

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19115494
A. ULLRICH AND)
V. MESIA-ULLRICH)
_____)

OPINION

Representing the Parties:

For Appellants: Alberto S. Alvarez¹

For Respondent: Meghan McEvilly, Tax Counsel III

A. Vassigh, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, A. Ullrich and V. Mesia-Ullrich (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for refund of \$1,161.25² for the 2016 tax year.

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

ISSUES

1. Whether appellants have established that reasonable cause exists to abate the demand penalty.
2. Whether the collection cost recovery fee was properly imposed.

FACTUAL FINDINGS

1. On April 10, 2018, FTB issued a Demand for Tax Return (2016 Demand) to appellant-husband because its records indicated that his 2016 California resident income tax return

¹Mr. Alvarez is a representative with the Tax Appeals Assistance Program (TAAP) who is presently representing appellants. Chandler Keeton is the TAAP representative who filed appellants’ reply brief. Appellants filed their own opening brief.

²This amount consists of a \$844.25 demand penalty and a \$317 collection cost recovery fee.

had not been filed and he had received sufficient income to trigger a filing obligation. The 2016 Demand required appellant-husband to respond by May 16, 2018, by either filing a 2016 tax return, providing evidence that a return has already been filed, or providing information on why he was not required to file a return. Appellant-husband did not respond.

2. Subsequently, FTB issued a Notice of Proposed Assessment (NPA) on June 11, 2018 (2016 NPA), which proposed to assess tax (based on income reported by appellant-husband's employer), the demand penalty, late-filing penalty, filing enforcement fee, and interest.³ Appellant-husband did not protest the 2016 NPA, and the assessment became due and payable.
3. FTB sent appellant a Notice of State Income Tax Due dated September 10, 2018, an Income Tax Due Notice dated December 12, 2018, and a Final Notice Before Levy and Lien dated January 22, 2019. The Final Notice Before Levy and Lien notified appellants that if FTB did not receive payment within 30 days, collection action would ensue, including a possible collection fee.
4. Appellants did not timely pay the assessed amount by the 30-day deadline. As a result, FTB began collection activities, collected various amounts from appellants, and imposed a \$317 collection cost recovery fee in February 2019.
5. Appellants ultimately filed their 2016 California resident income tax return late on April 29, 2019, reporting income tax withheld exceeding their tax liability for the 2016 tax year, and requesting a refund of overpaid tax. FTB accepted and processed the 2016 tax return but continued to impose a revised demand penalty of \$844.25 and the \$317 collection cost recovery fee. FTB reduced appellants' refund by the total of these amounts (i.e., \$1,161.25), and refunded the balance of the excess withholding and collection amounts to appellants.
6. On June 15, 2019, appellants filed a claim for refund seeking a refund of the demand penalty and collection cost recovery fee, which FTB denied. This timely appeal followed.

³ FTB later withdrew the late-filing penalty and the filing enforcement fee.

7. As relevant here, FTB had previously issued a Request for Tax Return dated April 18, 2017, to appellants, for their 2015 tax return (2015 Request). After appellants failed to respond, FTB issued an NPA (2015 NPA) dated June 19, 2017.

DISCUSSION

Issue 1: Whether appellants have established that reasonable cause exists to abate the demand penalty.

In an action for refund, the taxpayer has the burden of proof. (*Appeal of Li*, 2020-OTA-095P; *Dicon Fiberoptics, Inc. v. Franchise Tax Bd.* (2012) 53 Cal.4th 1227, 1235.) R&TC section 19133 provides that if a taxpayer fails to file a return upon notice and demand by FTB, then FTB may impose a penalty of 25 percent of the amount of tax assessed pursuant to R&TC section 19087, unless the failure is due to reasonable cause and not willful neglect. FTB will only impose a demand penalty if: (1) the taxpayer fails to respond to a current demand for tax return and (2) at any time during the preceding four tax years, FTB issued an NPA following the taxpayer's failure to timely respond to a request or demand for tax return. (*Appeal of Jones*, 2021-OTA-144P.)

Here, appellants failed to timely respond to the 2016 Demand and also failed to timely respond to the 2015 Request, resulting in a 2015 NPA during one of the four years preceding the 2016 tax year at issue. Thus, FTB properly imposed the demand penalty for the 2016 tax year.

To establish that reasonable cause exists to support abatement of the demand penalty, a taxpayer must show that the failure to timely respond to a demand occurred despite the exercise of ordinary business care and prudence. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Jones, supra.*) An analysis of reasonable cause requires examining the taxpayer's actions leading up to the failure to timely respond, the timing of those actions, and whether they reflect ordinary business care and prudence such that an ordinarily intelligent and prudent businessperson would have acted similarly in the situation. (*Appeal of Moren*, 2019-OTA-176P.)⁴

⁴ *Appeal of Moren, supra*, relates to reasonable cause in the context of a late-payment penalty. We look to that case, as well as other late-payment and/or late-filing penalty cases, for guidance since the same standards for reasonable cause apply to the demand penalty.

Personal difficulties that prevent a taxpayer from responding to a demand for 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. (See *Appeal of Head and Feliciano*, 2020-OTA-127P.) When a taxpayer alleges that the failure to timely respond was due to an incapacity, that excuse is valid only as long as the incapacity remains valid. (*Ibid.*) Furthermore, when a taxpayer alleges reasonable cause based on incapacity due to illness, the duration of the incapacity must approximate that of the failure to file. (*Ibid.*; see also *Wright v. Commissioner*, T.C. Memo. 1998-224, citing *Hayes v. Commissioner*, T.C. Memo. 1967-80.)

Reasonable cause has been found in cases where the taxpayer or a member of the taxpayer's family experiences an illness or incapacity that prevents the taxpayer from timely responding to a demand. A review of the applicable case law elucidates what types of circumstances have been understood to evince reasonable cause in such cases. The United States Tax Court (Tax Court) has found reasonable cause where the taxpayers have proven that they were unable to meet their filing obligation due to their own illness or that of a family member.⁵ However, as the Tax Court has noted, "the standard is a tough one to meet." (*Leslie v. Commissioner*, T.C. Memo. 2016-171.)⁶ Taxpayers must show that they were severely restricted from meeting their tax obligations. (*Appeal of Belcher*, 2021-OTA-284P.)

Taxpayers claiming mental or physical illness or incapacity prevented them from meeting their tax obligations must not only show that they were incapacitated to such a degree that they could not file the returns in question, but they must also show that they were *continuously* prevented from doing so during the relevant period.⁷ The courts have denied penalty abatement

⁵ See, e.g., *Tabbi v. Commissioner*, T.C. Memo. 1995-463 (reasonable cause found where taxpayers' son had heart surgery, taxpayers spent four months continuously with him in the hospital and filed their tax return two months after his death); *Jones v. Commissioner*, T.C. Memo. 1988-542 (reasonable cause found where the taxpayer was disabled for 42 weeks of the year); *Harris v. Commissioner*, T.C. Memo. 1969-49 (reasonable cause was found where the taxpayer's activities were severely restricted due to serious illness, and the taxpayer was in and out of hospitals due to stroke, paralysis, heart attack, bladder trouble and breast cancer). In *Hayes v. Commissioner*, *supra*, the Tax Court found reasonable cause where two children were seriously ill with pneumonia, the mother suffered a ruptured appendix requiring an emergency operation, and the father suffered a mental and physical collapse requiring hospitalization and causing him to be wheelchair-bound.

⁶ In *Leslie v. Commissioner*, *supra*, the taxpayer had been diagnosed with several serious mental disorders, but because she was able to manage her other business affairs, albeit with difficulty, the Tax Court determined she was not so impaired as to be unable to file timely returns.

⁷ In *Williams v. Commissioner*, 16 T.C. 893 (1951), the Tax Court did not find reasonable cause where the evidence did not show that the taxpayer's impairment due to a series of strokes was continuous, and did not show that his spouse was prevented from filing their returns.

where taxpayers have failed to prove that medical problems or other circumstances directly led to the taxpayers' inability to file the return.⁸ The "selective inability" to file tax returns while attending to other responsibilities does not demonstrate reasonable cause. (*Wright v. Commissioner, supra*, at p. *5.)

Appellants argue that reasonable cause exists to support abatement of the demand penalty for the 2016 tax year. Appellants present information pertaining to various circumstances they endured in support of their argument that they had reasonable cause for their failure to respond to FTB's 2016 Demand by the May 16, 2018 due date. Appellants point to events taking place as far back as 2014, arguing that while the "individual, numerous personal, medical and financial issues here do not constitute reasonable cause . . . when taken altogether, such issues sufficiently establish reasonable cause to abate the Demand penalty." However, much of appellants' arguments and evidence do not pertain to their ability to respond to the 2016 Demand during the relevant period between April 10, 2018, when FTB issued the Demand, to May 16, 2018, the deadline appellants were given to respond.⁹ In following the applicable law cited above, we focus our attention on circumstances that took place or the events that appellants endured through the relevant period.¹⁰

Appellants argue that caring for the medical needs of their son, who was born in 2017, prevented them from being able to respond to the Demand. Appellants allege that their son's condition worsened in 2018 and that he "required constant physical and emotional attention." Appellants contend that appellant-wife suffered post-partum depression, anxiety and insomnia, which prevented her from doing anything beyond caring for their son. Appellants also claim that

⁸ For instance, in *Ramirez v. Commissioner*, T.C. Memo. 2005-179, the Tax Court did not find reasonable cause, despite taxpayer's prior illness and surgery, because the taxpayer was able to continue his legal practice, pay business expenses, manage two rental properties, and care for two minor children. In *Wright v. Commissioner, supra*, the Tax Court did not find reasonable cause where the taxpayer had the capacity to attend to matters other than filing tax returns despite his mother's traumatic disappearance and death, and the taxpayer's failure to file returns continued beyond the duration of these events.

⁹ For example, Appellants provide an unsigned Employment Development Department (EDD) form presumably completed by appellant-husband's orthopedic surgeon, which indicates that appellant-husband was on disability from August 2017, through November 2017. According to the form, appellant-husband was released to return to work months before FTB issued its 2016 Demand. Appellant-wife also received disability insurance during 2017, and the evidence shows that she was released back to work as of December 30, 2017, also months before FTB issued its 2016 Demand.

¹⁰ While health issues are generally a matter of private concern, we discuss appellants' contentions that form the basis of their argument. Out of respect for appellants' privacy, we discuss only those contentions that are relevant to our analysis and conclusion.

appellant-wife suffered physical ailments due to giving birth that prevented her from resuming a normal and functional life. Appellants further argue that appellant-husband was tasked with being the caregiver while working during the period between April 10, 2018, and May 16, 2018, and while dealing with a health condition, which continuously prevented him from responding to the Demand.

The evidence appellants have provided that pertains to the relevant period does not show that appellants were continuously prevented from responding to the 2016 Demand. Appellants argue that their son's needs required constant care, such that they were prevented from responding to the 2016 Demand. However, a close examination of the evidence, over the period of time from their son's birth to when FTB issued the 2016 Demand, does not bear this out. Appellants were able to take their child home five days after his birth in late 2017, and while he did spend his first days in the newborn intensive care unit, he was discharged with no ongoing diagnoses. At his subsequent well check appointments, his doctor noted that appellants' child was doing well. A health status report noted that appellants' child was "has had no major illnesses. He has no history of ear infections, seizures or hospitalizations. He had surgery when he was 3 weeks old [in 2017] for frenulum correction (tongue-tied). He is not on any medication and has no known allergies." Appellants also provide a 2019 memo from a licensed occupational therapist, which does provide us with any information regarding the appellants' son's needs during the relevant period. The evidence does not show the "substantial medical issues" that appellants claim prevented them from responding to the Demand.

Appellants argue that appellant-wife, who was primarily tasked with filing their tax returns, "struggled with debilitating mental illnesses" such that she was unable to respond to the 2016 Demand. In support of this claim, appellants present a letter from a registered nurse who led a "mommy and me" group which appellant-wife joined with appellants' child in January 2018. The letter states that shortly after joining the group, appellant-wife reported experiencing some symptoms of post-partum depression, including anxiety, overwhelm, and sleep issues. However, appellants provide no actual assessment report or diagnosis of mental illness and fail to establish that appellant-wife was unable to respond to the 2016 Demand.

Appellants also argue that appellant-wife experienced medical problems immediately following the birth of their child, and that "such ailments caused substantial physical limitations" that along with her alleged mental illness, prevented her from responding to the 2016 Demand.

There is no evidence in the record that would support the claim of substantial limitation due to the physical ailments described, all of which fall outside of the relevant period. Appellants have not proffered any evidence which establishes that appellant-wife was prevented from responding to the 2016 Demand.

Appellants argue that appellant-husband was unable to reply to the Demand “due to complete mental and physical exhaustion” as a result of a health condition and his recovery from knee surgery which took place in August 2017.¹¹ Appellants provide a doctor’s letter stating that appellant-husband suffered symptoms such as fatigue, depression, memory loss and muscle weakness during the relevant period, and that this “was affecting [h]is normal performance.” It is not clear to what extent appellant-husband’s performance was affected or that his condition hindered his ability to respond to the 2016 Demand. According to appellant-husband’s medical records, his physical exams showed him to be “alert, no distress” both in late 2017 and in early 2018. Appellant-husband’s work calendar indicates that he had the capacity to attend to other matters, as he worked during April and May 2018, often five to seven days a week. Based on the evidence, it appears that appellant-husband sacrificed the timeliness of one aspect of his affairs to pursue other aspects. As explained above, the Tax Court has stated that the selective inability to attend to a tax obligation while attending to other responsibilities does not demonstrate reasonable cause. (*Wright v. Commissioner, supra*, at p. *5.) We do not have evidence to support appellants’ claim that appellant-husband was mentally or physically incapacitated during the relevant period and that his condition continuously prevented him from responding to the 2016 Demand.

We acknowledge that appellants underwent difficulty in dealing with the life events they faced during the relevant period, but even taken together, these life events do not meet a level that establishes that they were both continuously prevented from being able to timely respond to the 2016 Demand. There is no evidence that either appellant was incapacitated by their own physical or mental issues, or by the care their child required. The exercise of ordinary business care and prudence required appellants to set the time aside to respond to the 2016 Demand. When difficulties simply cause taxpayers to sacrifice the timeliness of one aspect of their affairs to pursue other aspects, the taxpayers bear the consequences of that choice. (*Head & Feliciano,*

¹¹ Appellant-husband indicates in a July 10, 2020 letter to FTB that healing from his knee surgery “took 3 months of physical therapy,” which comports with the conclusion of his disability insurance in November 2017. Therefore, appellant-husband had been released back to work well before FTB issued its Demand for 2016.

supra.) Appellants have not demonstrated that they exercised ordinary business care and prudence, and as such have not established reasonable cause to support abatement of the demand penalty.

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

R&TC section 19254(a)(1) requires FTB to impose a collection cost recovery fee when FTB notifies a taxpayer that the continued failure to pay an amount due may result in the imposition of the fee, and the taxpayer fails to timely pay the amount due in response to the notice. Furthermore, once properly imposed, there is no reasonable cause exception or any other provision in the statute allowing for relief from FTB's imposition of a collection cost recovery fee. (R&TC, § 19254; *Appeal of GEF Operating, Inc.*, 202-OTA-257P.) As such, our inquiry here is limited to determining whether FTB complied with the statutory notice requirements for imposing the collection cost recovery fee.

Here, FTB had received information that appellants had enough income to have a California filing requirement for tax year 2016. FTB issued several notices to appellants, including a Final Notice Before Levy dated January 22, 2019, which informed appellants that failure to pay the liability may result in collection action and imposition of a collection cost recovery fee. When appellants did not respond, FTB initiated collection actions and a collection cost recovery fee of \$317 was imposed on February 22, 2019. Appellants did not timely pay the amount due within the 30-day deadline, and the collection cost recovery fee was properly imposed.


As explained above, there is no statutory provision that authorizes the abatement of the collection cost recovery fee for any reason. FTB properly imposed the fee and appellants are therefore not entitled to an abatement of the collection cost recovery fee.

HOLDINGS


1. Appellants have not established that reasonable cause exists to abate the demand penalty.
2. The collection cost recovery fee was properly imposed.

DISPOSITION

We sustain FTB’s action in full.

DocuSigned by:

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 Amanda Vassigh
 Administrative Law Judge

We concur:

DocuSigned by:

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 Michael Geary
 Administrative Law Judge

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 Administrative Law Judge

Date Issued: 2/3/2022