OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011130
S. NORNHOLD AND	)
S. NORNHOLD	)
	)
	)

OPINION

Representing the Parties:

For Appellants: Samuel D. Brotman, Esq.

For Respondent: Eric A. Yadao, Tax Counsel III

For Office of Tax Appeals: Sheriene Anne Ridenour, Tax Counsel IV

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, S. Nornhold and S. Nornhold (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants' claim for refund of a late-filing penalty of $20,107.00 and a notice and demand (demand) penalty of $44,881.25, plus interest, for the 2013 tax year.

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

ISSUES

1. Whether appellants are liable for the late-filing penalty.
2. Whether appellants are liable for the demand penalty.

FACTUAL FINDINGS

1. After appellants failed to timely file a 2013 return, FTB alleges that it mailed a Demand for Tax Return (Demand) dated April 22, 2015, to appellant-husband at an address in Danville, California, which was the address indicated on appellants' 2012 tax return. The Demand stated that, based on federal Form 1099 information, FTB determined that appellant-husband had a 2013 California return filing requirement. The Demand required

that by May 27, 2015, appellant-husband file a 2013 California return, send a copy of the return if already filed, or explain why a return was not required.

2. When appellant-husband failed to timely reply to the Demand, FTB issued appellant-husband a Notice of Proposed Assessment (NPA) on June 22, 2015, for the 2013 tax year, which estimated appellant-husband's income to be $2,274,690, and proposed an assessment of tax of $278,898, a late-filing penalty of $69,724.50, a demand penalty of $69,724.50, and a filing enforcement fee of $76, plus interest.
3. FTB previously issued to appellant-husband a Demand on February 15, 2012, and an NPA on April 16, 2012, for the 2010 tax year.
4. Appellant-husband failed to timely protest the 2013 NPA and, on November 2, 2015, FTB mailed appellant-husband a 2013 Income Tax Due Notice.
5. On November 30, 2015, appellants untimely filed a joint 2013 California tax return.
6. After processing appellants' return, FTB revised the late-filing penalty to $20,107.00 and the demand penalty to $44,881.25, plus interest. FTB mailed a Notice of State Income Tax Due on February 8, 2016, to the same address as the 2013 Demand.
7. Appellants paid the balance due and filed a claim for refund of the late-filing and demand penalties, which FTB denied. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellants are liable for the late-filing penalty.

Individual taxpayers have until April 15 of the year following the tax year to timely file their personal income tax return. (R&TC, § 18566.) FTB allows an automatic six-month extension to file a California tax return if the return is filed within six months of the original due date. (R&TC, § 18567(a); Cal. Code Regs., tit. 18, § 18567(a).) However, in the case of calendar-year taxpayers residing or traveling abroad on April 15, the statutory due date is June 15; and with the automatic paperless six-month extension, the extended due date for filing is December 15. (R&TC, § 18567(a); FTB Notice 91-3.)

California imposes a penalty for the failure to file a return on or before the due date, unless it is shown that the late filing was due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) To establish reasonable cause, the taxpayer must show that the failure to timely file a return occurred despite the exercise of ordinary business care and prudence, or that

cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Curry* (86-SBE-048) 1986 WL 22783.)

Here, it is undisputed that appellants untimely filed their 2013 California income tax on November 20, 2015. Therefore, FTB correctly imposed the late-filing penalty, and the burden of proof is on appellants to show reasonable cause for their failure to timely file. Appellants contend that appellant-husband worked in Australia during the majority of 2013 and that Australia's tax year is from July 1, 2013, to June 30, 2014.[1] Appellants assert that to accurately prepare their 2013 return, they first needed to complete an Australian tax return, which was challenging since it was their first year filing such a return. Appellants contend that navigating Australian tax law, and then applying their Australian tax return information to their federal and California tax returns, caused the late filing of their 2013 return.

The Australian filing due date for the period of July 1, 2013, to June 30, 2014, is October 31, 2014,[2] which is after the pertinent California deadline of June 15, 2014, for taxpayers residing or traveling abroad on April 15, 2014, such as appellant-husband.[3] Appellants point to dates relevant to Australian tax law that occurred after the California filing due date, asserting that it was necessary for them to "complete" an Australian income tax return in order to accurately prepare their California return. However, reasonable cause and the absence of willful neglect are gauged at the time that a return is due. (*Morrissey v. Commissioner*, T.C. Memo. 1998-443.) Therefore, we examine whether reasonable cause existed for appellants' failure to file as of June 15, 2014. (*Ibid*.) Accordingly, whether appellants acted with ordinary business care and prudence in attempting to file after the deadline has passed does not, on its own, establish reasonable cause. (*Ellwest Stereo Theatres of Memphis, Inc. v. Commissioner*, T.C. Memo. 1995-610.)

Events occurring after the due date may be relevant, however, in determining the reliability of appellants' alleged reasons for failing to comply by the due date. (See *Estate of Vriniotis v. Commissioner* (1982) 79 T.C. 298, 311; see also *Estate of Sowell v. U.S.* (5th Cir. 1999) 198 F.3d 169 [holding that post-due date evidence is relevant to whether the failure to

[1] FTB notes this information by citing to the website for the Australian Tax Office: https://www.ato.gov.au/Individuals/Lodging-your-tax-return.

[2] *Ibid.*

[3] Appellants assert that appellant-husband resided outside the United States on April 15, 2014.

comply by the due date was reasonable].) For instance, an eight-month delay in filing after receiving necessary information is not indicative of reasonable cause. (See *Appeal of Moren*, 2019-OTA-176P, citing *Electric & Neon, Inc. v. Commissioner* (1971) 56 T.C. 1324, 1343.)

Appellants did not file their California return until November 30, 2015, more than 13 months after the Australian filing deadline of October 31, 2014. An acceptable reason for the failure to file a return will excuse such a failure only so long as the reason remains valid. (See *Appeal of Triple Crown Baseball, LLC*, 2019-OTA-25P, citing *Steven Bros. Foundation, Inc. v. Commissioner* (1962) 39 T.C. 93, 130, affd. in part & revd. in part on other grounds (8th Cir. 1963) 324 F.2d 633.) Appellants offer no explanation as to the reason for the 13-month delay after the filing deadline of their Australian return. Appellants provide no evidence or explanation of the circumstances in Australia that caused the difficulties. Such an unreasonable and unexplained time gap contradicts appellants' contention that the late filing was related to fulfilling their tax obligations in Australia. Therefore, as appellants' failure to file continued well beyond the duration of the alleged reason for delay, appellants' alleged circumstances do not constitute reasonable cause. (See *Jordan v. Commissioner*, T.C. Memo. 2005-266.)

Additionally, taxpayers have an obligation to file timely returns with the best available information, and then later, if necessary, file an amended return. (*Appeal of Xie*, 2018-OTA-076P.) Difficulty in obtaining information does not constitute reasonable cause for the late filing of a return. (*Ibid.*) We find that an ordinarily intelligent and prudent businessperson under similar circumstances would have filed a timely return based on an estimation of income to avoid a late-filing penalty, and thereafter, filed an amended return if needed. Here, appellants provided no evidence of any timely steps taken to file their return, or evidence of specifically how they were prevented from timely filing, despite the exercise of ordinary business care and prudence. Therefore, we have no basis upon which to find appellants had reasonable cause for their failure to timely file. Accordingly, they have not shown that the late-filing penalty should be abated.

Issue 2: Whether appellants are liable for the demand penalty.

If any taxpayer fails or refuses to furnish any information requested in writing by FTB or fails or refuses to make and file a return upon notice and demand by FTB, then, unless the failure is due to reasonable cause, FTB may add a penalty of 25 percent of the amount of any tax assessment pertaining to the assessment of which the information or return was required. (R&TC, § 19133.) Pursuant to California Code of Regulations, title 18, section

(Regulation) 19133, FTB will only impose a demand penalty if: (1) the taxpayer fails to respond to a current Demand in the manner prescribed; and (2) FTB has proposed an assessment of tax under the authority of R&TC section 19087(a), after the taxpayer failed to timely respond to a Request for Tax Return (Request) or a Demand in the manner prescribed, at any time during the four-taxable-year period preceding the taxable year for which the current Demand is issued. (Cal. Code Regs., tit. 18, § 19133(b).)

The burden is on taxpayers to prove that reasonable cause prevented them from timely responding to the Demand. (*Appeal of Bieneman* (82-SBE-148) 1982 WL 11825.) Reasonable cause means such cause as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances, or the exercise of ordinary business care and prudence.[4] (*Appeal of Halaburka* (85-SBE-025) 1985 WL 15809.)

Appellants contend that the prerequisite of Regulation 19133(b)(2) has not been satisfied because they did not fail to respond to a Demand for a prior tax year and FTB never issued an NPA in response. However, FTB previously issued to appellant-husband a Demand on February 15, 2012 (to which appellants failed to respond in the manner prescribed), and an NPA on April 16, 2012, for the 2010 tax year. Therefore, the prerequisite imposed by Regulation 19133 was satisfied.

FTB's Demand is Sufficient Notice because it was Mailed to Appellants' Last-Known Address

It is well established that notices, including a Demand, sent by FTB to a taxpayer's last-known address are sufficient, even if not received by the taxpayer.[5] (R&TC, § 18416; *Appeal of Goodwin, supra*.) R&TC section 18416 (effective January 1, 2008) provides as follows: (a) unless expressly otherwise provided in this part, any notice may be given by first-class mail postage prepaid; (b) for purposes of this part, any notice mailed to a taxpayer shall be sufficient if mailed to the taxpayer's last-known address; and (c) the last-known address shall be the address that appears on the taxpayer's last return filed with FTB, unless the taxpayer has

[4] The standard of ordinary business care requires that taxpayers take adequate steps to ensure that they receive their mail. (*Appeal of Schwyhart* (75-SBE-035) 1975 WL 3519.)

[5] "The notice is valid even if not received by the taxpayer, if it is mailed to the taxpayer's last known address." (*U.S. v. Zolla* (9th Cir. 1984) 724 F.2d 808, 810; see also *Appeal of Goodwin* (97-SBE-003) 1997 WL 258474 ["a notice is valid when mailed to the taxpayer's last-known address"].)

provided to FTB clear and concise written or electronic notification of a different address, or FTB has an address it has reason to believe is the most current address for the taxpayer.

The purpose of the last-known address rule is to protect the taxing agency where the agency does not have the taxpayer's correct address due to the failure or inability of the taxpayer to notify the agency of a change in address. (*Delman v. Commissioner* (3d Cir. 1967) 384 F.2d. 929, 932.) Application of this rule places the responsibility on taxpayers to notify the taxing agencies of any changes in address and to take reasonable steps to ensure that they receive their mail. (*Appeal of Floria* (83-SBE-003) 1983 WL 15390.)

When a taxpayer contends that a notice is not sufficient, FTB must show that it mailed the notice to the taxpayer's last-known address by competent and persuasive evidence. (*Coleman v. Commissioner* (1990) 94 T.C. 82, 90.) When FTB provides evidence that it mailed the notice to the taxpayer's last-known address and the notice was not returned to FTB as undeliverable, such notice is sufficient. (See *Appeal of Bryant* (83-SBE-180) 1983 WL 961596 ["the record indicates that [FTB] mailed the notice and demand"]; *Appeal of Halaburka*, *supra* ["[FTB's] computer has verified that the notice was sent"]; *Appeal of Findley* (86-SBE-091) 1986 WL 22761 ["[FTB's] records indicate that the notice was sent"].)

In this case, appellants contend that due process requires notices be sent to the taxpayers' last-known address, but that FTB has not provided any evidence to establish that it mailed the Demand to their Danville address, such as a certificate of mailing or other record. We note that R&TC section 19050 provides that a "certificate by the Franchise Tax Board . . . of the mailing of the notices specified in this article is prima facie evidence of the assessment of the deficiency and of the giving of the notices." FTB, however, is not required to obtain a certificate of mailing when it mails its notices. (See R&TC, §§ 19033, 19045 and 19133.) The statutory requirement is that FTB's deficiency assessments "shall be mailed in a manner that includes a postmark . . . [which] means a postal marking made on a letter, package, or postcard indicating the date on which the item is delivered to the United States Postal Service." (R&TC, § 19033.) In addition, FTB is not required to obtain or provide a certificate of mailing for a notice to be sufficient, pursuant to the last-known address rule under R&TC section 18416. Therefore, while a certificate of mailing constitutes prima facie evidence of the assessment of the deficiency and of the giving of the notices, we only require evidence that the notice was

mailed for the purposes of the last-known address rule. (See *Appeal of Bryant, supra; Appeal of Halaburka, supra*.)

Federal case law states that evidence of mailing includes postal service records, such as a Form 3877.[6] (*U.S. v. Zolla* (9th Cir. 1984) 724 F.2d 808, 810; *Coleman v. Commissioner, supra*, 94 T.C. at pp. 90-92.) Internal Revenue Code (IRC) section 6212 provides a federal last-known address rule that is substantially similar to the California rule set forth in R&TC section 18416. (IRC, § 6212 ["notice of a deficiency . . . if mailed to the taxpayer at his last-known address, shall be sufficient"; see also Treas. Reg. § 301.6212-2.) However, IRC section 6212 specifically authorizes the Internal Revenue Service (IRS) to issue its notices of deficiency by "certified mail or registered mail." Furthermore, the IRS has implemented mailing procedures which entail the recording of certified and registered mailings on Forms 3877. (*Welch v. U.S.* (Fed.Cir. 2012) 678 F.3d 1371, 1376 [explaining the IRS manual provides certified and registered mailing records are kept on Form 3877].)

R&TC section 18416(a), however, only provides that "[u]nless expressly otherwise provided in this part, any notice may be given by first-class mail postage prepaid."[7] FTB procedures do not require the recording of mailings on Forms 3877 and formal opinions of Office of Tax Appeals' predecessor, the Board of Equalization, provide no requirement that FTB provide a Form 3877 or other postal record to prove mailing for purposes of the last-known address rule. (See, e.g., *Appeal of Bryant*, *supra*; *Appeal of Halaburka*, *supra*.)

The California last-known address statute is substantially similar to the federal statute; therefore, we consider law interpreting the federal statute to be persuasive. (*Douglas v. State of California* (1942) 48 Cal.App.2d 835, 838.) However, "[w]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject . . . is significant to show that a different intention existed." (*People v. Valentine* (1946) 28 Cal.2d 121, 142.) Therefore, where the California and federal statutes diverge, such as with regard to the requirement that a notice must be mailed by registered or certified mail, we find federal case law to be inapplicable. Accordingly, while

[6] "Postal Service Form 3877, Firm Mailing Book For Accountable Mail, is a form for recording items delivered to and received by the post office and showing the type of mail, e.g., certified mail, or the service requested, e.g., signature confirmation." (*Walker v. Commissioner*, T.C. Memo. 2018-22, fn. 5.)

[7] Similarly, R&TC section 17036 provides that "[u]nless expressly otherwise provided in this part, any notice may be given by first class mail postage prepaid."

FTB is free to provide any available evidence to prove mailing, including postal records, we find that FTB is not obligated to provide a certificate of mailing or other postal record, such as a Form 3877, as a prerequisite to establish mailing, pursuant to the last-known address rule.

FTB contends that we should apply California Evidence Code section 664, which states that it is presumed that an official duty has been regularly performed. Specifically, FTB contends that this presumption of regularity allows the reasonable inference that FTB mailed the Demand. In the absence of clear evidence to the contrary, the IRS has relied on the presumption of official regularity and delivery to meet the burden of proof to show actual mailing of a notice of deficiency.[8] (*Sego v. Commissioner* (2000) 114 T.C. 604, 611.) The presumption of official regularity arises when: (1) the existence of a notice is established; and (2) direct documentary evidence of the fact of mailing and compliance with established procedures for mailing notices. (*Ruddy v. Commissioner*, T.C. Memo. 2017-39; *Welch, supra*, 678 F.3d at p. 1379.) More specifically, compliance with mailing procedures raises a presumption of official regularity. (*Coleman, supra*, at p. 91.) When the existence of a notice is in dispute and there is no notice in the record, proof of the notice could be met by offering sufficiently corroborative evidence in the form of testimony, correspondence, habit evidence, or otherwise. (*Welch, supra*, at p. 1380, citing *U.S. v. Zolla*, *supra*.) If the presumption applies, the burden of coming forward shifts to the taxpayer to rebut the presumption "by clear and convincing evidence." (*Cropper v. Commissioner* (10th Cir. 2016) 826 F.3d 1280, 1285.) The presumption may be rebutted if a taxpayer affirmatively shows a failure to follow established procedures. (*Coleman*, *supra*, at p. 91.)

Even without the presumption of official regularity, actual mailing can be established by "otherwise sufficient" evidence. (*Ruddy v. Commissioner*, *supra*; *Coleman, supra*, at p. 91.) Such evidence of mailing includes, for example, documentary evidence, evidence of mailing practices corroborated by direct testimony, or any evidence that is "otherwise sufficient." (*Welch v. U.S.*, *supra*, 678 F.3d at p. 1379, citing *Byk v. Commissioner*, T.C. Memo. 1983-516

[8] Although case law exists applying the presumption that an official duty is regularly performed in such circumstances as an agency mailing official documents (see, e.g., *Marvin Lieblein, Inc. v. Shewry* (2006) 137 Cal.App.4th 700; *Edgell v. Nicholson* (2006) 21 Vet.App. 107 [nonpub. Opn.]), there is no specific legal authority applying Evidence Code section 664's regular performance of official duties presumption to FTB's mailing of Demands or other notices to taxpayers.

[mailing may be established "as any other pertinent fact by other competent evidence such as the testimony of [IRS] agents"].)

Here, there is no dispute as to the existence of the Demand, and a copy of the Demand is included in the record. Specifically, FTB has provided a 2013 Demand issued to appellant-husband indicating an address that is the same address as reported on appellants' 2012 tax return, and there is no indication that the Demand was returned as undelivered.[9] FTB notes that it is unable to provide copies of certain notices. Specifically, FTB asserts that "some legacy system-generated notices, especially for older tax years, are not retained, cannot be reproduced and any evidence of those notices being issued may be limited to computer record of such."[10] FTB further explains that, as its electronic systems continue to improve, it will be able to provide copies of certain mailed notices. However, because there is no dispute or question as to the existence of the Demand, we need not address the matter further.[11]

As stated above, we do not require FTB to provide postal records, such as a Form 3877, which federal courts have held give rise to the presumption of official regularity. However, FTB provides two computer records which indicate that the Demand was mailed to appellants. First, FTB provides a computer record from its Integrated Nonfiler Compliance (INC) computer system called "INC Application." There is a list of forms, including NPAs and Demands, such as the 2013 NPA and Demand at issue. The computer record indicates the date of the Demand, April 22, 2015, and states "SentLetter" under the column "Method" and "Correspondence Sent" under the column "Result." Second, FTB provides a computer record labeled "Correspondence List," which indicates all correspondence sent and received between appellants and FTB. The list indicates that the 2013 "Demand Notice" was "sent" on April 22, 2015. Accordingly, as an alternative to the production of postal records, which we previously held were not required to be provided, we find that either one of these computer records is, on their own, sufficient to

[9] While appellants assert that appellant-husband worked a majority of 2013 in Australia, they do not contend that his last-known address was not their Danville address. In addition, appellants indicate that appellant-wife "remained at the California residence and would have received any notices sent by FTB."

[10] As an example of a computer record confirming a notice, specifically an NPA, a computer printout "Proposed Assessment Information Display," indicates the date of the 2013 NPA as June 22, 2015, and the notice amount of $431,053.04 matches the "Total Tax, Penalties, Interest, and Fee" indicated on the copy of the NPA provided by FTB.

[11] We also note that the NPA is also a record of the existence and contents of the Demand. The NPA provides the date the Demand was sent and that appellant-husband could "do one of the following by 03/21/2012" while providing the responses required by that due date.

establish that the Demand was mailed to appellant's last-known address, pursuant to R&TC section 18416.

As noted above, mailing may also be shown by other types of sufficient evidence, which may include custom and habit testimony concerning mailing practices supplemented with supporting documents. (*Coleman, supra*, 94. T.C. at p. 92; see also *Jenkins v. Tuneup Masters* (1987) 190 Cal.App.3d 1, 13-14 ["direct evidence of . . . custom and habit concerning mailing practices is sufficient to prove the fact of those mailing practices"].) Here, FTB provides a detailed explanation of its normal and customary mailing practices.[12] FTB states that its INC system identifies potential nonfilers and communicates a batch job via its Electronic Notification System to be performed by FTB's print room. Three to five days prior to the mail date, the notice is printed and sent to FTB's mail room.

FTB provides a declaration signed under penalty of perjury by an FTB official, a Business Services Officer, who has been responsible for the supervision of day-to-day mailroom operations since 2013, including the time period during which the Demand at issue was mailed. He states that FTB's correspondence is either prepared for delivery to the United States Post Office (USPS) by hand or machine, sorted by machine, and after postage is applied, loaded onto trucks and delivered to USPS for delivery. FTB's mail room processes approximately 100,000 notices for delivery to the USPS daily. Notices, such as a Demand, are generated by the INC system and received in the mail room as part of a large batch of similar notices with the same mail date. One day prior to the mail date, inserts are associated with the notice and machine-inserted into an envelope. The mailing machines translate the address to a bar code, which is printed on the notice for expedited processing by the postal service. Where applicable, forwarding software recognizes a USPS change of address and the envelope is addressed with the new address. On the mail date, mail is sorted for postal discounts and then sent to the post office for delivery.[13]

[12] FTB also provides a flow-chart demonstrating the mailing process, from delivery to the mailroom to being loaded onto a truck for delivery to the post office. For instance, the chart states that before mail is delivered to the post office, mailroom staff will "Load sorted mail on postal cages" and then "Scan each cage and print report."

[13] To the extent a notice or letter is damaged in the mailroom process, the mailroom returns the damaged notice to the filing enforcement program area, which recreates the notice to be included in a later mail batch. If damage is recognized after the batch is mailed, a note is made in the taxpayer's account to indicate the notice did not issue, the case is set to re-pursue in the filing enforcement system, and a new notice is issued. FTB notes that, in this case, neither the Demand nor the NPA were damaged and reissued, and the notices were not returned to FTB by the USPS.

FTB asserts that if a taxpayer files a valid return in response to the Demand, FTB will process the return, and if the taxpayer does not respond to the Demand/Request by filing a return in the manner requested, FTB will issue an NPA. If the taxpayer protests the NPA, FTB will put a hold on the account to consider the protest. If the taxpayer requests a hearing in the protest letter, FTB will hold a hearing in person or telephonically. If a hearing is held, FTB will send a Position Letter informing the taxpayer of the protest determination that either requests additional evidence or affirms the NPA.[14]

As explained above, FTB's INC system is programmed to verify that notices are sent and will issue a subsequent notice only after confirming issuance of the prior/predicate notice. Therefore, issuance of an NPA is predicated on the prior issuance of a Demand; the INC system will not issue an NPA if a prior Demand is not issued.[15] Similar to the discussion above with regard to FTB's computer records, the NPA itself is a record that the Demand was sent. The INC computer program provides the send date of the Demand in the NPA, which, as discussed above, is recorded in FTB's INC system. Here, the NPA states that the Demand was sent and provides the Demand send date as entered in the INC system, which is April 22, 2015. The NPA states: "On 04/22/2015 we sent you a notice stating that we had no record of your 2013 California personal income tax return." The NPA states that the notice asked that by May 27, 2015, appellant-husband file a 2013 California return, send a copy of the return if already filed, or explain why a return was not required. The NPA then explains that appellant-husband did not respond to the Demand: "We have no record of receiving your tax return or information indicating that you do not have a filing requirement." Accordingly, while FTB's computer records indicating that the Demand was mailed are sufficient to establish mailing, we also hold that the subsequent NPA issued by FTB is a sufficient record to establish that the prior, related Demand was mailed to appellant's last-known address, pursuant to R&TC section 18416.

[14] If a letter is received in response to an NPA within the 60-day protest period and it is unclear whether the letter is a protest, FTB will place a hold on the account and send a Protest Clarification Letter with a deadline to respond. If no clarification is provided or the taxpayer fails to protest, the NPA will become a final liability. If the taxpayer does not file a return during protest or the protest does not show error in the proposed assessment, a Notice of Action (NOA) will be issued. If the NPA is revised in any way during protest, FTB will issue an NOA - Revision. The NOA may be appealed within 30 days. If no appeal is filed, the proposed liability becomes final, due and payable, and subject to collection until paid.

[15] Similarly, issuance of an NPA is predicated on the issuance of a Demand/Request and the issuance of an NOA indicates that an NPA was properly mailed.

Overall, FTB has provided a preponderance of evidence to establish that the Demand was mailed to appellants' last-known address. On the other hand, appellants provide no evidence to establish a defect in the INC process, that FTB did not follow its normal mailing procedures, or otherwise show that the Demand was not mailed to their last-known address. Therefore, the Demand was sufficient notice under the last-known address rule, pursuant to R&TC section 18416.

Appellants Have Not Rebutted the Presumption of Receipt of the Last-Known Address Rule

In addition to arguing that FTB did not mail the Demand, appellants contend that they have reasonable cause for failing to timely respond to the Demand because they did not receive the Demand. Specifically, appellants contend that, while appellant-husband was in Australia, appellant-wife remained at their California residence and would have received any notices sent by FTB.[16] However, because FTB properly mailed the Demand to appellants' last- known address, as discussed above, it is presumed that appellants received the Demand. (*Appeal of Johnston* (83-SBE-238) 1983 WL 15609; *Cropper v. Commissioner*, *supra*, 826 F.3d at p. 1287.) A taxpayer may rebut the presumption of receipt by providing clear evidence that the notice was not delivered. (*Cropper v. Commissioner*, *supra*, 826 F.3d at p. 1287.) A taxpayer's unsubstantiated claim that he or she did not receive a notice will generally be insufficient to rebut the presumption. (*Appeal of Goodwin*, *supra* [unsupported contention of non-receipt is "minimal" and "insufficient" evidence]; *Appeal of Johnston*, *supra* [unsupported contention of non-receipt cannot overcome presumption of mailing].)

Appellants provide no evidence to establish that they did not receive the Demand, and only provide unsupported contentions, which are insufficient to rebut the presumption of receipt. (See *Appeal of Goodwin*, *supra*.) In addition, we find their claims less reliable, given they have a practice of failing to timely reply to Demands. While they assert that they have "never before received or failed to respond to a Demand for Tax Return, and the FTB had never before proposed an assessment after the Taxpayers failure to respond to such a Demand," FTB's computer record indicates that it issued a "Request/Demand" and an NPA for the following tax years: 2000, 2002, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2013 and 2014. We also note that an examination of the other evidence in the record is persuasive evidence that appellants

[16] There is no dispute that appellants' last-known address was their Danville address in California.

received the 2013 Demand, such as subsequent notices mailed to the same address that were received by appellants. (*Appeal of La Salle Hotel Co*. (66-SBE-071) 1966 WL 1412 ["subsequent letters posted to the same address were admittedly received"]; *Appeal of Crittenden* (74-SBE-043) 1974 WL 2859 ["a copy of the letter is contained in the record, and the subsequent [NPA] and Notice of Action . . . were admittedly received"].) For instance, appellants replied on
February 29, 2016, to a Notice of Tax Return Change or a Notice of State Income Tax Due dated February 8, 2016, which were both sent to the same address used on the Demand.[17]

Appellants further argue that their accountant also did not receive the Demand. They state that their accountant signed a Power of Attorney (POA) form FTB 3520 to receive copies of any notices and correspondence from FTB. Appellants note that the form only covered the 2009 through 2012 tax years, so neither they nor their accountant received the Demand. However, R&TC section 18416 only requires that "any notice mailed to a *taxpayer* shall be sufficient if mailed to the taxpayer's last known address." (Emphasis added.) R&TC section 18416 does not require FTB to mail a notice to an address other than a taxpayer's one address of record. (*Chapman v. Commissioner*, T.C. Memo. 2019-110 ["a taxpayer can have only one last known address on the date that the notice of deficiency is issued"].) FTB is not required to send the Demand to additional addresses in order to comply with the notice requirement of R&TC section 18416. (See *Houghton v. Commissioner* (1967) 48 T.C. 656 [copies of correspondence sent to representative are courtesy].) Here, appellants have not shown that they provided "clear and concise" notification of a different address to FTB. (See R&TC, § 18416(c).) Appellants provide no other argument to show reasonable cause for failing to timely respond to the Demand. Therefore, the demand penalty was properly imposed.

[17] We note that FTB also provides a computer record reflecting the Form 1099 income source(s) reporting income to appellant-husband at the same address used by FTB in the Demand and NPAs.

HOLDINGS

1. Appellants are liable for the late-filing penalty.
2. Appellants are liable for the demand penalty.

DISPOSITION

FTB's action is sustained.

DocuSigned by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

We concur:

DocuSigned by:
Nguyen Dang
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Nguyen Dang
Administrative Law Judge

DocuSigned by:
8A4294817A67463...
Andrew Wong
Administrative Law Judge

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