

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18093784
R. KING AND)
J. KING)
_____)

OPINION

Representing the Parties:

For Appellants: Tax Appeals Assistance Program¹

For Respondent: Joel M. Smith, Tax Counsel

A. ROSAS, Administrative Law Judge: Under Revenue and Taxation Code (R&TC) section 19324, appellants R. King and J. King appeal respondent Franchise Tax Board’s action in denying appellants’ claim for refund of \$1,333.75 (demand penalty of \$1,107.75 and collection cost recovery fee of \$226) for tax year 2013. Appellants waived the right to an oral hearing; therefore, we decide this matter based on the written record.

ISSUES

1. Whether appellants have established that their failure to timely respond to the Demand for Tax Return was due to reasonable cause and not due to willful neglect.
2. Whether respondent properly imposed the collection cost recovery fee.

FACTUAL FINDINGS

The Four-Year Period Preceding the Year at Issue

1. Appellants failed to file a 2009 tax return by the due date.
2. On December 29, 2010, respondent issued R. King a Request for Tax Return. Appellants failed to respond.
3. On May 2, 2011, respondent issued R. King an NPA for tax year 2009.

¹ Appellants filed their initial appeal letter. They were subsequently represented by the Tax Appeals Assistance Program (TAAP). TAAP law student Sergey Nemolyaev drafted appellants’ reply brief.

The Year at Issue: Tax Year 2013

4. Respondent received information that R. King earned enough income to have a California filing requirement for tax year 2013.
5. On April 22, 2015, respondent issued R. King a Demand for Tax Return for tax year 2013.
6. Appellants did not respond by the deadline set forth in the Demand for Tax Return.
7. On June 22, 2015, respondent issued R. King a Notice of Proposed Assessment (NPA) for tax year 2013. The NPA estimated R. King's income based on wages and proposed a tax liability, a late filing penalty, a demand penalty of \$1,107.75, a filing enforcement fee, and interest.
8. R. King did not respond to the NPA, it went final, and respondent commenced collection efforts.
9. In November 2015, respondent issued an Income Tax Due Notice to R. King, which warned that if respondent did not receive the full balance within 30 days, respondent may take collection action.
10. In December 2015, respondent issued a Final Notice Before Levy and Lien to R. King, which warned that if respondent did not receive the full balance within 30 days, respondent intended to take collection action without further notice and may impose a collection fee.
11. On April 15, 2017, appellants filed a joint California Resident Income Tax Return for tax year 2013, reporting a tax overpayment. Respondent accepted this tax return, abated the late filing penalty, and, in May 2017, issued to appellants a Notice of Tax Change along with a refund. As stated in this notice, respondent reduced appellants' refund by \$1,333.75 (demand penalty of \$1,107.75 and collection cost recovery fee of \$226).
12. On April 15, 2018, appellants filed a claim for refund, requesting abatement of the demand penalty and collection cost recovery fee.
13. Respondent denied the claim, and appellants timely appealed.

DISCUSSION

Issue 1 – Whether appellants have established that their failure to timely respond to the Demand for Tax Return was due to reasonable cause and not due to willful neglect.

California imposes a penalty for the failure to file a return upon respondent's notice and demand, unless the failure is due to reasonable cause and not willful neglect. (R&TC, § 19133.) The demand penalty is designed to penalize a taxpayer's failure to respond to the demand, not a taxpayer's failure to pay the proper tax. (*Appeal of Bryant* (83-SBE-180) 2019 WL 1187161; *Appeal of Hublou* (77-SBE-102) 1977 WL 4093.) Respondent will impose the demand penalty when a taxpayer fails to respond to a demand for a tax return, and respondent has issued an NPA in response to the taxpayer's failure to respond to a similar demand during the four-year period preceding the year at issue. (Cal. Code Regs., tit. 18, § 19133(b).)

Here, both requirements are satisfied: first, regarding tax year 2013, appellants failed to respond to the Demand for Tax Return issued on April 22, 2015; and second, regarding the four-year period preceding the year at issue, appellants failed to file a return for tax year 2009 after respondent issued a Request for Tax Return on December 29, 2010, and thereafter respondent issued an NPA on May 2, 2011, which resulted in a final assessment. Thus, the issue before us is whether appellants have established that their failure to timely respond to the demand was due to reasonable cause and not due to willful neglect.

The burden is on taxpayers to prove that reasonable cause prevented them from responding to the demand. (*Appeal of James* (83-SBE-009) 1983 WL 15396.) To establish reasonable cause, taxpayers 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 reasons 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 Tons* (79-SBE-027) 1979 WL 4068.) Based on the preponderance of the evidence standard, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (Evid. Code, § 115; *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.)

In arguing that reasonable cause prevented them from responding to the Demand for Tax Return, appellants make three arguments. First, appellants argue that they did not have the information necessary to file their tax return. Although appellants submitted copies of their late-

filed California returns for tax years 2009 through 2012, there is no evidence that the late filing of their 2013 return was due to reasons beyond their own control—or due to reasons other than their own late filing of these prior year returns. Moreover, a taxpayer's inability to file a return by the due date, provide a timely response to a notice and demand, or furnish requested information because of lack of necessary information or documents, is not considered reasonable cause. (*Appeal of Orr* (68-SBE-010) 1968 WL 1640.)

Second, appellants argue that they relied on oral statements made by an unidentified employee of respondent, who purportedly told them that if appellants filed their 2013 tax return, respondent would not impose any penalties. In effect, appellants ask that the Office of Tax Appeals (OTA) estop respondent from asserting the penalties on account of the purported advice that this unidentified employee provided to them. As the California Supreme Court has stated, the doctrine of equitable estoppel “ordinarily will not apply against a governmental body except in unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy. [Citations.]” (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 793.) In the present case, not only did appellants fail to prove any of the elements of the doctrine of equitable estoppel,² but appellants have not demonstrated that, under the facts in the record, the imposition of the demand penalty of \$1,107.75 would result in grave injustice.

Lastly, appellants argue that they filed late because R. King was the victim of identity theft. Appellants did not provide any evidence in support of this argument: they did not provide a copy of a police report or other agency report showing the facts surrounding the identity theft; and they did not show that they filed an Identity Theft Affidavit (FTB Form 3552) with respondent. Moreover, even if appellants established they had been the victims of identity theft during the relevant time period, “[w]hile being a victim of identity theft may have been inconvenient,” this does not excuse appellants from the requirement to file a tax return on time. (*Barker v. Commissioner* (2018) T.C. Memo. 2018-67.) Similarly, identity theft alone does not excuse appellants from responding to the demand; appellants still have the burden to prove that reasonable cause prevented them from responding. But appellants did not show how the identity

² The California Supreme Court has established the elements of the doctrine of equitable estoppel as follows: “(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.” (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488-489; *City of Goleta v. Superior Court (Oly Chadmar Sandpiper General Partnership)* (2006) 10 Cal.4th 270, 279.) Here, appellants did not prove any of these elements.

theft caused them to personally fail to timely respond to the Demand for Tax Return, or that their reasons for failing to respond to the demand—reasons based on the identity theft—were such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. Appellants also did not show why they could not respond, at the very least, simply to inform respondent of the facts surrounding the identity theft.

There is practically no relevant evidence for OTA to weigh and consider; and, based on a lack of evidence, we conclude that appellants failed to prove that reasonable cause prevented appellants from responding to the Demand for Tax Return.

Issue 2 – Whether respondent properly imposed the collection cost recovery fee.

We now consider whether respondent properly imposed the \$226 collection cost recovery fee. Under the applicable law, if a taxpayer “fails to pay any amount of tax, penalty, addition to tax, interest, or other liability . . . a collection cost recovery fee shall be imposed if the Franchise Tax Board has mailed a notice to that person for payment that advises that the continued failure to pay the amount due may result in a collection action, including the imposition of a collection cost recovery fee.” (R&TC, § 19254(a).) Furthermore, once properly imposed, there is no reasonable cause exception or any other provision in the statute allowing for relief from respondent’s imposition of a collection cost recovery fee. (*Appeal of Myers* (2001- SBE- 001) 2001 WL 37126924.)


Respondent received information that R. King earned enough income to have a California filing requirement for tax year 2013. Respondent issued R. King a Demand for Tax Return, requiring a response by a date certain; however, when appellants did not respond, respondent issued R. King an NPA for tax year 2013. When R. King did not respond to the NPA, it went final, and respondent commenced collection efforts. Respondent issued several notices to R. King warning that if respondent did not receive the full balance within 30 days, respondent may take collection action and may impose a collection fee. When R. King failed to pay the full balance within 30 days, respondent commenced collection efforts and imposed a \$226 collection cost recovery fee. Therefore, respondent’s imposition of a collection cost recovery fee was proper.

HOLDINGS


1. Appellants did not establish that their failure to timely respond to the Demand for Tax Return was due to reasonable cause and not due to willful neglect.
2. Respondent properly imposed the collection cost recovery fee.

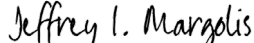
DISPOSITION

We sustain respondent’s action in full.

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 Alberto T. Rosas
 Administrative Law Judge

We concur:

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 Elliott Scott Ewing
 Administrative Law Judge

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 Jeffrey I. Margolis
 Administrative Law Judge

Date Issued: 7/16/2020