

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18124062
B. GALLO AND)
J. GALLO)
_____)

OPINION

Representing the Parties:

For Appellants: B. Gallo and J. Gallo

For Respondent: Andrew Amara, Tax Counsel

E. S. EWING, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, B. Gallo and J. Gallo (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$5,603.75 for the 2013 tax year.

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

ISSUE

Whether the notice and demand penalty (demand penalty) under R&TC section 19133 was properly imposed, and, if so, whether appellants have shown reasonable cause for failing to respond to the notice and demand to support an abatement of the penalty.

FACTUAL FINDINGS

1. Appellants did not file a timely California income tax return for the 2013 tax year.
2. On May 5, 2015, FTB issued appellants a Demand for Tax Return (demand) for their 2013 tax year.
3. Appellants did not file a 2013 tax year return by the due date in the demand. FTB then issued a Notice of Proposed Assessment (NPA), which proposed to assess a demand penalty.

4. Previously, during the 2011 tax year, appellants were issued a demand for the 2009 tax year but they failed to respond to that demand. Then, on July 5, 2011, FTB issued an NPA for appellants' 2009 tax year.
5. On April 4, 2017, appellants filed an untimely joint California resident income tax return for the 2013 tax year. FTB then issued a Notice of Tax Change, adjusting the demand penalty in accordance with the information in appellants' 2013 tax year return.
6. Appellants paid the liability in full and filed a claim for refund of the demand penalty.
7. FTB denied the claim for refund and appellants filed this timely appeal.

DISCUSSION

Generally, personal income tax returns are due by April 15th of the year following the close of the taxable year. (R&TC, § 18566.) A demand penalty may be imposed when a taxpayer fails to provide requested information or file a return upon notice and demand by FTB, unless it is shown that such failure was due to reasonable cause and not willful neglect. (R&TC, § 19133.) The amount of the penalty is 25 percent of the amount of tax determined pursuant to R&TC section 19087 or of any tax deficiency assessed by FTB. (*Ibid.*) The penalty is proper where the taxpayer does not respond within the time period set forth in the demand. (*Appeal of Bazan* (82-SBE-259) 1982 WL 11915.) The penalty imposed by this section is properly computed on the amount of the total correct tax liability as of the return due date before deduction of credits (including withholding credits). (*Appeal of Scott* (83-SBE-094) 1983 WL 15480.)

Pursuant to R&TC section 19503, FTB has the authority to prescribe rules and regulations necessary to enforce the Personal Income Tax Law. FTB exercised that authority in adopting California Code of Regulations, title 18, (Regulation) section 19133, which states how FTB will apply the discretion granted in the demand penalty statute. Regulation section 19133 provides two conditions for the imposition of the demand penalty, stating that in the case of an individual taxpayer, the penalty will only be imposed by FTB if “(1) the taxpayer fails to timely respond to a current Demand for Tax Return in the manner prescribed, and (2) the FTB has proposed an assessment of tax . . . , 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).)

The demand penalty at issue in this case is for the 2013 tax year. The first condition under Regulation section 19133(b)(1) is satisfied because appellants failed to respond to the demand that FTB issued to them on May 5, 2015. The second condition under Regulation section 19133(b)(2) is also satisfied, which requires that FTB must have issued an NPA to appellants at any time during the 2009, 2010, 2011, or 2012 tax year after they failed to respond to a Request or Demand for Tax Return. Here, on July 5, 2011, FTB issued a prior NPA to appellants for failure to respond to a demand for their 2009 tax year. Accordingly, the two conditions of Regulation section 19133 have been met and the demand penalty was properly imposed.

However, appellants assert that the demand penalty should be abated due to reasonable cause. The burden of proving reasonable cause for the failure to file upon notice and demand is on the taxpayer. (*Appeal of Beadling* (77-SBE-021) 1977 WL 3831.) A taxpayer's failure to respond to a demand must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Head and Feliciano*, 2020-OTA-127P; *Appeal of Halaburka* (85-SBE-025) 1985 WL 15809.)

Here, appellants make several arguments as to why the demand penalty should be abated. First, appellants argue that because no corresponding federal penalty was assessed by the Internal Revenue Service, the demand penalty should be abated. However, the demand penalty is a California-specific penalty and its imposition does not depend on whether a federal penalty was assessed. (R&TC, § 19133.)

Second, appellants assert that they have always paid their taxes in full and on time. However, as mentioned above, the demand penalty is imposed for failing to respond to a demand, and therefore appellants' asserted good history of timely paying their taxes is not relevant to the issue here of what steps they took to timely respond to the demand for purposes of abating the penalty.¹ (R&TC, § 19133.)

Third, appellants believe the late filing penalty under R&TC section 19131 somehow "overrides" the demand penalty. We disagree. The demand penalty is a separate and distinct penalty from the late filing penalty under R&TC section 19131. The late filing penalty was not assessed because the late filing penalty is calculated on the amount of underpayment of tax

¹ We note that there is a late payment penalty under R&TC section 19132 (late payment penalty). We also note that FTB did not impose the late payment penalty in this case because the record shows that there was no underpayment of tax for the 2013 tax year.

related to the late-filed return. In this case, the record shows that there was no underpayment of tax due to amounts appellants had already applied to their 2013 tax year. (R&TC, § 19131.)

Finally, appellants argue that the NPA was not properly issued because it was only addressed to one of the appellants. However, because appellants filed a joint return, they have joint and several liability. R&TC section 19006(b) provides that, when a joint return is filed by spouses, the liability for the tax on the aggregate income is joint and several. Therefore, the NPA was not invalid because it was addressed to only one of the appellants.


To summarize, we find that none of appellants' arguments for abatement of the demand penalty show reasonable cause for the failure to respond to the demand for tax return sufficient to abate the demand penalty for the 2013 tax year.

HOLDING

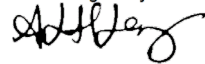
The demand penalty under R&TC section 19133 was properly imposed and appellants have not shown reasonable cause sufficient to support an abatement of the penalty.


DISPOSITION

FTB's action is sustained.

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Elliott Scott Ewing
Administrative Law Judge

We concur:

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Andrea L.H. Long
Administrative Law Judge

DocuSigned by:

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John O. Johnson
Administrative Law Judge

Date Issued: 12/29/2020