

HEARING
OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Franchise/

Income Tax Appeals Hearing of:

CARL L. GIORDANO,

OTA Case No. 18053180

Appellant.

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

TUESDAY, FEBRUARY 25, 2020

10:00 A.M.

OFFICE OF TAX APPEALS HEARINGS
400 R STREET
HEARING ROOM
SACRAMENTO, CALIFORNIA 95811

Reported by Peter Petty

APPEARANCES

Panel Lead:

JOHN JOHNSON, ADMINISTRATIVE LAW JUDGE

STATE OF CALIFORNIA
OFFICE OF TAX APPEALS HEARINGS
400 R STREET
SACRAMENTO, CALIFORNIA

Panel Members:

SUZANNE BROWN, ADMINISTRATIVE LAW JUDGE

ELLIOTT SCOTT EWING, ADMINISTRATIVE LAW JUDGE

For Appellant:

CARL L. GIORDANO, TAXPAYER

For Franchise Tax Board:

JOEL SMITH, TAX COUNSEL

EXHIBITS

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(Exhibits premarked, described and retained by Administrative Law Judge.)	

1 TUESDAY, FEBRUARY 25, 2020 - 10:00 A.M.

2 ALJ JOHNSON: This is the appeal of Carl L. Giordano.
3 It's OTA Case Number 18053180. It is 10:00 a.m. on February
4 25th, 2020, here in beautiful Sacramento, California.

5 I am the lead ALJ for this hearing, John Johnson.
6 With me today are Judge Brown -- good morning, Judge Brown.

7 ALJ BROWN: Good morning.

8 ALJ JOHNSON: And good morning as well to Judge
9 Ewing.

10 ALJ EWING: Good morning.

11 ALJ JOHNSON: Thank you.

12 Let me have the parties introduce themselves for the
13 record, starting with Appellant.

14 THE APPELLANT: Carl Giordano.

15 ALJ JOHNSON: Thank you. And is "Mr. Giordano" okay,
16 if we address you that way?

17 THE APPELLANT: Sure.

18 ALJ JOHNSON: Okay. And Franchise Tax Board?

19 MR. SMITH: Joel Smith.

20 ALJ JOHNSON: Thank you.

21 Mr. Giordano, I know you have the Tax Appeals
22 Assistant Program, or TAAP, T-A-A-P, representing you on
23 appeal. They did not respond to the hearing notice or appear
24 on your behalf at the prehearing conferences, so, just to be
25 clear, they're not representing you today. Is that correct?

1 THE APPELLANT: Apparently not.

2 ALJ JOHNSON: Okay. Thank you.

3 I want to remind everybody OTA, the Office of Tax
4 Appeals, is an independent agency. We have no ex parte
5 communications with the Franchise Tax Board or Appellant
6 regarding this matter. Everything that we're going to base
7 our decision on is what's been presented by the parties
8 through briefing and today, and everything that we've
9 received has been shared with both parties.

10 Furthermore, each administrative law judge at OTA is
11 bound by the Code of Judicial Ethics, and we're bound to be
12 independent and impartial.

13 We have read the briefs and examined the submitted
14 exhibits, and we are looking forward to your testimony and
15 arguments today.

16 We appreciate, also, that it's taken many steps to
17 get to this point, and thank the parties for their efforts
18 thus far.

19 The issue on appeal is whether the demand penalty is
20 properly imposed and, if so, whether Appellant has shown
21 reasonable cause for the failure to the demand penalty.

22 Appellant has provided Exhibits 1 and 2. Franchise
23 Tax Board has provided Exhibits A through I. The parties
24 have stated they have no objections to the exhibits, and
25 those are, therefore, admitted as evidence into the record.

1 With that, we are ready to begin with the parties'
2 presentations. We will start with Appellant. If you're
3 ready, I can swear you in.

4 (Exhibits admitted into evidence)

5 THE APPELLANT: I'm ready.

6 ALJ JOHNSON: Please stand and raise your hand.

7 (Appellant sworn in.)

8 ALJ JOHNSON: Thank you. Now, you'll have up to 10
9 minutes. You can begin whenever you're ready.

10 THE APPELLANT: All right. For a housekeeping, I
11 just want to confirm that the Board is, in fact, employed by
12 the state of California. Is that correct?

13 ALJ JOHNSON: The Office of Tax Appeals is an agency
14 within the state of California, correct.

15 THE APPELLANT: So you are California employees?

16 ALJ JOHNSON: Correct.

17 THE APPELLANT: State of California employees, and
18 you investigate the state of -- so you're investigating a
19 party. You work for the party involved in this?

20 ALJ JOHNSON: We don't work for the Franchise Tax
21 Board, no.

22 THE APPELLANT: But you work for the state of
23 California?

24 ALJ JOHNSON: That is correct.

25 THE APPELLANT: Franchise Tax Board is the state of

1 California, is it not?

2 ALJ JOHNSON: They also are an agency under state of
3 California, correct.

4 THE APPELLANT: Okay. Mine is really short and
5 sweet. I really don't have much to present, other than on or
6 about March 1st of '16, I received a notice from Franchise
7 Tax Board indicating that they -- a demand notice, I guess
8 you might say -- and I returned that around March 7th, asking
9 for a six-month extension.

10 During that time period, I've never received any
11 other correspondence from the Franchise Tax Board, and I, in
12 fact, did complete my return within the six-month time frame.
13 After I got that -- after my return was submitted, then I
14 received a letter from them stating that I owed them
15 penalties in the amount of \$608 because I did not file -- or
16 that I "ignored," is what I think they mentioned -- I ignored
17 their demand letter.

18 My defense would be that I sent in an extension
19 around March 7th, asking for the six-month time extension,
20 and I never received any other correspondence from them
21 saying yes or no. I assumed it was a yes, because I never
22 received anything else saying, "No, we do not" -- "We're not
23 allowing you the six months' time extension."

24 Then I received, like I said, the notice of demand
25 for penalties, and then I appealed that through the Appeals

1 Board, you might say. So I don't really have any other -- I
2 mean, other than what's in the 1 and 2 for exhibits, I don't
3 have anything else to submit.

4 ALJ JOHNSON: All right. Well, thank you.

5 Franchise Tax Board, do you have any questions for
6 Appellant?

7 MR. SMITH: No.

8 ALJ JOHNSON: Okay. And any questions from the
9 panel? Judge Ewing?

10 ALJ EWING: No.

11 ALJ JOHNSON: Okay. And Judge Brown?

12 ALJ BROWN: No.

13 ALJ JOHNSON: All right. Thank you.

14 Franchise Tax Board, then, you'll have up to 10
15 minutes. You can begin whenever you're ready.

16 MR. SMITH: Thank you. Good morning.

17 There are two parts to this appeals issue regarding
18 the imposition of the demand penalty. First is whether
19 Respondent properly imposed the demand penalty for the 2014
20 tax year. As I will explain, under California Code of
21 Regulations, Title 18, Section 19133, imposition of the
22 demand penalty is proper.

23 Second is whether Appellant has established
24 reasonable cause to abate the demand penalty. The records
25 shows Appellant has not established reasonable cause.

1 The facts are straightforward. As Appellant shared,
2 when Respondent did not receive a timely 2014 tax return from
3 Respondent, Respondent issued a demand for tax return. When
4 Respondent failed to received a response, Respondent issued a
5 notice of proposed assessment imposing the demand penalty.
6 Thereafter, Appellant filed his 2014 tax return. Respondent
7 accepted the return, and adjusted the demand penalty
8 accordingly.

9 Respondent imposed the demand penalty under authority
10 granted by Revenue and Taxation Code Section 19133. This
11 section gives Respondent discretionary authority to impose a
12 demand penalty. As a result of this discretion, Respondent
13 adopted Regulation Section 19133 in 2004.

14 Under Regulation Section 19133(d), the demand penalty
15 for Appellant's 2014 tax year is proper because Respondent
16 issued a prior notice of proposed assessment to Appellant for
17 the 2013 tax year, after issuing a request for tax return.

18 The rules of statutory construction govern the
19 interpretation of regulations. California courts have held
20 that the fundamental objective when interpreting a regulation
21 is to determine the intent of the agency adopting the
22 regulation.

23 To start, courts look to the plain meaning of the
24 language to determine the agency's intent. Under Butts v.
25 Board of Trustees, which cites to Code of Civil Procedure

1 Section 1858, when interpreting a regulation, courts must
2 first give meaning to every word and phrase in the
3 regulation. Courts must read the regulation as a whole, and
4 courts cannot omit what has been inserted into the
5 regulation.

6 After considering the entire regulation, if the plain
7 meaning is ambiguous or inconsistent, California courts give
8 great deference to the interpretation of the regulation by
9 the adopting agency. Under Yamaha v. Board of Equalization,
10 a California Supreme Court decision, California courts defer
11 to the agency's expertise when it touches on policy issues
12 within the agency's purview, and when the agency has shown
13 consistent enforcement of the regulation.

14 So now we need to apply the rules of statutory
15 construction to Regulation Section 19133. The plain language
16 in Subdivisions B and D of the regulation creates ambiguity
17 in the regulation, meaning courts cannot simply look at the
18 plain meaning of the language. Respondent is not aware of
19 any California authority that suggests Subdivision D should
20 be ignored if it is inconsistent with Subdivision B.

21 In previous demand penalty opinions, the Office of
22 Tax Appeals has quoted Cook v. Commissioner, a Seventh
23 Circuit case which is not mandatory California authority, to
24 support the assertion that Subdivision D of the regulation
25 should be ignored. Cook v. Commissioner held it was proper

1 to consider an example in a federal treasury regulation that
2 was consistent with the other parts of the regulation.

3 Cook v. Commissioner did not consider the situation
4 here today, where two parts of the same regulation are
5 inconsistent. Therefore, in accordance with California law,
6 Subdivision D should not be ignored, and deference should be
7 given to Respondent's longstanding interpretation of the
8 regulation.

9 As stated, Revenue and Taxation Code Section 19133
10 grants Respondent discretionary authority to impose a demand
11 penalty. In order to provide uniform exercise of that
12 discretion, Respondent adopted Regulation Section 19133 more
13 than 15 years ago to provide clear direction to California
14 taxpayers.

15 Respondent adopted the regulation with the intent to
16 codify Respondent's demand penalty policy to penalize recent
17 repeat non-filers. In addition, Respondent adopted
18 Regulation Section 19133 after substantial analysis on the
19 imposition of the demand penalty, with input from the three-
20 member Franchise Tax Board.

21 Respondent's interpretation of the regulation
22 provides certainty to taxpayers. That is, Respondent will
23 impose the demand penalty if it issued a notice of proposed
24 assessment to the taxpayer for one of the immediately
25 preceding four tax years. An alternative interpretation that

1 ignores Subdivision D of the regulation, and ignores
2 Respondent's intent, is not consistent with California law,
3 creates unnecessary confusion, and puts taxpayers at a
4 disadvantage if their distant filing history can expose them
5 to the demand penalty.

6 Respondent's interpretation of Regulation Section
7 19133 addresses an area of the agency's expertise where the
8 agency has shown consistent enforcement of the regulation for
9 more than 15 years, and it touches on policy issues within
10 the agency's purview. Therefore, under Yamaha v. Board of
11 Equalization, deference should be given to Respondent's
12 interpretation. Respondent properly imposed the demand
13 penalty for the 2014 tax year.

14 As for abatement of the demand penalty, under Revenue
15 and Taxation Code Section 19133, Respondent's imposition of
16 the demand penalty is presumed proper unless Appellant is
17 able to show that his failure to timely reply to the demand
18 for tax return was due to reasonable cause and not due to
19 willful neglect.

20 As stated in The Appeal of Tao Xie, a precedential
21 OTA opinion, Appellant must provide credible and competent
22 evidence to support a claim of reasonable cause. Further,
23 unsupported assertions do not establish reasonable cause.
24 Here Appellant has not provided any credible and competent
25 evidence to support abatement of a demand penalty. Appellant

1 has only made an unsupported assertion that he requested a
2 six-month extension.

3 It is Respondent's normal course of business, when a
4 taxpayer requests an extension on a demand, to issue a letter
5 to the taxpayer informing them of the extension. There is no
6 record of an extension being granted or an extension being
7 requested from Appellant for this matter. For Appellant's
8 2015 tax year, which is not the tax year at issue, Appellant
9 was granted an extension to respond to the demand. Again,
10 there is no evidence of that for the 2014 tax year.

11 So, as such, based on California law and evidence in
12 the record, Respondent requests you sustain its position. I
13 can answer any questions you might have.

14 ALJ JOHNSON: Thank you.

15 We'll turn to Appellant. We have afforded five
16 minutes for you if you have anything that you would like to
17 reply or add at this point.

18 THE APPELLANT: Yes. I'd like to reply that I heard
19 a lot of, seemed like, lawyer talk, but I still don't -- I
20 still haven't seen any proof that I ignored their demand.
21 Where is their proof? I mean, is it possible that the letter
22 that I sent off was lost in the mail? Is it possible that it
23 was lost by one of the employees of the Franchise Tax Board?

24 Also, I don't understand why I just can't be assessed
25 a late fee. What did the state of California -- how were

1 they damaged by using my money free for a two-year period?
2 What did they suffer -- what damage did they suffer having my
3 money for two years, free, and why can't I be afforded the
4 same luxury that the state of California is afforded, where
5 they say they just have to send the letter to the last known
6 address? I've been at the same residence for 20 years, yet
7 they've used three different addresses to correspond with me.

8 And, lastly, I would just like to know who else,
9 other than the state of California or a government agency,
10 would be able to get away with something like this? If I was
11 running a private business, and I was doing something similar
12 to this, I don't think I'd be in business long, in other
13 words, a 25-percent penalty over -- like I said earlier, they
14 had free use of my money for two years. How were they
15 damaged by them not receiving my tax return in a timely
16 manner? They had my money for two years, free.

17 I don't have any other questions, other than that.

18 ALJ JOHNSON: All right. Thank you.

19 Let me turn to my panel members and see if they have
20 any questions for the parties. I'll start with Judge Ewing.

21 ALJ EWING: I do not.

22 ALJ JOHNSON: All right. Thank you.

23 And Judge Brown?

24 ALJ BROWN: I do not.

25 ALJ JOHNSON: All right. Mr. Giordano, I believe,

1 from your briefs that were provided, the assertion is that
2 you received the return-addressed envelope from Franchise Tax
3 Board with that demand, and you used that to send back the
4 request for the extension. Is that correct?

5 THE APPELLANT: That's right.

6 ALJ JOHNSON: And you didn't happen to keep a copy of
7 the extension request?

8 THE APPELLANT: I did not.

9 ALJ JOHNSON: Understandable. Okay. Thank you.

10 THE APPELLANT: But, as the state mentioned earlier,
11 I've had in the past -- he mentioned prior -- or the next tax
12 year. In '15, I did the same thing.

13 ALJ JOHNSON: Right. Thank you.

14 Franchise Tax Board, what is the situation? What
15 happens when there's potentially a letter that gets lost in
16 the mail or lost at Franchise Tax Board? What's the general
17 law, as you understand it, regarding that?

18 MR. SMITH: Well, the general law, as I explained, is
19 that there needs to be credible and competent evidence.
20 Generally, that's considered a, you know, certified mail
21 receipt in this particular situation. We've also got -- if a
22 phone call is made, that's documented, and if something is
23 received in the mail, that's also documented. There's
24 nothing in our files to suggest that anything was filed. So
25 the general legal principle is that it's the taxpayer's

1 burden to establish reasonable cause.

2 ALJ JOHNSON: All right. Thank you.

3 THE APPELLANT: I might add, though, that he
4 mentioned that there's nothing certified mail, but none of
5 the letters they sent me were ever certified, either.

6 ALJ JOHNSON: All right. Thank you.

7 Going to the regulation, if we can, just for a
8 minute, I know you mentioned that the purpose of the
9 regulation was to address recent repeat non-filers. What do
10 you mean by "recent"? Is that defined in any of the
11 legislative language or in the statute or regulation itself?

12 MR. SMITH: No. That's just a term that I've used.
13 That's the intent. It's not to -- it's to look back at the
14 immediately preceding four tax years, and to determine if a
15 request for demand was issued for one of those four tax
16 years, and that's how it's been applied for more than 15
17 years, and that's how the system -- the filing system works.

18 If it's to be interpreted another way, it doesn't fit
19 with how the filing enforcement works. If the prior year,
20 say, in 2013, if that NPA doesn't meet the regulation
21 standard, then the FB would never be able to impose a demand
22 penalty if someone were to fail to file in the prior year,
23 because the FB waits until a return is not filed to reach out
24 to the taxpayer to inquire about a filed return.

25 So that's why it's applicable to the four tax years,

1 not calendar years, looking back, and, by extension, if it
2 were to be considered based on when the NPA is issued, not
3 the tax year that it's issued for, then a taxpayer's failure
4 to file seven, eight, nine years into the past could expose
5 them to the demand penalty under that reading, and that is
6 not at all what the demand penalty regulation was adopted to
7 address.

8 ALJ JOHNSON: Okay. And the regulation -- so what is
9 the intent behind allowing sort of having to have this prior
10 failure to respond to a request or demand that resulted in an
11 NPA? What is the purpose of allowing sort of a freebie, if
12 you could use that term, before then imposing a demand
13 penalty on the second infraction? Is that a benefit to the
14 taxpayer, or what's the purpose of that?

15 MR. SMITH: Right. So, before the regulation -- the
16 regulation just says that FTB may impose the demand penalty,
17 and so it's a discretionary statute. FTB has discretionary
18 authority to do it. And so the regulation was adopted to
19 make that discretion uniform and applicable to all individual
20 taxpayers.

21 So is it taxpayer-friendly? Yes, because the statute
22 could give FTB authority to impose a demand penalty right
23 away, and the decision was made to give them the -- give
24 taxpayers the one "freebie," as you called it, within the
25 previous four tax years, to impose the demand penalty. So

1 the reason for the regulation is to just create uniform
2 application of the demand penalty for all individual
3 taxpayers.

4 ALJ JOHNSON: All right. Was the purpose of the
5 regulation to provide sort of a warning or a notice to
6 taxpayers before being hit with the penalty, or is it merely
7 to not give the penalty to individuals who had made one
8 mistake, and instead try to target repeat non-filers?

9 MR. SMITH: Meaning that we would never send a
10 request or demand, we'd just impose the penalty right away?

11 ALJ JOHNSON: Maybe that was a false "either/or." Is
12 there any intent in the regulation to give taxpayers a
13 warning that a repeat failure to respond to a demand could
14 result in a penalty? Is that part of the intent of the
15 regulation or not?

16 MR. SMITH: I mean, I suppose that it could be. I
17 mean, the intent is to uniformly apply the demand penalty to
18 individual taxpayers, and by letting a taxpayer know -- I
19 mean, that's just the process of the penalty, as far as they
20 got a request or a demand, and you didn't respond to it, for
21 one of the four previous tax years. So that exposes you to
22 the penalty. You still get the request or demand for
23 the -- you get the demand for the following year, to give you
24 the heads-up that it is a possible penalty, and that, you
25 know, you need to respond accordingly.

1 ALJ JOHNSON: Okay.

2 MR. SMITH: I hope that answers the question. I'm a
3 little confused by the question.

4 ALJ JOHNSON: I believe so, yes. One question I have
5 is just, you mentioned how, if you read it the other way,
6 that the NPA had to be issued during one of the preceding
7 years to the tax year at issue, you can have a situation
8 where the tax year would be seven years prior, for example,
9 and my question is, when you're looking at, say, 2013 and
10 2014, you have a situation where, for example, in this
11 appeal, the request for the 2013 tax return didn't come until
12 after the filing due date for the 2014 tax year.

13 My question is, if that sort of request nonresponse
14 NPA for 2013 that came out in June 2015 -- if that was
15 supposed to act as sort of a notice to the taxpayer that "You
16 need to respond to these requests. Otherwise, you could get
17 hit with a penalty," is it meeting that purpose if it's
18 coming out after, sort of, the failure has already happened
19 for the second year?

20 MR. SMITH: Right. And, I mean, it's not that, when
21 you notified, the penalty is automatically imposed. There is
22 the notice that "Hey. If you don't respond, this penalty
23 will be imposed."

24 ALJ JOHNSON: So the demand itself, for the second
25 year, would be notice that the penalty is going to be

1 imposed?

2 MR. SMITH: Correct. It doesn't mean that it will be
3 imposed.

4 ALJ JOHNSON: Okay. And just a last question, and I
5 appreciate Mr. Giordano for being patient during this sort of
6 lawyer speak. You mentioned the inconsistency between
7 Subsections or Divisions B and D. So, in B, it does say,
8 "During the four-year period," rather than "For that
9 four-year period." Do you have any thoughts or explanations
10 as to why "during" was used there, rather than "for"?

11 MR. SMITH: No, I do not have any thoughts. I know
12 how it's been applied for more than 15 years, which is how
13 I've explained --

14 ALJ JOHNSON: Okay. I don't mean --

15 MR. SMITH: -- which is consistent with Subdivision
16 D.

17 ALJ JOHNSON: Subdivision D is an example, correct,
18 provides a set of fact -- a fact pattern?

19 MR. SMITH: Yes. Subdivision D is -- in a part of
20 the regulation, is an example.

21 ALJ JOHNSON: Does that Subdivision D, particularly
22 that example -- does it provide sort of the four corners of
23 when the penalty is going to be imposed, or is it simply one
24 fact pattern?

25 MR. SMITH: It provides an example of tax years 1999

1 and 2001. The fact pattern that it outlines does
2 not -- would not result in the demand penalty under
3 Subdivision B. So that's where the ambiguity exists, and
4 where, you know, the next step in statutory construction
5 needs to be taken.

6 ALJ JOHNSON: All right. Thank you.

7 Let me circle back, if there's any more questions.
8 Judge Ewing?

9 ALJ EWING: Yes, I do have one question for the
10 Franchise Tax Board. I understand that the letter that the
11 Appellant sent, or says he sent, to you requesting additional
12 time to file the return -- you did not receive that letter.
13 The Appellant does not have a copy of the letter. But I
14 believe it's your position that, regardless if you had
15 received that letter requesting for additional time to file
16 the return, that would not have sufficed for purposes of the
17 penalty. Is that correct?

18 MR. SMITH: No. Taxpayers can ask for an extension,
19 and if we get that extension, it can be over the phone, which
20 is explained on the demand itself, or written, and then the
21 standard practice is, if it's over the phone or written,
22 Respondent issues a letter saying, "We received your request.
23 Your request has been granted. You must file a return by this
24 date."

25 ALJ EWING: Okay. Thank you.

1 ALJ JOHNSON: And Judge Brown?

2 ALJ BROWN: No, I do not have questions.

3 ALJ JOHNSON: All right. So, with that, I believe we
4 have the admitted evidence from the record. We have your
5 arguments and your testimony today. Is there any final
6 questions from Appellant?

7 THE APPELLANT: No.

8 ALJ JOHNSON: Okay. And any final questions from
9 Franchise Tax Board?

10 MR. SMITH: No.

11 ALJ JOHNSON: All right. Thank you. I wish to thank
12 both parties again for being here today presenting your
13 appeal. The record is now closed. This concludes the
14 hearing on this appeal. The parties should expect our
15 written decision no later than 100 days from today.

16 With that, we are now off the record, and this
17 concludes today's Office of Tax Appeals hearings. Thank you.

18 (Whereupon the proceedings were
19 adjourned at 10:26 a.m.)

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