

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18011443
ERIC W. GRAB AND CHRISTINE GRAB) Date Issued: November 5, 2019
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OPINION

Representing the Parties:

For Appellants: Christine Grab
For Respondent: Eric A. Yadao, Tax Counsel III
Cynthia Kent, Tax Counsel IV

K. GAST, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Eric W. Grab and Christine Grab (appellants) appeal an action by respondent Franchise Tax Board (FTB) in denying their refund claim for the following: (1) a notice and demand (demand) penalty of \$3,540.75, and a collection cost recovery fee of \$170, plus interest, for the 2011 tax year; (2) a demand penalty of \$4,413.25, plus interest, for the 2013 tax year; and (3) a demand penalty of \$6,652.25, plus interest, for the 2014 tax year.¹

Office of Tax Appeals (OTA) Administrative Law Judges Kenneth Gast, Josh Lambert, and Linda C. Cheng held an oral hearing for this matter in Los Angeles, California, on August 20, 2019. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

ISSUES

1. Whether appellants are liable for the demand penalties imposed for the 2011, 2013, and 2014 tax years.
2. Whether appellants are liable for the collection cost recovery fee imposed for the 2011 tax year.

¹ Appellants no longer contest the liabilities on appeal for the 2008 tax year. Therefore, the late-filing penalty of \$946.75, estimated tax penalty of \$119.39, and interest of \$363.75 are not at issue.

FACTUAL FINDINGS

2011 Tax Year

1. Because FTB did not have a record of a 2011 tax return filed by either Mr. Eric W. Grab (appellant-husband) or Mrs. Christine Grab (appellant-wife), it issued a Demand for Tax Return (2011 Demand) to appellant-husband on January 4, 2013, and a Request for Tax Return to appellant-wife on January 25, 2013. The 2011 Demand and request required a reply no later than February 6, 2013, and February 27, 2013, respectively. The 2011 Demand specifically required a response by either providing a copy of a return if already filed, filing a return, or replying with information indicating why appellant-husband did not have a filing requirement.
2. In a letter dated January 30, 2013, appellants jointly replied that their return remained unfiled due to issues involving moving, medical conditions, family, and tenant litigation. On March 29, 2013, FTB issued a deferral letter to appellant-wife in her name only, granting her until June 27, 2013, to file a 2011 tax return.
3. FTB issued to appellant-husband a Notice of Proposed Assessment (NPA) dated March 11, 2013,² imposing, among other things, a demand penalty and interest.³ FTB subsequently issued to appellant-husband a Notice of State Income Tax Due, explaining the NPA was due and payable. FTB also issued to appellant-wife a separate NPA on July 22, 2013, based on solely on her estimated income.⁴
4. Appellants sent additional correspondence to FTB, contesting the estimated income proposed on the NPA issued to appellant-wife and continuing to assert they were having difficulty preparing the return due to family hardships. Appellant-wife protested the 2011 NPA issued to her.
5. Because the balance for the 2011 tax year (i.e., tax, penalties, and interest) remained

² It appears FTB issued a 2011 NPA to appellant-husband before the end of the deferral period because the deferral letter was issued in appellant-wife's name only.

³ FTB previously issued to appellant-husband a Request for Tax Return for the 2010 tax year dated February 8, 2012, followed by an NPA for that same tax year dated May 29, 2012.

⁴ Unlike the 2011 NPA issued to appellant-husband, the 2011 NPA issued to appellant-wife did not impose a demand penalty. We also note that FTB previously sent to appellant-wife a Request for Tax Return for the 2005 tax year dated January 16, 2007, following by an NPA for that same tax year dated March 19, 2007.

unpaid, FTB issued several notices to appellant-husband, including a Final Notice Before Levy on October 8, 2013, which advised him to pay the balance due no later than October 23, 2013, or a collection cost recovery fee may be imposed. FTB also issued a Notice of State Income Tax Due to appellant-wife, notifying her that the 2011 NPA became final and payment was due.⁵

6. Appellants untimely filed their joint 2011 tax return on March 1, 2014.

2013 Tax Year

7. Because FTB did not have record of a 2013 tax return filed by either appellant, it issued a Demand for Tax Return (2013 Demand) to appellant-husband on January 27, 2015, and a separate 2013 Demand to appellant-wife on April 22, 2015. The 2013 Demands required a reply by appellant-husband and appellant-wife no later than March 4, 2015, and May 27, 2015, respectively, by providing a copy of a return if already filed, explaining why they had no filing requirement, or by filing a return.
8. Appellants jointly requested additional time to file their 2013 tax return due to family hardships. On May 11, 2015, FTB issued a deferral letter to appellant-wife in her name only, allowing her until July 30, 2015, to file a 2013 return.
9. When no return was filed, FTB issued separate NPAs to appellant-husband and appellant-wife, each imposing, among other things, demand penalties and interest.
10. FTB issued several notices to appellant-wife, including a Final Notice Before Levy, advising her to pay the balance due for 2013. She replied with payment and a letter, stating she was paying the amount under protest, was due a refund, and did not owe anything.
11. Appellants untimely filed their joint 2013 return on August 3, 2016.

2014 Tax Year

12. Because FTB did not have record of a 2014 tax return filed by either appellant, it issued a Demand for Tax Return (2014 Demand) to appellant-husband on March 9, 2016, and a separate 2014 Demand to appellant-wife on April 26, 2016. The 2014 Demands required a reply by appellant-husband and appellant-wife no later than April 13, 2016, and

⁵ FTB did not impose a separate collection cost recovery fee on appellant-wife.

- June 1, 2016, respectively, by providing returns already filed, explaining why they did not have a filing requirement, or by filing a return.
13. Appellant-husband replied that his wife was ill, they were due a refund for 2014, and they were working on filing their return.
 14. Because appellants did not file 2014 returns in response to the 2014 Demands, FTB issued separate NPAs to appellant-husband and appellant-wife, each imposing, among other things, demand penalties and interest. FTB also issued separate Income Tax Due Notices to appellants.
 15. Appellants untimely filed their joint 2014 tax return on January 25, 2017.
 16. After appellants filed their untimely joint 2011, 2013, and 2014 tax returns, FTB recomputed the demand penalties to reflect the tax stated on those returns. Appellants paid the liabilities due for the 2011, 2013, and 2014 tax years, and then filed a refund claim, which FTB denied. This timely appeal followed.

DISCUSSION

Issue 1 – Whether appellants are liable for the demand penalties imposed for the 2011, 2013, and 2014 tax years.

Appellants bear the burden of proving entitlement to their refund claim, which means they must not only prove the amounts paid were incorrect, but must also produce evidence to establish the proper amounts due, if any. (*Dicon Fiberoptics, Inc. v. Franchise Tax Bd.* (2012) 53 Cal.4th 1227, 1235.) For reasons discussed below, we find appellants have not met their burden of proving they are owed a refund of the demand penalties.

Imposition of the Demand Penalties

R&TC section 19133 provides that if a taxpayer fails to file a return upon notice and demand by FTB, then FTB may impose a penalty of 25 percent of the amount of tax assessed pursuant to R&TC section 19087, unless the failure is due to reasonable cause and not willful neglect. Here, appellants argue the demand penalties were improperly imposed. They contend they properly responded to the 2011, 2013, and 2014 Demands because they provided timely replies, such as requests for extensions or letters explaining why they could not file their returns due to hardships. We disagree.

California Code of Regulations, title 18, section 19133(b)(1), provides that for individuals, the demand penalty will only be imposed if, among other requirements, “the taxpayer fails to timely respond to a current Demand for Tax Return *in the manner prescribed.*” (Emphasis added.) Here, appellants’ replies do not satisfy this requirement. The Demands advised appellants to respond by providing a copy of a return if already filed, by filing a return, or by replying with information indicating why they did not have a filing requirement. Because appellants’ responses did not dispute the fact that they were required to file tax returns for the 2011, 2013, and 2014 tax years (and instead focused on the difficulties appellants were having in preparing their returns), they did not respond to the Demands “in the manner prescribed.” To conclude otherwise would allow taxpayers to indefinitely delay filing their returns by providing any kind of response to a demand notice, which would defeat the penalty’s purpose of requiring prompt filing of returns upon notice.

Appellants also contend they made timely tax payments, including an overpayment from the 2010 tax year that should have been applied to the 2011 tax year. Therefore, they argue no penalty is owed since they paid their taxes on time. However, the demand penalty is computed *without* regard to payments and withholding credits. (*Appeal of Scott* (83-SBE-094) 1983 WL 15480.) It is designed to penalize a taxpayer for failing to respond to a Demand, not for failing to pay the proper tax due. (*Appeal of Hublou* (77-SBE-102) 1977 WL 4093.) Accordingly, the demand penalties were properly imposed for 2011, 2013, and 2014 tax years.⁶

Reasonable Cause

Since the demand penalties were properly imposed, the remaining issue is whether appellants have established reasonable cause to abate them. 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) 1982 WL 11825.) The taxpayer’s reason for failing to respond must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances.

⁶ We also note that, for the years at issue, FTB sent separate notices (e.g., requests and/or demands for tax returns and NPAs) to appellant-husband and appellant-wife. While we recognize FTB’s practice can impose an administrative burden on appellants in tracking and properly responding to these notices, under the facts of this case, we do not place legal significance on this practice for purposes of evaluating whether the demand penalties were properly imposed. Appellants ultimately filed joint tax returns and, therefore, are jointly and severally liable for the tax and resulting demand penalties originally imposed on one spouse and subsequently revised based on their combined income and tax when a joint return is filed. (See R&TC, § 19006(b).)

(*Appeal of Malakoff* (83-SBE-140) 1983 WL 15525.) The taxpayer bears the burden of proving reasonable cause exists to abate the demand penalty. (*Ibid.*)

Appellants assert they faced numerous hardships that prevented them from timely responding to the 2011, 2013, and 2014 Demands. However, we find these hardships do not rise to the level constituting reasonable cause to abate the demand penalties.

Appellants contend they were unable to timely respond to the Demands because appellant-wife and their newborn child were experiencing illnesses. In addition, they cared for their elderly parents, who also had medical issues. The standard for reasonable cause based on illness is a high one. While significant illness or other personal difficulties may constitute reasonable cause, taxpayers must present credible and competent proof that despite the exercise of ordinary business care and prudence, they were continuously prevented from timely filing a return. (*Appeal of Halaburka* (85-SBE-025) 1985 WL 15809.) Where personal difficulties simply caused taxpayers to sacrifice the timeliness of one aspect of their affairs to pursue other aspects, taxpayers must bear the consequences of that choice. (*Appeal of Halaburka, supra*; *Appeal of Orr* (68-SBE-010) 1968 WL 1640.)

Here, although we do not question that appellants or their close family members were experiencing severe medical issues, we do not believe appellants were continuously prevented from responding to the Demands in the manner prescribed. For example, during the relevant times at issue, the record shows that appellant-husband worked as a full-time employee, and appellants pursued recreational activities and took various trips, some related to appellant-husband's business travel, as well as maintained an online travel blog. Therefore, appellants were not continuously prevented from responding to the Demands.

Appellants assert they were also prevented from responding to the Demands because appellant-husband worked long hours and frequently travelled for work. "However, being too busy is an insufficient reason to relieve [appellants] of [their] statutory obligation to file a timely tax return," which they failed to do in response to the Demands. (*Appeal of Loew's San Francisco Hotel Corp.* (73-SBE-050) 1973 WL 2783.)

Appellants further assert they had difficulty obtaining tax documents from appellant-husband's previous employer. They maintain this prevented them from filing their 2010 tax return on time, which allegedly also caused them to fail to respond to the 2011 Demand by filing their 2011 tax return. However, the fact that tax information is unavailable or difficult to obtain

is insufficient to constitute reasonable cause. (*Appeal of Malakoff, supra.*) Appellants also do not explain why the 2010 tax information was needed to prepare the 2011 tax return, and if it was, why they could not have reasonably estimated their California taxes and filed a 2011 return by the due date of the 2011 Demand, and then amended it after receiving the relevant tax information.

Appellants contend they were preoccupied with litigation with their tenant, which also prevented them from responding to the Demands. However, the pursuit of litigation at the expense of meeting tax deadlines does not constitute reasonable cause. (*Appeal of Orr, supra.*)

Finally, appellants make numerous allegations that the reason they filed their tax returns late was “a direct result of improprieties committed by the FTB.” For example, they allege FTB lost or misapplied their estimated tax payments, FTB did not provide information on tax payments held in suspense until a return was filed, and FTB “persistently threaten[ed] to reinstate” wage garnishment collection activities. However, appellants’ allegations do not explain why they were prevented from filing tax returns in response to the Demands. To us, it appears that if they had filed such returns in response to the Demands, that would have been sufficient to avoid imposition of the demand penalties, even if appellants had to claim inaccurate tax payments on the returns and then amend them to claim accurate payments.⁷ Accordingly, appellants are liable for the demand penalties.

Issue 2 – Whether appellants are liable for the collection cost recovery fee imposed for the 2011 tax year.

R&TC section 19254(a)(1) provides that FTB shall impose a collection cost recovery fee if a person fails to pay an amount of tax, interest, penalty, or other liability due and FTB has mailed a notice for payment that advises that continued failure to pay may result in collection action. The statute does not provide any exception for reasonable cause. (*Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.)

Here, the record indicates that FTB issued a Final Notice Before Levy on October 8, 2013, which advised appellant-husband that a collection cost recovery fee may be imposed if FTB did not receive full payment of the liabilities stated in that notice. Appellants do

⁷ To the extent appellants’ allegations are based on their belief they are entitled to a remedy for FTB’s actual or alleged violation of substantive or procedural rights, we do not have jurisdiction over this issue. (See Cal. Code Regs., tit. 18, § 30104(d).)

not dispute they received such notice. In addition, the record does not show they timely paid the liabilities (i.e., tax, penalties, and interest) in response to the notice. Accordingly, FTB properly imposed the fee, and there is no basis for abating it.⁸

HOLDINGS

1. Appellants are liable for the demand penalties for the 2011, 2013, and 2014 tax years.
2. Appellants are liable for the collection cost recovery fee for the 2011 tax year.

DISPOSITION

FTB’s action in denying appellants’ refund claim is sustained.

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 Kenneth Gast
 Administrative Law Judge

We concur:

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 Josh Lambert
 Administrative Law Judge

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 Linda C. Cheng
 Administrative Law Judge

⁸ As with the demand penalties, we note that appellants are jointly and severally liable for the cost collection recovery fee, even though the fee was originally imposed only on appellant-husband.