

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:  
**J. KEYAK**

) OTA Case No. 20096677  
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**OPINION**

Representing the Parties:

For Appellant:

J. Keyak

For Respondent:

Noel Garcia, Tax Counsel

E. S. EWING, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, J. Keyak (appellant) appeals an action by the Franchise Tax Board (respondent) denying appellant’s claim for refund of \$853.50 for the 2016 tax year.

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

**ISSUE**

Whether appellant has established reasonable cause to abate the demand penalty under R&TC section 19133.

**FACTUAL FINDINGS**

1. Appellant did not timely file a California tax return for the 2015 or 2016 tax years.
2. Respondent obtained information indicating that appellant received income sufficient to prompt a filing requirement for the 2016 tax year. On July 19, 2019, respondent issued a Demand for Tax Return (2016 Demand) requiring that appellant reply no later than August 21, 2019, by either filing a tax return for the 2016 tax year, providing evidence showing appellant already filed a return, or explaining why appellant was not required to file a return. At appellant’s request, the date to reply to the 2016 Demand was extended by respondent to October 21, 2019. Appellant did not respond to the 2016 Demand by the extended due date and respondent issued appellant a Notice of Proposed Assessment

- (NPA) dated December 13, 2019. The NPA estimated appellant's income based on the then-available income information and proposed a tax liability of \$4,658.00, a late filing penalty of \$1,164.50, a demand penalty of \$1,167.25, a filing enforcement fee of \$93, and applicable interest. This resulted in a total proposed assessment of \$7,826.67.
3. Respondent had previously issued a Request for Tax Return to appellant with respect to the 2015 tax year on May 30, 2017 (2015 Request). Appellant failed to respond to that request, and respondent issued an NPA for the 2015 tax year on August 21, 2017.<sup>1</sup>
  4. Appellant filed a 2016 tax year return on February 7, 2020, reporting lower California taxable income than reflected on the NPA, a tax liability of \$3,414.00, payments and withholdings of \$4,451.00, and a requested refund of \$1,037.00. Appellant did not self-assess a demand penalty on the 2016 tax year return as filed. Respondent accepted appellant's return as filed and issued a Notice of Tax Return Change - Refund, which continued to impose the demand penalty, but reduced it to \$853.50. This resulted in a revised refund of \$183.50 issued to appellant (\$1,037.00 - \$853.50).<sup>2</sup>
  5. Appellant submitted a claim for refund for the demand penalty of \$853.50. Respondent denied the claim for refund.
  6. This timely appeal followed.

### DISCUSSION

California imposes a penalty on taxpayers for failing to file a return or to provide information upon respondent's demand to do so, unless reasonable cause prevented the taxpayer from complying with the demand. (R&TC, § 19133.) For individuals, respondent will only impose a demand penalty if: (1) the taxpayer fails to respond to a current demand; and (2) at any time during the preceding four tax years, respondent issued an NPA following the taxpayer's

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<sup>1</sup> The amounts proposed to be assessed in the NPA for the 2015 tax year are not relevant here because the only fact that is relevant is that respondent issued the 2015 Request and appellant did not respond to that request, which led to the issuance of the NPA for the 2015 tax year. The 2015 tax year is otherwise not at issue in this appeal.

<sup>2</sup> Even though respondent accepted appellant's return as filed, respondent's proposed refund in the Notice of Tax Return Change – Refund was lower than the refund calculated by appellant on the untimely 2016 tax year return because appellant did not self-assess the demand penalty. While respondent continued to impose the demand penalty, it revised the amount of the penalty by computing it based on the lower tax liability of \$3,414.00 reported in appellant's 2016 return (which respondent accepted as filed) instead of the \$4,658.00 tax liability respondent initially proposed in the 2016 NPA.

failure to timely respond to request or demand for tax return. (Cal. Code Regs., tit. 18, § 19133(b).)

Here, appellant failed to timely file a return for the 2015 tax year, was subsequently issued the 2015 Request, failed to respond to that request, and was issued an NPA for the 2015 tax year. Then, as with the 2015 tax year, appellant failed to timely file a return for the 2016 tax year, was subsequently issued the 2016 Demand, failed to timely respond to that demand, and was issued an NPA for the 2016 tax year. Because appellant failed to respond to the 2015 Request, and respondent thereafter issued an NPA for the 2015 tax year that is within the preceding four tax years from the 2016 tax year at issue, respondent properly proposed to assess the demand penalty in this case. (Cal. Code Regs., tit. 18, § 19133(b); *Appeal of Jones*, 2021-OTA-144P.)

Appellant does not dispute that the demand penalty was properly imposed, nor does she dispute the calculation of the penalty. Instead, appellant asserts that there is reasonable cause to abate the penalty. To establish reasonable cause, a taxpayer must show that the failure to respond to a demand occurred despite the exercise of ordinary business care or that the reason for failing to respond would prompt an ordinarily intelligent and prudent businessperson to act similarly under the circumstances. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) The burden of proving reasonable cause for the failure to file a return upon demand is on the taxpayer. (*Ibid.*)

Illness or other personal difficulties that prevent a taxpayer from responding to a demand for a tax return 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 Head and Feliciano*, 2020-OTA-127P.)<sup>3</sup> When a taxpayer alleges reasonable cause based on an incapacity attributable to illness, the duration of the incapacity must be approximate to the tax obligation deadline.<sup>4</sup> (*Ibid.*) However, if the difficulties simply cause the taxpayer to sacrifice the timeliness of one aspect of the taxpayer's affairs to pursue other aspects, the

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<sup>3</sup> The cited appeal relates to reasonable cause in the context of a late filing penalty. We see no reason to treat the standards for reasonable cause differently for a late filing penalty or a demand penalty.

<sup>4</sup> With respect to the demand penalty, there is no "tax filing deadline" since the penalty would not have been imposed if a return had been filed in timely response to respondent's demand. The tax obligation deadline at issue here is the date appellant was directed to respond to respondent's 2016 Demand, August 21, 2019, which was subsequently extended to October 21, 2019.

taxpayer must bear the consequences of that choice. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P.)

Appellant asserts that she failed to respond to the 2016 Demand because of “disruptive challenges” she experienced. Appellant contends that hearing loss and fraud related to the hearing loss, several surgical procedures, and multiple automobile accidents prevented her from timely filing her return and not responding to the 2016 Demand. However, we find that appellant has not provided credible and competent evidence that she was continuously prevented from filing a tax return or responding to respondent’s 2016 Demand. In fact, some of the events cited by appellant, such as a surgery and several auto accidents, occurred before the 2016 Demand was issued to appellant.<sup>5</sup> We further note that there is no evidence in the record that these events that occurred before the 2016 Demand was issued were of a long-term nature, such that would later and continuously prevent appellant from timely filing her return or responding to the 2016 Demand. Finally, the record indicates that appellant went on vacation during a portion of the time period in question, indicating that appellant was not otherwise prevented from tending to her tax filing obligations.<sup>6</sup> If the taxpayer sacrifices the timeliness of one aspect of the taxpayer’s affairs to pursue other aspects (such as a vacation), the taxpayer must bear the consequences of that choice. (*Appeal of Triple Crown Baseball LLC, supra.*)

Considering the nature and timing of all of the events and the duration of the asserted disruptions, we do not find “credible and competent proof that the taxpayer was *continuously prevented from*” responding to the demand. (*Appeal of Head and Feliciano, supra*, italics added.) While we understand these were difficult circumstances for appellant, we nevertheless agree with respondent that “appellant has not demonstrated how the events continuously prevented her from timely responding” to the 2016 Demand. The burden of proving reasonable cause for the failure to file a return upon demand is on the taxpayer. (*Appeal of GEF Operating, Inc., supra.*) Appellant has not met her burden of proof.

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<sup>5</sup> The evidence provided by appellant indicated that one surgery occurred on February 27, 2019, and a second surgery occurred on June 19, 2019, both of which are prior to the 2016 Demand issued by respondent on July 19, 2019. Additionally, we note that while appellant was initially provided a deadline of August 21, 2019, to respond to the 2016 Demand, this deadline was extended, at appellant’s request, to October 21, 2019.

<sup>6</sup> Appellant states that she spent approximately one month from September 18, 2021, until October 19, 2021, vacationing in a small town in Montana. We note that this vacation occurred during the time period between the initial August 21, 2019, deadline and the extended October 21, 2019, deadline to respond to the 2016 Demand.

HOLDING

Appellant has not established reasonable cause to abate the demand penalty under R&TC section 19133.

DISPOSITION

Respondent’s action is sustained.

DocuSigned by:



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Elliott Scott Ewing  
Administrative Law Judge

We concur:

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Cheryl L. Akin  
Administrative Law Judge

DocuSigned by:



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Huy "Mike" Le  
Administrative Law Judge

Date Issued: 12/14/2021