

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
S. HARRIS

) OTA Case No. 20056155
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OPINION

Representing the Parties:

For Appellant:

S. Harris

For Respondent:

Phillip C. Klean, Tax Counsel III

H. LE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, S. Harris (appellant) appeals an action by Franchise Tax Board (respondent) proposing a failure to file upon demand (demand) penalty of \$1,352 and a filing enforcement fee of \$93 for the 2017 tax year.¹

Appellant waived her right to an oral hearing; therefore, we decide this matter based on the written record.

ISSUES

1. Whether appellant has established a basis to abate the demand penalty.
2. Whether the filing enforcement cost recovery fee was properly imposed.

FACTUAL FINDINGS

1. Appellant did not file a 2017 tax return.

¹ Respondent’s proposed assessment also includes \$3,480 of additional tax, a late-filing penalty of \$870, and applicable interest. However, since appellant’s arguments are limited to the demand penalty and the filing enforcement cost recovery fee, we focus our opinion to these two issues.

2. Subsequently, respondent received information indicating that appellant received income from two employers well in excess of the 2017 filing threshold.²
3. Respondent sent appellant a Demand for Tax Return on September 17, 2019, requiring that appellant file a tax return, send a copy of the tax return, or explain why she was not required to file a tax return, by October 23, 2019. Appellant did not respond by the prescribed deadline.
4. Respondent then issued a Notice of Proposed Assessment (NPA) on November 25, 2019, proposing tax based on an estimate of appellant's income as reported by appellant's two employers and imposing a demand penalty and filing enforcement fee.
5. Appellant protested the NPA, which respondent denied and sent a Notice of Action. This timely appeal followed.
6. As relevant here, respondent previously issued a Request for Tax Return dated February 9, 2016, for appellant's 2014 tax return. After appellant failed to respond, respondent issued an NPA dated April 11, 2016.

DISCUSSION

Issue 1: Whether appellant has established a basis to abate the demand penalty.

A demand penalty may be imposed when a taxpayer fails or refuses to make and file a return upon notice and demand by respondent unless the taxpayer can show that its failure to file a return is due to reasonable cause and not willful neglect. (R&TC, § 19133.) California Code of Regulations, title 18, (Regulation) section 19133 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 [R&TC] section 19087, subdivision (a), after the taxpayer failed to timely respond to a

² For 2017, an individual with a filing status of single or head of household with two or more dependents was required to file a tax return if gross income exceeded \$37,621 for individuals under the age of 65, and \$38,614 for individuals 65 and older. (California 2017 Personal Income Tax Booklet, <https://www.ftb.ca.gov/forms/2017/17-540-booklet.html>.) Regardless of appellant's age and number of dependents (appellant attached an unfiled 2017 federal return indicating head of household filing status with two dependents), her gross income exceeded the threshold for filing a 2017 return.

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).)

Here, both conditions are present. First, appellant failed to timely respond to respondent's September 17, 2019 Demand for Tax Return.³ Second, respondent issued a prior NPA "during the four-taxable-year period preceding" the tax year at issue.⁴ Thus, respondent properly imposed the demand penalty.

When respondent imposes a demand penalty, the law presumes that respondent's action was correct. (See *Appeal of Wright Capital Holdings LLC*, 2019-OTA-219P.) The burden of proof is on the taxpayer to show that reasonable cause exists to support an abatement of the penalty. (*Ibid.*) To establish reasonable cause, a taxpayer must show that the failure to reply to the notice and demand or to the request for information occurred despite the exercise of ordinary business care and prudence. (*Ibid.*)

Here, appellant provided no reason why she failed to timely respond to the Demand for Tax Return. Therefore, appellant did not establish reasonable cause, and we have no basis to abate the demand penalty.

³ Appellant asserts she sent all information requested in May 2019, but this was before respondent issued its Demand for Tax Return. Also, appellant attached a signed Internal Revenue Service (IRS) Form 1040 Return Delinquency notice dated May 31, 2019. However, the IRS is an agency separate from respondent.

⁴ The four taxable years preceding 2017 are 2013, 2014, 2015, and 2016. It is noteworthy that respondent's prior NPA satisfies two competing interpretations of Regulation section 19133. Respondent issued the prior NPA on April 11, 2016, for the 2014 tax year, which is *during* the four-taxable-year-period prior to the 2017 tax year, and *for* one of the four taxable years preceding the 2017 tax year.

Issue 2: Whether the filing enforcement cost recovery fee was properly imposed.

R&TC section 19254(a)(2) provides if a person fails or refuses to make and file a tax return within 25 days after formal legal demand to file the tax return is mailed to that person by respondent, respondent shall impose a filing enforcement cost recovery fee. Once properly imposed, R&TC section 19254 provides no grounds upon which the fee may be abated.


Respondent sent appellant a demand for appellant’s 2017 return, to which appellant did not respond within 25 days. Therefore, respondent properly imposed the filing enforcement cost recovery fee, and there is no basis for abating the fee.

HOLDINGS


1. Appellant has not established a basis to abate the demand penalty.
2. The filing enforcement cost recovery fee was properly imposed.


DISPOSITION

We sustain respondent’s action in full.

DocuSigned by:

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 Huy "Mike" Le
 Administrative Law Judge

We concur:

DocuSigned by:

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 Nguyen Dang
 Administrative Law Judge

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 Tommy Leung
 Administrative Law Judge

Date Issued: 2/3/2021