years. (Cal. Code Regs., tit. 18, § 19133(b).)

Respondent's determination is presumed correct and a taxpayer has the burden of proving it to be wrong. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.)⁴ Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.)

With respect to the 2013 tax year, appellant failed to respond to the Demand by the February 25, 2015 deadline. With respect to the 2012 tax year, respondent also failed to timely respond to a Demand and an NPA was subsequently issued. Accordingly, respondent satisfied

³ FTB also applied the overpayments to \$57.24 of interest and \$226 toward a collection cost fee, which represent the difference between the total overpayments and the Demand penalty. These amounts are not in dispute.

⁴ Published decisions of the Board of Equalization (BOE) may generally be found on the BOE's website: <http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion>. The Office of Tax Appeals (OTA) is the successor in interest to BOE regarding income tax appeals. Therefore, precedential BOE opinions that were adopted prior to January 1, 2018, in accordance with applicable law and regulations, may be cited as precedential authority to OTA. (Cal. Code of Regs., tit. 18, § 30501(d)(3).)

all the regulatory requirements for imposing the demand penalty for the 2013 tax year. The fact that appellant ultimately complied with the Demand *after* the February 25, 2015 deadline, does not establish that respondent erred in imposing the demand penalty. (*Appeal of Irma E. Bazan*, 82-SBE-259, Nov. 17, 1982.) Accordingly, we find that respondent properly imposed the demand penalty upon appellant for the 2013 tax year.

2. Has appellant established reasonable cause for abatement of the demand penalty?

When respondent imposes a demand penalty, the burden of proof is on the taxpayer to show that reasonable cause exists to support an abatement of the penalty. (*Appeal of Eugene C. Findley*, 86-SBE-091, May 6, 1986.) To establish reasonable cause, a taxpayer must show that the failure to timely reply to the Demand occurred despite the exercise of ordinary business care and prudence. (*Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982.) The taxpayer's reason for failing to respond to the Demand must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Eugene C. Findley, supra.*)

Illness or other personal difficulties may be considered reasonable cause if the taxpayer presents credible and competent proof that he was continuously prevented from responding to the Demand. (*Appeal of Michael J. and Diane M. Halaburka*, 85-SBE-025, Apr. 9, 1985.) However, if the difficulties simply caused the taxpayer to sacrifice the timeliness of one aspect of his affairs to pursue other aspects, the taxpayer must bear the consequences of that choice. (*Appeal of William T. and Joy P. Orr*, 68-SBE-010, Feb. 5, 1968.) A taxpayer's selective inability to perform tax obligations, while participating in regular business activities, does not establish reasonable cause. (*Watts v. Commissioner* (1999) T.C. Memo. 1999-416.)

Appellant's contention that there was a delay in his receipt of the Demand because it was mailed to his residence in Laguna Beach, does not constitute reasonable cause for his failure to timely respond. Respondent properly mailed the Demand to appellant's Laguna Beach address because it was his last-known address. It is well settled that any notice to a taxpayer shall be sufficient if it is mailed to the taxpayer's last-known address, which is the address that appears on the taxpayer's last return filed with FTB, unless the taxpayer has provided to the FTB clear and concise written or electronic notification of a different address, or the FTB has an address it has reason to believe is the most current address for the taxpayer. (Rev. & Tax. Code, § 18416(b), (c).) This is true even if the notice never actually reaches the taxpayer. (*Appeal of*

Yvonne M. Goodwin, 97-SBE-003, Mar. 19, 1997.) Here, appellant did not notify respondent of his current address until January 7, 2016, nearly a year after respondent mailed the Demand and NPA to appellant's last-known address on file with respondent. Further, no evidence was presented to suggest FTB had a more current address for appellant. Therefore, it was not respondent's action which caused any delay in appellant's receipt of the Demand, but rather, appellant's failure to exercise ordinary business care and prudence by updating his mailing address with respondent immediately after moving, continuing to regularly check the mail received at his Laguna Beach address, or by having his mail forwarded from that address to his current address.

Appellant has also not explained or provided any evidence to show why his alleged divorce, change of residence, or securing tax advice continuously prevented him from timely responding to the Demand. Further, while we recognize that these events likely placed an additional burden on appellant's time, we are not persuaded that this burden was so encompassing as to completely prevent appellant from spending the necessary time to file a return, or to hire someone to do so on his behalf. And even accepting that such were the case, the fact that appellant chose to prioritize obtaining a divorce, changing his residence, and securing tax advice over timely responding to the Demand, means that appellant must now bear the consequences of that choice. (*Appeal of William T. and Joy P. Orr, supra.*)

Accordingly, appellant has not shown reasonable cause for failing to timely respond to the Demand.

HOLDINGS

1. Respondent properly imposed the demand penalty upon appellant for the 2013 tax year.
2. Appellant has failed to establish reasonable cause for the abatement of the demand penalty.

DISPOSITION

Respondent's action in denying appellant's claim for refund is sustained.

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Douglas Bramhall
Administrative Law Judge

We concur:

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Daniel Cho

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Daniel K. Cho

Administrative Law Judge

DocuSigned by:

Nguyen Dang

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Nguyen Dang

Administrative Law Judge