

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 18042653
CHRISTIAN JENSEN)	Date Issued: March 13, 2019
)	
)	
)	

OPINION

Representing the Parties:

For Appellant: Lawrence Maggitti, Representative

For Respondent: Andrew Amara, Tax Counsel

KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Christian Jensen (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund in the amount of \$3,110 for the 2005 tax year.¹ This matter is being decided on the written record because appellant waived his right to an oral hearing.

ISSUES

1. Whether appellant established a basis for abatement of the late-filing penalty.
2. Whether appellant established a basis for abatement of the demand penalty.

FACTUAL FINDINGS

1. Appellant was a California resident during 2005.
2. Appellant’s employers, T-Mobile and Fuse Mobile, collectively reported paying California wages to appellant of \$106,295 during 2005. A financial institution separately reported paying taxable income of \$42,709 to appellant during 2005.²

¹ Appellant requests a refund of a \$2,089.50 demand penalty and a \$1,020.50 late-filing penalty.

² The record does not reflect the specific nature of the income from the financial institution, except that it was reported to appellant on one of the following forms: Form W-2G, 1099-G, 1099-R, or 1099-MISC.

3. On January 16, 2007, FTB issued a Demand for Tax Return (Demand) to appellant, giving him until February 21, 2007, to file a return or respond with an explanation for why no return is required. Appellant did not timely respond to the Demand. Additionally, FTB had previously issued a Notice of Proposed Assessment (NPA) on August 2, 2004, following appellant's failure to timely respond to a Request for Tax Return dated April 2, 2004, for the 2001 tax year.
4. On March 19, 2007, FTB issued an NPA for \$11,455 in tax (\$7,179 tax due after applying withholding credits of \$4,276), a late-filing penalty of \$1,794.75, a demand penalty of \$2,863.75, a filing enforcement fee of \$125, plus applicable interest, for the 2005 tax year. Appellant did not appeal the NPA, and it became final on May 18, 2007.
5. On January 15, 2008, appellant filed a 2005 tax return, reporting tax of \$8,358 (less withholding credits of \$4,276). On or around February 27, 2008, FTB accepted the income amounts reported on the return, and reduced the late-filing penalty to \$1,020.50, and the demand penalty to \$2,089.50.
6. Appellant paid off the liability through a series of installment payments covering a nine-year period. The first payment of \$125 was made on September 29, 2008, and the final payment of \$4,250.77 was made on August 22, 2017.
7. By letter dated August 20, 2017, appellant filed a claim for refund requesting abatement of the late-filing and demand penalties on the basis of reasonable cause.³ The claimed refund amount at issue is \$3,110.
8. FTB issued a Notice of Action (NOA) denying the \$3,110 claim for refund on August 29, 2017, on the basis that appellant failed to establish reasonable cause.
9. Appellant timely appealed the NOA on November 9, 2017, contending that he initially had to request an extension due to difficulty in timely obtaining tax documents from his employer. Appellant contends he lost his job, was forced into a dire financial situation, and did not timely file his 2005 return. Appellant further contends that he filed the return immediately upon learning that FTB had filed a lien against him. Furthermore, appellant contends abatement is warranted because he paid off the 2005 liability through an installment payment arrangement, and has maintained compliance for other tax years.

³ Prior to full payment, appellant had filed a protective claim for refund with respect to the same penalties, and requesting relief of the penalties on same basis, on June 27, 2016.

DISCUSSION

1. The late-filing penalty

California law imposes a penalty for the failure to timely file a return, unless it is shown that the late filing is due to reasonable cause and not willful neglect. (R&TC, § 19131(a).) The amount of the penalty is five percent of the tax due, after allowing for timely payments, for every month or fraction of a month that the return is late, up to a maximum 25 percent penalty. (R&TC, § 19131(a).) The penalty will be abated if a taxpayer establishes that the failure to file was due to reasonable cause and not willful neglect. (R&TC, § 19131(a).)

For a taxpayer to establish that a failure to file was due to reasonable cause, the taxpayer must show that the failure occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*United States v. Boyle* (1985) 469 U.S. 241, 245-246 (*Boyle*); *Appeal of Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983; *Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982.)⁴ The standard of reasonable business care and prudence imposes on taxpayers a general obligation to take reasonable measures to timely obtain and maintain the requisite documentation or other information necessary to file a required return by the due date. (See Cal. Code Regs, tit. 18, § 19032(a)(5).) Thus, delay due to difficulty in accumulating documents or other necessary information generally will not constitute reasonable cause for purposes of abating the late-filing penalty. (*Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982 [alleged unavailability of records]; *Appeal of William T. and Joy P. Orr*, 68-SBE-010, Feb. 5, 1968 [lack of necessary information or documents to file].) Furthermore, an allegation that a taxpayer was unable to obtain the information necessary to file a return, in the absence of evidence establishing why the information was unavailable, and of the taxpayer's "continuity of his efforts to secure the necessary information" from the due date until the date the return was late-filed, does not constitute reasonable cause. (*Raymond J. Beran, et. al., v. Commissioner* (1980) T.C. Memo. 1980-119.)

FTB correctly asserts that the late-filing penalty applies at the maximum rate of 25 percent of the tax required to be paid with the return, because appellant filed his return on January 15, 2008, which is more than five months after the April 15, 2006 due date to timely file

⁴ The Board of Equalization's (board's) precedential opinions (designated by "SBE" in its citation) are viewable on the board's website at <www.boe.ca.gov/legal/legalopcont.htm>.

a 2005 tax return.⁵ In order to abate the penalty, appellant must establish that circumstances constituting reasonable cause prevented him from timely filing his 2005 return. Here, appellant alleges that he had difficulty obtaining necessary documentation from his employer, and thus was unable to timely file his 2005 return. Nevertheless, appellant provided no documentation or argument to explain how, or when, he was prevented from timely filing a return, and what efforts, if any, he took to obtain the necessary documents and meet his filing obligation. Appellant additionally contends that he immediately filed the return upon learning that FTB filed a lien against him, has since paid off the liability, and has maintained compliance in other tax years. These contentions indicate that appellant took action to bring his account current *after* the taxes were assessed and a late-filing penalty imposed. Appellant does not, however, explain why the *late filing* was due to reasonable cause.⁶ Therefore, we find that appellant failed to establish a basis for abatement of the late-filing penalty.⁷

2. The demand penalty

California law imposes a penalty for the failure to file a return upon notice and demand, unless the failure is due to reasonable cause and not willful neglect. (R&TC, § 19133.) The penalty is 25 percent of either: the total tax assessed pursuant to section 19087 (pertaining to a failure to file a return or the filing of a false or fraudulent return), or of any deficiency tax assessed by FTB concerning the assessment for which the return was required. (R&TC, § 19133; Cal. Code Regs., tit. 18, § 19133(a).) With respect to a failure to file a personal income tax return, the law provides that the demand penalty will only be imposed by FTB if:

(b)(1) the taxpayer fails to timely respond to a current Demand for Tax Return in the manner prescribed, and

(2) the FTB has proposed an assessment of tax under the authority of Revenue and Taxation Code section 19087, subdivision (a), after the taxpayer failed to timely respond

⁵ As relevant, since the due date landed on a Saturday, appellant could have filed by April 17, 2006, and the return would have been treated as filed timely on April 15, 2006, pursuant to Government Code section 6707.

⁶ The Internal Revenue Service may waive the federal late-filing penalty for purposes other than reasonable cause. For example, the IRS adopted a first-time abatement policy in 2001 for certain taxpayers with a good filing history, as provided in Section 20.1.1.3.3.2.1 of the Internal Revenue Manual, and this policy applies regardless of whether a late filing was due to reasonable cause and not willful neglect. As relevant, FTB does not have a first-time abatement policy.

⁷ Based on our finding that appellant failed to establish reasonable cause, we do not address whether appellant established a lack of willful neglect, which is the second element required to abate the penalty.

to a Request for Tax Return or a Demand for Tax Return in the manner prescribed, at any time during the four-taxable-year period preceding the taxable year for which the current Demand for Tax Return is issued.

(Cal. Code Regs., tit. 18, § 19133(b).) Here, appellant failed to respond to the January 16, 2007, Demand for the tax year at issue: 2005. Moreover, FTB issued an NPA to appellant for the 2001 tax year on August 2, 2004, after appellant failed to respond to a Request for Tax Return dated April 26, 2004. Therefore, FTB properly imposed a demand penalty in the amount of 25 percent of the tax liability for 2005 that FTB estimated pursuant to section 19087, irrespective of timely payments.⁸ (R&TC, § 19133.) In order to abate the demand penalty, appellant must establish reasonable cause for failing to timely respond to the 2005 Demand dated January 16, 2007.

Appellant offers no specific explanation for why he did not timely respond to the Demand. Instead, appellant raises the same contentions as a basis for abatement of the demand penalty, as for the late-filing penalty discussed above. The standard of reasonable cause is the same as with the late-filing penalty. (See *Appeal of Michael J. and Diane M. Halaburka*, 85-SBE-025, Apr. 9, 1985; *Appeal of Elmer R. and Barbara Malakoff*, 83-SBE-140, June 21, 1983.) Appellant's alleged difficulty obtaining tax documents from his employer is not relevant to explaining why appellant failed to respond to the Demand. With respect to the remaining contentions, for the same reasons as described above, we find that appellant failed to establish reasonable cause as a basis for abatement of the demand penalty.⁹

HOLDINGS

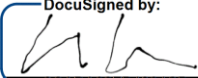
1. Appellant failed to establish a basis for abatement of the late-filing penalty.
2. Appellant failed to establish a basis for abatement of the demand penalty.

⁸ After appellant filed his delinquent return reporting a reduced tax liability, FTB made a corresponding reduction to the demand penalty amount.


⁹ Based on our finding that appellant failed to establish reasonable cause, we do not address whether appellant established a lack of willful neglect, which is the second element required to abate the penalty

DISPOSITION

FTB's action denying appellant's claim for refund for the 2005 tax year is sustained.

DocuSigned by:

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Andrew J. Kwee
Administrative Law Judge

We concur:

DocuSigned by:

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Neil Robinson
Administrative Law Judge

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Kenneth Gast
Administrative Law Judge