

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18042860  
**ALBERT E. HIRST, III** )  
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**OPINION**

Representing the Parties:

For Appellant: Ernest H. Mattison, Jr., CPA

For Respondent: Eric A. Yadao, Tax Counsel III

K. GAST, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19045, Albert E. Hirst, III (appellant) appeals an action by respondent Franchise Tax Board (FTB) in proposing tax of \$18,733, a late-filing penalty of \$4,683.25, a notice and demand (demand) penalty of \$5,018.75, and a filing enforcement cost recovery fee of \$81, plus interest, for the 2015 tax year. Appellant waived his right to an oral hearing. Therefore, this matter is being decided based on the written record.

**ISSUES**

1. Whether appellant has established reasonable cause to abate the late-filing penalty.
2. Whether appellant is liable for the demand penalty.
3. Whether appellant is liable for the filing enforcement cost recovery fee.

**FACTUAL FINDINGS**

1. Through its filing enforcement program, FTB received information from numerous sources, including appellant’s law practice, indicating he had earned sufficient income that required him to file a 2015 California resident income tax return.
2. Because appellant had not filed a 2015 tax return, FTB issued a Demand for Tax Return. The demand required appellant to respond by May 24, 2017, by either filing a 2015 tax

- return, sending a copy of the return if one had been filed, or explaining why he was not required to file a return. Appellant did not respond.
3. Subsequently, FTB issued a Notice of Proposed Assessment (NPA), estimating appellant's taxable income and proposing tax, a late-filing penalty, a demand penalty,<sup>1</sup> and a filing enforcement cost recovery fee, plus interest, in the amounts noted above.
  4. Appellant protested the NPA. He contended FTB overestimated his income because most, if not all, of that income was generated by and taxable to his C corporation, through which he conducted his law practice. He further contended he had been "struggling with serious medical issues," which is why he did not file a 2015 tax return. Appellant suggested he would file a 2015 tax return, but he did not.
  5. FTB issued a Notice of Action, affirming its NPA. This timely appeal followed.
  6. During briefing, appellant filed an untimely, original 2015 tax return (Form 540), but FTB initially rejected it because it omitted income that FTB believed was attributable to appellant. Appellant then filed an untimely, original 2015 corporate tax return (Form 100) for his law practice and reported the omitted income on that return. Appellant also filed an amended 2015 personal income tax return (Form 540X) that reflected additional income and tax owed after he prepared his corporation's tax return.<sup>2</sup> FTB accepted the amended return, "subject to [its] authority to examine that return." Although FTB still maintains it properly imposed the penalties and the fee, it stated that based on the tax reflected in the amended return, it will reduce the late-filing penalty to \$4,258.25 and the demand penalty to \$4,898.50.<sup>3</sup>

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<sup>1</sup> FTB previously issued an NPA dated April 4, 2016, for appellant's failure to file a 2014 tax return, which was issued after appellant did not timely respond to FTB's Demand for Tax Return dated February 3, 2016, for his 2014 tax return. FTB also previously issued an NPA dated March 26, 2012, for appellant's failure to file a 2010 tax return, which was issued after appellant did not timely respond to FTB's Demand for Tax Return dated January 25, 2012, for his 2010 tax return.

<sup>2</sup> The original and amended tax return reflected a married filing jointly filing status, as opposed to a single filing status reflected in the NPA. Because appellant's spouse was not named as a party to any of the above-referenced notices, only Mr. Albert E. Hirst, III is included as the appellant in this matter.

<sup>3</sup> Since FTB accepted the tax stated in appellant's amended 2015 tax return, whether its NPA properly computed the tax owed is no longer at issue and will not be addressed herein.

## DISCUSSION

### Issue 1 - Whether appellant has established reasonable cause to abate the late-filing penalty.

R&TC section 19131 imposes a penalty for the failure to file a return on or before the due date, unless it is shown that the late filing is due to reasonable cause and not due to willful neglect. (R&TC, § 19131(a).) To establish reasonable cause, “the taxpayer must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that such cause existed as would prompt an [ordinarily] intelligent and prudent businessman to have so acted under similar circumstances.” (*Appeal of Tons* (79-SBE-027) 1979 WL 4068.) A late-filing penalty imposed by FTB is presumed to be correct, and the burden of proof is on the taxpayer to establish that reasonable cause exists to support an abatement of the penalty. (*Ibid.*)

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.)

Appellant contends he untimely filed his 2015 tax return due to “the seriousness of his stroke condition.” As support, he submits a one-page hospital document entitled “Patient Discharge Instructions,” dated July 9, 2017, indicating he had a stroke or experienced stroke-like symptoms in mid-2017. Appellant also submits an undated letter from his doctor, alleging that appellant represented to his doctor that he had suffered a stroke on July 6, 2017, and he further “suffered some cognitive impairment,” which “would have existed within the year [i.e., 2016] leading up to the stroke and continuing thereafter.”

However, during 2016—the year his 2015 tax return was due—appellant was gainfully employed by his law corporation, earning wages of \$114,000. Therefore, we find appellant’s illness did not incapacitate him to such an extent that he was unable to timely file his 2015 tax return. (See, e.g., *Marrin v. Commissioner*, T.C. Memo. 1997-24, *affd.* (2d Cir. 1998) 147 F.3d 147 [reasonable cause for late-filing not found where taxpayer was a full-time employee and was

also actively transacting business in the securities market despite claimed depression].) Accordingly, appellant has not established reasonable cause to abate the late-filing penalty.

Issue 2 - Whether appellant is liable for the demand penalty.

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. California Code of Regulations, title 18, (Regulation) section 19133 further provides that for individuals, the demand penalty will only be imposed if the follow 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), emphasis added.)

We requested additional briefing to determine whether, under subsection (b)(2), either (1) the prior tax year NPA must have been issued “at any time during the four-taxable-year period preceding” the current tax year for which FTB seeks to impose the demand penalty, or (2) the prior tax year NPA simply needs to be issued *for* a tax year within that four-taxable-year period regardless of when the NPA is issued. However, we do not need to decide this issue because FTB submitted prior year notices that satisfy either interpretation. Specifically, an NPA was issued for the 2010 tax year dated March 26, 2012 (satisfying the first interpretation), and an NPA was issued for the 2014 tax year (satisfying the second interpretation). Therefore, we find the demand penalty was properly imposed.

The remaining issue is whether appellant has established reasonable cause to abate the demand penalty. However, appellant presents the same arguments as those for the late-filing penalty, which we rejected above. In addition, the record reflects that on May 15, 2017, appellant was able to file numerous late California returns for his law corporation for the 2004 through 2011 tax years. That occurred during the time-period appellant was required to respond

(i.e., by May 24, 2017) to FTB's Demand for Tax Return for the 2015 tax year, but he did not respond. Accordingly, appellant has not shown reasonable cause exists to abate the demand penalty.

Issue 3 - Whether appellant is liable for the filing enforcement cost recovery fee.

R&TC section 19254(a)(2) provides that, if any person fails or refuses to make and file a return within 25 days after FTB mails to that person a formal Demand for Tax Return, FTB is required to impose a filing enforcement cost recovery fee. The statute does not allow for abatement of or relief from the fee, even on a showing of reasonable cause. (*Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.) Here, FTB issued to appellant a Demand for Tax Return for the 2015 tax year, which notified him that this fee would be imposed for failure to timely respond to the demand. Appellant did not respond. Accordingly, the fee was properly imposed, and we have no basis to abate it.

HOLDINGS

1. Appellant has not established reasonable cause to abate the late-filing penalty.
2. Appellant is liable for the demand penalty.
3. Appellant is liable for the filing enforcement cost recovery fee.

DISPOSITION

FTB’s action is modified in accordance with its concession, based on the revised tax stated in appellant’s amended 2015 tax return, to reduce the late-filing penalty to \$4,258.25 and the demand penalty to \$4,898.50. Otherwise, FTB’s action is sustained.

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 Kenneth Gast  
 Administrative Law Judge

We concur:

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 Linda C. Cheng  
 Administrative Law Judge

DocuSigned by:  
  
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 Elliot Scott Ewing  
 Administrative Law Judge

Date Issued: 12/19/2019