

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
GINA MCCLURE

) OTA Case No. 18042674
)
) Date Issued: May 15, 2019
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)
)

OPINION

Representing the Parties:

For Appellant: Gina McClure

For Respondent: Andrew Amara, Tax Counsel III
Marguerite Mosnier, Tax Counsel IV

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Gina McClure (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$1,146.75 for the 2015 taxable year.

Office of Tax Appeals Administrative Law Judges Teresa A. Stanley, Kenneth Gast, and Nguyen Dang held an oral hearing for this matter in Torrance, California, on December 13, 2018. Following the hearing, the record was reopened for additional briefing. After receipt of responses from both parties, the record was closed on February 11, 2019, and this appeal was submitted for decision.

ISSUES

1. Did FTB properly impose the demand-to-file penalty (Demand Penalty) pursuant to R&TC section 19133?
2. Has appellant shown reasonable cause to abate the Demand Penalty?

FACTUAL FINDINGS

1. Appellant did not file a timely 2015 California tax return.
2. FTB received information that appellant had sufficient income to require that she file a return, including \$75,053 in employee wages. On April 26, 2017, FTB sent her a

Demand for Tax Return (Demand). FTB informed appellant that by May 31, 2017, she must either file her tax return, show that she had already filed a tax return, or provide information that shows she was not required to file. Appellant telephoned FTB in response to the Demand, and FTB extended appellant's time to respond to June 30, 2017.

3. Appellant did not file a return or respond by the extended due date. FTB estimated appellant's income and issued an NPA on July 17, 2017.
4. Appellant filed her 2015 return on August 5, 2017, reporting a tax liability after exemption credits of \$4,587, tax withholdings of \$9,863, and requesting a refund of \$5,276. Appellant also reported having received a Form 1099-Misc from Zenith showing "other income" of \$152,447. However, appellant attached a statement to her return explaining that she was not including the entire \$152,447 reported on the Form 1099-Misc in her income because most of that money went to her attorney. She claimed that of the \$152,447 amount, only the \$46,907.87 check she actually received from Zenith was taxable. Appellant attached a copy of the check issued to her by Zenith to the return.
5. FTB processed appellant's late-filed return, eliminated the proposed late-filing penalty (since withholdings exceeded appellant's reported tax liability) and reduced the proposed Demand Penalty to \$1,146.75 (25 percent of the reported tax liability). FTB applied appellant's withholdings to satisfy the revised liabilities, refunded the balance, and issued a Notice of Tax Return Change on September 5, 2017, reflecting the action it had taken.
6. Appellant thereafter filed a claim for refund of the Demand Penalty based on reasonable cause. In it, appellant contended that she did not timely respond to the Demand because she believed she was unable to file her return before Zenith corrected the Form 1099-MISC. She asserted that she made several attempts to get a corrected Form 1099-MISC, so that she would not have to pay taxes on income which she did not receive. Appellant further asserted that although she did not file returns for 2011, 2012, and 2013, her income in those years was insufficient to trigger a filing requirement. She asserted that she has always paid on time.
7. As in taxable year 2015, appellant did not timely file tax returns for taxable years 2011 and 2012. For each of those years FTB issued Demands, on January 10, 2013 and on January 10, 2014, respectively. Appellant did not timely respond to those Demands, and therefore, FTB issued the following NPAs: on March 18, 2013, for 2011, that became

due and payable on May 17, 2013; and, on March 10, 2014, for 2012, that became a final liability on May 9, 2014.

8. Three months after the liability became a final liability for 2011, appellant contacted FTB by phone on August 4, 2013, and informed the FTB representative that she was living off savings and unemployment compensation that year. Based on the information provided by appellant, FTB withdrew its assessment for 2011.
9. Seven months after the liability became a final liability for 2012, appellant contacted FTB by phone on December 8, 2014, to discuss collection action being taken by FTB. Appellant also called FTB on December 30, 2014, January 7, 2015, January 20, 2015, and January 29, 2015, to discuss the 2012 tax year assessment, her lack of a filing requirement, collection actions, and when her refund would be processed. FTB's notes of these discussions indicate that FTB ultimately agreed with appellant's claim that she was not required to file a 2012 tax return and withdrew its proposed assessment for 2012.
10. Appellant filed her 2011 and 2012 tax returns in late 2014, and FTB refunded to her overpaid 2012 taxes.
11. On November 21, 2017, FTB denied appellant's claim for refund for 2015, and this timely appeal followed.
12. At the appeal hearing, appellant asserted that the 2011 and 2012 NPAs were withdrawn by FTB because she had no filing requirement; therefore, she does not believe the NPAs may provide the basis for imposition of the Demand Penalty for the 2015 taxable year.

DISCUSSION

Issue 1 - Did FTB properly impose the Demand Penalty pursuant to R&TC section 19133?

California imposes a penalty for the failure to file a return or to provide information upon FTB's demand to do so, unless reasonable cause prevented the taxpayer from responding to the Demand. (R&TC, § 19133.) For individual taxpayers, FTB may only impose a Demand Penalty if a taxpayer fails to respond to a current Demand, and FTB issues an NPA under the authority of R&TC section 19087(a), after the taxpayer failed to timely respond to a request for a tax return or to a Demand, at any time during the four taxable years preceding the year for which the current Demand is being issued. (Cal. Code Regs., tit. 18, (Regulation) § 19133(b).) The Demand Penalty is designed to penalize the failure of a taxpayer to timely respond to a Demand,

and not a taxpayer's failure to pay the proper tax. (*Appeal of Bryant*, 83-SBE-180, 2019 WL 1187161; *Appeal of Hublou*, 77-SBE-102, 1977 WL 4093.)

Pursuant to R&TC section 19503, FTB has the authority to prescribe rules and regulations necessary to enforce the Personal Income Tax Law. FTB exercised that authority in promulgating Regulation section 19133, which states how FTB will exercise the discretion granted to the agency in the demand penalty statute. (See R&TC, § 19133 [FTB "may" add a penalty].) That regulation provides that, for individuals, the Demand Penalty will only be imposed if the following two conditions are satisfied:

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.

(Regulation § 19133(b)(1)-(2).)

Appellant does not dispute that she failed to timely respond to the 2015 Demand, and the evidence shows that she did not timely respond to the 2011 and 2012 Demands. At the hearing, appellant contended that the Demand Penalty was improperly imposed because FTB withdrew its assessments for taxable years 2011 and 2012. Therefore, she believes FTB did not propose any assessment during one of the four preceding taxable years as required by Regulation section 19133(b)(2). FTB conceded that the 2011 and 2012 assessments were withdrawn based on appellant's verbal representations and additional documents she submitted. However, both NPAs were withdrawn after the liabilities associated therewith had become final.

Nothing in Regulation section 19133 requires FTB to abate the Demand Penalty when an assessment for a prior year has been withdrawn. In this case, FTB has followed the plain language of the regulation. The subsequent withdrawal of the NPAs for the earlier taxable years does not absolve appellant of her obligation to timely file her tax returns or to furnish timely information in response to an FTB Demand. The fact remains that appellant failed to respond to formal Demands, and that failure is exactly the inaction that the statute was designed to penalize. (See *Appeal of Scott*, 83-SBE-094, 1983 WL 15480 [taxpayer contended the penalty did not apply because no tax deficiency existed].) We, therefore, find that FTB properly exercised its

discretion in applying the Demand Penalty to appellant's 2015 taxable year.

Issue 2 - Has appellant shown reasonable cause to abate the Demand Penalty?

Although we find that the Demand Penalty was correctly imposed in this case, appellant asserted that she had reasonable cause for her failure to timely file a return for taxable year 2015. A Demand Penalty may be abated by establishing that the failure to timely file or respond was due to reasonable cause and not due to willful neglect. (R&TC, § 19133.) On appeal, appellant bears the burden of proving that her failure to respond was reasonable. (*Appeal of Bryant, supra.*) To establish reasonable cause, appellant must demonstrate that she exercised ordinary business care and prudence. (*Appeal of Bieneman, 82-SBE-148, 1982 WL 11825.*)

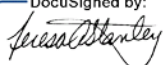
Appellant contends that she was unable to timely respond to the Demand because she was attempting to obtain a corrected Form 1099-MISC from Zenith. Appellant provided evidence showing that she made several attempts to correct the Zenith Form 1099-MISC, which overstated her earnings. However, a taxpayer's difficulty in obtaining necessary information is not reasonable cause for filing late or failing to furnish requested information upon demand. (See *Appeals of Campbell, 85-SBE-112, 1985 WL 15882.*) Appellant has not demonstrated that she was precluded from timely responding to the Demand. Appellant could have filed her return on time and included with her return a statement explaining the discrepancy between the income she received and the income reported on Form 1099-MISC. Additionally, she could have filed a return and corrected it with an amended return when she obtained the correct reports. Instead, appellant took no such action until after the deadline stated in the Demand had expired. Therefore, appellant has not established that she acted as a reasonably prudent person under the circumstances. She has not shown reasonable cause to abate the Demand Penalty.

HOLDINGS

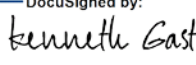
1. FTB properly imposed the Demand Penalty pursuant to R&TC section 19133.
2. Appellant has not established reasonable cause to abate the Demand Penalty.

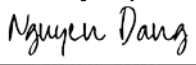
DISPOSITION

FTB's action is sustained in full.

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Teresa A. Stanley
Administrative Law Judge

We concur:

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Kenneth Gast
Administrative Law Judge

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Nguyen Dang
Administrative Law Judge