

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18010672
A. BAEZ)
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OPINION

Representing the Parties:

For Appellant: Tax Appeals Assistance Program (TAAP)¹
For Respondent: Mira V. Patel, Tax Counsel

A. LONG, Administrative Law Judge:² Pursuant to Revenue and Taxation Code (R&TC) section 19324, A. Baez (appellant) appeals an action by Franchise Tax Board (respondent) denying appellant’s claim for refund of \$255.25 related to the notice and demand penalty (demand penalty) for the 2014 tax year.³

Appellant waived the right to an oral hearing; and therefore, the matter is being decided based on the written record.

ISSUE

Whether appellant is liable for the demand penalty.

FACTUAL FINDINGS

1. Appellant did not file a California income tax return for the 2014 tax year. Consequently, respondent sent appellant a Demand for Tax Return (Demand) dated March 2, 2016,

¹ Appellant filed her opening brief on her own behalf. Zheyuan Zheng of TAAP filed appellant’s reply brief and Charles White of TAAP filed appellant’s supplemental brief. Amy Omar is currently the TAAP representative.

² This matter was originally assigned to administrative law judge (ALJ) Amanda Vassigh but reassigned to ALJ Andrea L.H. Long for completion.

³ Appellant states in her opening brief that she is also requesting an abatement of interest. Because respondent has not withheld any interest from appellant’s 2014 account and the amount she seeks is equal to the notice and demand penalty amount, there will be no discussion of the interest issue.

stating that it had no record of receiving her 2014 return. Respondent determined that appellant received enough income to require her to file a tax return after receiving information that appellant earned income from Sechrist Industries, Inc., Adecco USA, Inc., and Wells Fargo Bank, N.A.⁴ The Demand required appellant to file a 2014 return, provide evidence that she already filed a 2014 return, or explain why she was not required to file a 2014 return. Relevant to this appeal, respondent had previously issued a Demand on January 14, 2015, for the 2013 tax year, and issued a 2013 NPA on March 16, 2015.

2. After receiving no response to the Demand by the deadline of April 6, 2016, respondent issued a Notice of Proposed Assessment (NPA). The NPA estimated appellant's income to be \$63,314 and proposed total tax of \$441. The NPA also imposed a late-filing penalty of \$135, a demand penalty of \$702, a filing enforcement fee of \$79, plus applicable interest.
3. On July 5, 2016, appellant filed her 2014 return. Appellant reported total tax of \$1,021, a withholding credit of \$2,367, and an overpayment of \$1,346, which she claimed as a refund.
4. Respondent accepted the return as filed, abated the \$135.00 late-filing penalty and the \$79.00 filing enforcement fee, and reduced the demand penalty to \$255.25. On July 20, 2016, respondent issued a Notice of Tax Change that advised appellant of the revised demand penalty amount and the revised overpayment of \$1,090.75 (\$1,346.00 - \$255.25) that would be refunded to appellant. On that same date, respondent issued appellant's refund.
5. On August 8, 2016, respondent received appellant's claim for refund of \$1,346. Appellant explained that her delay for filing her 2014 return was due to the deaths of two siblings. After their deaths, she contends that she planned to file her 2014 return, but had a slab leak in her kitchen, which took over six months to get her house back in order. Soon after, she had another slab leak in the bathroom and in another room, which took another few months to put her house back in order. Because respondent had already

⁴For the 2014 tax year, a single individual under age 65 with no dependents realizing a California gross income of \$16,047 or a California adjusted gross income of \$12,838 was required to file a California income tax return, while a single individual age 65 or older with no dependents realizing a California gross income of \$21,447 or a California adjusted gross income of \$18,238 was required to file a California income tax return.

refunded \$1,090.75 to appellant, respondent treated the claim for refund as a request for abatement of the demand penalty of \$255.25. In a letter dated September 12, 2016, respondent denied appellant's claim for refund of \$255.25.

6. Appellant timely filed this appeal.

DISCUSSION

R&TC section 19133 imposes a penalty when a taxpayer fails to file a return or provide information upon respondent's notice and demand to do so, unless the failure is due to reasonable cause and not willful neglect. Respondent will only impose a demand penalty if: (1) the taxpayer fails to respond to a current Demand for Tax Return and (2) at any time during the preceding four tax years, respondent issued an NPA following the taxpayer's failure to timely respond to a Request for Tax Return or a Demand for Tax Return. (Cal. Code Regs., tit. 18, § 19133(b).)

Illustrating this rule are two examples contained in California Code Regulations, title 18, section (Regulation) 19133(d). Example 1 assumes that a taxpayer has failed to file for the 1999 tax year, and that respondent mails to the taxpayer a request for tax return for the 1999 tax year on January 15, 2001. The taxpayer failed to respond to this request, and respondent issued an NPA on March 20, 2001, assessing tax, a late-filing penalty, and interest, but no demand penalty. Example 2 continues under the same facts as Example 1, except that the taxpayer has also failed to file a return for the 2001 tax year. Respondent issues a demand for tax return for the 2001 tax year, but will impose the demand penalty should the taxpayer fail to respond because the taxpayer received an NPA for not filing a return within the previous four years.

An inconsistency develops, however, in concurrently applying the second condition above and Example 2 to the facts of this appeal. Here, respondent issued a Demand for the 2013 tax year to appellant on January 14, 2015, and issued the 2013 NPA on March 16, 2015, after the 2014 tax year. Appellant's failure to respond to that Demand, therefore, could not have occurred during one of the four preceding tax years (i.e., 2010 through 2013). Thus, the second condition of the regulation has not been met. Nevertheless, according to Example 2 and consistent with the intent of the regulation, imposition of the demand penalty is warranted because appellant received an NPA for previously failing to timely file her 2013 tax year return.

This interpretation is supported by the legislative intent of Regulation 19133, which is to impose the demand penalty only upon individual taxpayers who are repeat nonfilers; that is,

those taxpayers who received an NPA for previously failing to timely file within any one of the preceding four taxable years.⁵

In keeping with the intent of the drafters, the language in Example 2 should control. Otherwise, it would lead to a demonstrably absurd result. Appellant's 2013 Demand required appellant to file a 2013 return in 2015, making it impossible for respondent to issue the requisite NPA for the 2013 tax year any earlier than 2015.

Here, appellant failed to timely respond to the Demand for the 2014 tax year. Because appellant failed to timely respond to the 2013 Demand and respondent issued a 2013 NPA during the preceding four taxable year period, respondent properly imposed the demand penalty for the 2014 tax year.

To establish reasonable cause, a taxpayer must show that the failure to timely 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 to the Demand must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Findley* (86-SBE-091) 1986 WL 22761.)

Illness or other personal difficulties may be considered reasonable cause if the taxpayer presents credible and competent proof that the taxpayer was continuously prevented from responding to the Demand. (*Appeal of Halaburka* (85-SBE-025) 1985 WL 15809; *Appeal of James* (83-SBE-009) 1983 WL 15396; *Appeal of Seaman* (75-SBE-080) 1975 WL 3564.) When a taxpayer alleges reasonable cause based on the taxpayer's incapacity due to her illness or the illness of an immediate family member, the duration of the incapacity must approximate that of the tax obligation deadline. (See *Wright v. Commissioner*, T.C. Memo. 1998-224 [involving the late-filing penalty], citing *Hayes v. Commissioner*, T.C. Memo. 1967-80 (*Hayes*).) However, if the difficulties simply caused the taxpayer to sacrifice the timeliness of one aspect of the taxpayer's affairs to pursue other aspects, the taxpayer must bear the consequences of that choice. (*Appeal of Orr* (68-SBE-010) 1968 WL 1640 [involving the late-filing penalty].) A taxpayer's selective inability to perform tax obligations, while participating in regular business

⁵ "Under this proposed regulation, the Franchise Tax Board defines a repeat nonfiler as an individual who has received a proposed assessment of tax after receiving and failing to respond to either a request for tax return or a demand for tax return within the previous four years. The Franchise Tax Board has also determined that four years is a reasonable period of time to look back in making a determination as to whether a taxpayer is a repeat nonfiler." (Cal. Reg. Notice Register 2004, No. 17-Z, p. 504.)

activities, does not establish reasonable cause. (*Watts v. Commissioner* (1999) T.C. Memo. 1999-416.)

R&TC section 18416 provides that respondent may send any notice by first class prepaid postage and it is sufficient if such notice is mailed to a taxpayer's last-known address, which is the address that appears on the taxpayer's last return filed with respondent, unless the taxpayer has provided to respondent clear and concise written or electronic notification of a different address or respondent has an address that it has reason to believe is the most current address for the taxpayer. (See also *Appeal of Goodwin* (97-SBE-003) 1997 WL 258474; *Appeal of Johnston* (83-SBE-238) 1975 WL 3514.)

Here, appellant recounts multiple events that allegedly prevented her from timely responding to the Demand. Appellant's two sisters passed away: one in July 2013 and the other in September 2014. Appellant lost her job in July 2014. Her home developed three slab leaks in December 2014, September 2015, and September 2016. Appellant asserts that between the time the 2014 Demand was sent to her and the time that her response was due, she lost her mail, she was dealing with a second slab leak, and she suffered from stomach and sinus problems. Appellant states that the culmination of all of these events caused her to suffer from depression. Appellant states that the refund would help cover her personal expenses of fixing the third slab leak.

While we recognize that the death of family members, personal illness, and home repairs likely placed additional burdens on appellant's time, based on the lack of evidence in the record, we are not persuaded that these burdens were so encompassing as to prevent appellant from spending the necessary time to respond to the 2014 Demand during the March 2, 2016 (the date of the 2014 Demand) through April 6, 2016 (the date appellant's response was due) time period. Appellant chose to handle home repairs instead of replying to respondent's demand. Moreover, appellant has not provided any credible and competent evidence, such as medical records, showing that she was continuously prevented from timely responding to the Demand. Accordingly, appellant has not demonstrated that her actions or inactions were consistent with those that would have been taken or not taken by an ordinarily intelligent and prudent businessperson in her circumstances who received a Demand from respondent.

Appellant compares her case to *Hayes, supra*, T.C. Memo. 1967-80.⁶ The tax court in *Hayes* found that the taxpayers demonstrated reasonable cause for not timely filing a return because, while the taxpayers “were staying in California” due to numerous medical reasons “and their income tax return was being prepared by a [tax preparer] there, all of the personal records necessary to complete the tax return were located in Maine.” The tax court abated the late-filing penalty after examining the eight-month period surrounding the taxpayer’s filing due date. In contrast, appellant argues that she had reasonable cause not to timely respond to the March 2, 2016 Demand due to events that occurred during the prior three-year period. However, unlike the taxpayers in *Hayes*, appellant has not substantiated that she was continuously prevented from responding to the Demand by the April 6, 2016 deadline. (See *Appeal of Halaburka, supra.*)

Additionally, appellant contends that she had reasonable cause for not timely responding to the Demand because she lost a lot of her mail around the time that respondent sent her the Demand. Appellant does not contend that respondent mailed the Demand to an incorrect address. More importantly, appellant does not deny that she received the Demand. We note that respondent sent the Demand to the same address that appellant listed on her 2014 return, her refund claim, and her appeal letter.

Therefore, appellant has not shown reasonable cause for failing to timely respond to the Demand.

⁶ We will not address appellant’s references to two Board of Equalization cases cited in her brief because they are not precedential.

HOLDING

Appellant is liable for the demand penalty for the 2014 tax year.

DISPOSITION

Respondent's action in denying appellant's claim for refund is sustained.

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Andrea L.H. Long

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Andrea L.H. Long

Administrative Law Judge

I concur:

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Linda C. Cheng

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Linda C. Cheng

Administrative Law Judge

J. ANGEJA, dissenting:

I respectfully dissent from the majority’s holding that respondent properly imposed the demand penalty for the 2014 tax year.

Revenue and Taxation Code (R&TC) section 19133 provides that if a taxpayer fails to file a return upon notice and demand by respondent, then respondent 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 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) [respondent] 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)(1)-(2), emphasis added.)

Under the plain and unambiguous language of subsection (b)(2) above, this subsection requires the NPA for a prior tax year to have been issued at any time “*during the four-taxable-year period preceding*” the current tax year for which respondent seeks to impose the demand penalty. Here, to properly impose the demand penalty for the 2014 tax year, respondent’s regulation requires that respondent have issued an NPA for a prior tax year on a date anytime between January 1, 2010, through December 31, 2013. This threshold requirement has not been met in this case.

Specifically, rather than being issued “*during the four-taxable-year period preceding the taxable year for which the current [Demand] is issued,*” respondent’s NPA for the 2013 tax year was not issued until March 16, 2015, which is *after* the 2014 tax year “*for which the current [Demand] is issued.*” (Emphasis added.) Therefore, respondent improperly imposed the demand penalty.

I also note that Example 2 of the regulation appears to apply the regulation as if it stated that the demand penalty could be issued if an NPA were issued “*within the previous four years.*”

On this ground, the example contemplates imposition of the demand penalty for the 2001 tax year where the prior NPA for the 1999 tax year was issued on a date during the 2001 tax year. Thus, the example imposes the demand penalty when the prior NPA was issued during the *same* tax year for which the current Demand is issued.

However, this example is directly contrary to the operative language of the regulation that requires that the prior NPA have been issued “during the four-taxable-year period *preceding* the taxable year for which the current [Demand] is issued.” (Emphasis added.) Thus, respondent’s regulation is internally inconsistent. Furthermore, as stated in Regulation 19133(d), the examples are only “intended to illustrate the provisions of this regulation.” It has been stated that “examples set forth in regulations remain persuasive authority *so long as they do not conflict with the regulations themselves.*” (*Cook v. Commissioner* (7th Cir. 2001) 269 F.3d 854, 858, emphasis added.) This suggests that conflicts between regulatory language and illustrative examples should be resolved in favor of the regulatory language.

I find that the operative language of the regulation is unambiguous. It carefully and precisely references “the four-taxable-year period preceding” the tax year for which the current Demand is issued. Rather than interpreting the operative language of the regulation, the example appears to overlook or disregard that language. In this circumstance, I see no reason to place greater weight on the implication of the example than on the clear and precise operative language. Thus, I resolve the internal conflict in respondent’s regulation by finding that respondent is bound by the ordinary and unambiguous meaning of the words used in the governing language of its regulation. Here, as respondent did not properly impose the demand penalty pursuant to Regulation 19133(b)(2), appellant should not be liable for it for the 2014 tax year.

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Jeffrey G. Angeja

Administrative Law Judge

Date Issued: 3/27/2020