

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18042746
)
RICHARD D. CINTRON) Date Issued: April 15, 2019
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_____)

OPINION

Representing the Parties:

For Appellant: Richard Cintron, Taxpayer

For Respondent: Andrew Amara, Tax Counsel

KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,¹ Richard Cintron (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) denying his claim for refund of \$3,461.50 for the 2015 tax year. This matter is being decided based on the written record because appellant waived his right to an oral hearing.

ISSUE

Whether appellant established a basis for abatement of the demand penalty.

FACTUAL FINDINGS

1. Appellant failed to timely file a tax return for 2015. Appellant’s employer reported paying appellant \$193,200 in wages during 2015. Additionally, several other sources reported making taxable payments or distributions totaling over \$68,000 to appellant during 2015.²
2. On May 31, 2017, FTB issued a Demand for Tax Return (Demand) for 2015, which notified appellant that failure to respond by July 5, 2017, would result in imposition of a

¹ All further section references are to the Revenue and Taxation Code unless otherwise indicated.

² Appellant had previously failed to timely file a return for the 2012 tax year, and FTB issued a Request for Tax Return on January 22, 2014, and a Notice of Proposed Assessment for that year on March 24, 2014.

demand penalty. When appellant failed to respond to the Demand, FTB estimated appellant had gross income of \$261,819. FTB issued a Notice of Proposed Assessment (NPA) on July 31, 2017, proposing to assess \$21,450 in tax, a 25-percent demand penalty of \$5,362.50, and a late-filing penalty.

3. Appellant did not protest the NPA. Instead, appellant and his wife, Julie Mader Cintron, filed a joint California Resident Income Tax return on August 15, 2017, reporting tax of \$13,846. FTB accepted the return as filed, and issued a Notice of Tax Return Change on August 28, 2017, notifying appellant that FTB reduced the 25-percent demand penalty to \$3,461.50. FTB also recomputed the interest and late-filing penalty. Subsequently, appellant made several payments which, along with his withholdings, reduced his remaining liability to \$1,344.32, which was subsequently paid in full.
4. On October 13, 2017, appellant filed a claim for refund with FTB, on the basis of reasonable cause. Appellant contends that he and his family moved out of state to New Mexico during July 2017. The moving company allegedly stole all his tax documents, including the Demand, which he had compiled and placed together in the same location. Appellant contends that he did not discover he missed the deadline to respond until he was able to get another copy of the Demand, along with his other tax documents, and by this time it was several days after the due date to respond. In support, appellant submitted a police report, which indicates that the alleged theft occurred between June 30, 2017, and August 15, 2017 (the date the theft was reported to the police). The police report also indicates that appellant's wife reported that "important paperwork" was in a "clear plastic box," and that she believed the moving company stole the box.
5. On November 13, 2017, FTB notified appellant of FTB's action disallowing appellant's claim for refund on the basis that he failed to establish reasonable cause. The notice states that appellant had 90 days to appeal FTB's action to OTA.³
6. Appellant timely appealed FTB's action on January 24, 2018, on the basis of reasonable cause. Appellant stated that he was dealing with a personal matter involving his children stemming from an incident which occurred in 2015, which was the reason his family

³The notice states appellant may appeal to the Board of Equalization (board); however, on and after January 1, 2018, OTA became the successor to the board with respect to this appeal. (Gov. Code, §§ 15672, 15674.)

moved out of state, and his time prior to the move was filled with court appearances, counseling, and police statements related to the personal matter.

7. FTB responded by letter dated July 10, 2018, contending that the appeal should be denied because appellant failed to establish or allege continuous incapacity from July 5, 2017 (the due date for responding to the Demand), through August 15, 2017 (the date a return was filed). FTB does not dispute that the documents were stolen. FTB's position is that since appellant moved in July, and the Demand was due on July 5, "appellant would have filed late regardless of the theft of his documents."
8. On February 14, 2019, Judge Kwee held a conference in this matter with both parties during which both parties agreed that the only issue remaining to be decided is abatement of the demand penalty. Appellant also clarified that he was unable to timely respond to the Demand because his tax documents, including the Demand, were stolen before the due date to respond.

DISCUSSION

California law imposes a penalty for the failure to file a return or furnish information upon notice and demand, unless the failure is due to reasonable cause and not willful neglect. (R&TC, § 19133.) In the case of a failure to file a return, the penalty is 25 percent of the total tax assessed without regard to payments or withholdings. (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:

- (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 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).) The purpose of the demand penalty is intended to penalize the failure of a taxpayer to respond to a Demand. (*Appeal of W. L. Bryant*, 83-SBE-180, Aug. 17, 1983; *Appeal of Frank E. and Lilia Z. Hublou*, 77-SBE-102, July 26, 1977.) Here, the demand penalty was properly imposed because appellant failed to timely respond to the current

Demand (for 2015). Additionally, FTB issued an NPA for the 2012 tax year on March 24, 2014, based on appellant's failure to respond to a January 22, 2014, Request for Tax Return for the 2012 tax year.

The demand penalty may be abated for reasonable cause. (R&TC, § 19133.) The reasonable cause exception of section 19133 is patterned after Internal Revenue Code (IRC) section 6651; thus, we may look to federal authority for guidance in interpreting the standard of reasonable cause. (*Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658; *Rihn v. Franchise Tax Bd.* (1955) 131 Cal.App.2d 356, 360.) For a taxpayer to establish that a failure to act 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 Stephen C. Bieneman*, 82-SBE-148, July 26, 1982.)⁴ Furthermore, it is not sufficient to establish an inability to respond by the due date; the taxpayer must also establish a "continuity of his efforts to" comply from the due date until the actual compliance date. (*Raymond J. Beran, et. al., v. Commissioner* (1980) T.C. Memo. 1980-119.)

Appellant first contends that personal matters stemming from a 2015 incident involving his children prevented him from timely responding to the Demand. Physical incapacity or emotional problems may support a finding of reasonable cause within the meaning of IRC section 6651. (*Shih-Fu Peng v. United States* (Fed.Cl. 2018) 139 Fed.Cl. 630, 634.) For example, reasonable cause may be established when the severity or timing of a physical illness or debilitation "makes it virtually impossible for the taxpayer to comply – things like emergency hospitalizations or other incapacity occurring around tax time." (*In re Carlson* (1997) 126 F.3d 915, 923.) The taxpayer must provide supporting documentation such as evidence of psychiatric care to establish incapacity caused by mental or emotional circumstances. (*Stine v. United States* (Fed.Cl. 2012) 106 Fed.Cl. 586, 592.) Additionally, the taxpayer must be prevented from timely responding, and not merely sacrificing the timeliness of one aspect of the taxpayer's affairs to pursue other aspects. (*Appeal of Halaburka*, 85-SBE-025, April 9, 1985; *Appeal of Orr*, 68-SBE-10, Feb. 5, 1968.) Here, appellant did not provide documentation to support that he was

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>.

continually incapacitated through August 15, 2017, due to personal matters stemming from an incident that occurred two years earlier in 2015. To the contrary, appellant contends that he was attending to important matters, such as court appearances, and moving from one location to another location. Furthermore, by the due date of the Demand, appellant had already moved out of state. Thus, we find that appellant chose to sacrifice the timeliness of responding to tax matters in favor of addressing his personal matters (here, the decision to move out of state).

Appellant alternatively contends he was unable to respond because his tax information, including the Demand, was stolen. A fire, casualty, natural disaster or other disturbance can be grounds for reasonable cause abatement if documentation necessary to file the return is lost or destroyed as a result of the fire or other event. (*Estate of Stuller v. United States* (C.D.Ill. 2014) 55 F.Supp.3d 1091, 1118.) While the same principle would apply in the context of a theft of tax records, here, according to appellant, the tax documentation at issue allegedly was stolen at the end of June 2017,⁵ and appellant did not establish why he was prevented from responding until August 15, 2017. In this respect, it appears that appellant did not even report the theft of the documents to police until August 15, 2017. 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. (*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].) Appellant admits that he received the Demand, and was able to get an additional copy of the Demand several days after the July 5, 2017, due date. Nevertheless, appellant failed to establish why it took him until August 15, 2017, to respond to the Demand. Appellant did not indicate what other steps, if any, he took prior to August 15, 2017, to respond to the Demand, or explain how any of the stolen documentation prevented him from responding sooner. Therefore, we find that appellant failed to establish reasonable cause.

⁵The police report indicates that the incident could have occurred as late as August 15, 2017 (the date reported to police).

HOLDING

Appellant failed to establish reasonable cause for abating the section 19133 demand penalty.

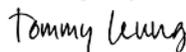
DISPOSITION

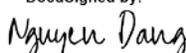
FTB's action is sustained.

DocuSigned by:

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Andrew J. Kwee
Administrative Law Judge

We concur:

DocuSigned by:

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Tommy Leung
Administrative Law Judge

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Nguyen Dang
Administrative Law Judge