

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

In the Matter of the Appeal of: ) OTA Case No. 21088400  
 A. EDWARDS, JR. )  
 )  
 )  
 )  
 )  
 )  
 )

---

**OPINION ON REHEARING**

Representing the Parties:

For Appellant: Gene Weinstein, Representative

For Franchise Tax Board (FTB): Christopher T. Tuttle, Tax Counsel III

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, A. Edwards, Jr. (appellant) appeals an action by respondent Franchise Tax Board (FTB) imposing a notice and demand (demand) penalty of \$7,126.47 for the 2013 tax year. On February 1, 2021, the Office of Tax Appeals (OTA) issued an Opinion in which OTA held that FTB's determination should be modified to reflect revised California source income of \$13,654.49 and to abate the demand penalty of \$7,126.47. In addition, OTA held that appellant's late filing penalty should be correspondingly recomputed and reduced based on the revised California source income. FTB's action was otherwise sustained.

FTB then timely filed a petition for rehearing contending that a rehearing should be granted as to the issues of OTA's revision of appellant's California source income and abatement of the demand penalty. On August 11, 2021, OTA issued an Opinion on Petition for Rehearing that granted a rehearing solely on the issue of the demand penalty.<sup>1</sup>

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

---

<sup>1</sup> Specifically, the Opinion stated that a rehearing was granted for the purposes of determining whether the demand penalty was properly imposed, including whether the prerequisites of the California Code of Regulations, title 18, section 19133(b) are satisfied under *Appeal of Jones*, 2021-OTA-144P, a precedential Opinion issued on March 4, 2021, and, if it is determined that the penalty was properly imposed, whether appellant has shown reasonable cause for failing to timely respond to the Demand for the 2013 tax year, such that the penalty may be abated.

### ISSUES

1. Whether FTB properly imposed the demand penalty.
2. Whether appellant established reasonable cause for failing to timely reply to the Demand for Tax Return (Demand) for the 2013 tax year.

### FACTUAL FINDINGS

1. Appellant, a nonresident of California, did not file a California income tax return for the 2013 tax year.
2. FTB received a 2013 California Schedule K-1 from a California S corporation, reporting that appellant received California source income.
3. FTB issued a Demand to appellant on May 5, 2015, requiring appellant to, by the due date provided, file a return, provide a copy of the return if already filed, or explain why appellant was not required to file a return.
4. FTB's records indicate that on February 24, 2014, appellant provided the address used on the 2013 Demand dated May 5, 2015.<sup>2</sup> The Demand was not returned as undeliverable.
5. When no response was provided, FTB issued a Notice of Proposed Assessment (NPA) on July 6, 2015, which proposed to assess tax, a demand penalty of \$7,126.47, a late filing penalty, a filing enforcement cost recovery fee, and applicable interest. The NPA was mailed to the same address as the February 24, 2014 Demand.
6. Previously, appellant was issued a June 17, 2014 Demand and an August 25, 2014 NPA for the 2012 tax year. Appellant was also issued a March 13, 2013 Request for Tax Return and a May 13, 2013 NPA for the 2011 tax year.
7. Appellant filed a protest in response to the NPA. FTB issued a Notice of Action affirming the NPA. Appellant timely appealed to the OTA.
8. On February 1, 2021, OTA issued an Opinion in which OTA held that FTB's determination should be modified to reflect revised California source income of \$13,654.49 and to abate the demand penalty of \$7,126.47. In addition, OTA held that appellant's late filing penalty should be correspondingly recomputed and reduced based on the revised California source income. FTB's action was otherwise sustained.

---

<sup>2</sup> FTB's records also indicate that appellant verified the address on September 15, 2015.

9. FTB then timely filed a petition for rehearing, and OTA issued an Opinion on Petition for Rehearing that granted a rehearing solely on the issue of the demand penalty.

### DISCUSSION

#### Issue 1: Whether FTB properly imposed the demand penalty.

California imposes a demand penalty on taxpayers for failing to file a return or to provide information upon FTB's demand to do so, unless reasonable cause prevented the taxpayer from complying with the Demand. (R&TC, § 19133.) For individuals, FTB 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, FTB issued an NPA following the taxpayer's failure to timely respond to a Request for Tax Return (Request) or a Demand. (Cal. Code Regs., tit. 18, § 19133(b).)

FTB issued a 2013 Demand to appellant on May 5, 2015, but appellant did not provide a response. Therefore, we examine whether the prerequisites of California Code of Regulations, title 18, section 19133(b) are satisfied. For the 2012 tax year, FTB issued a June 17, 2014 Demand and an August 25, 2014 NPA. For the 2011 tax year, FTB issued a March 13, 2013 Request and a May 13, 2013 NPA. Therefore, both the 2011 and 2012 NPAs were for tax years within the four tax years preceding the 2013 tax year at issue (i.e., 2009 through 2012). (Cal. Code Regs., tit. 18, § 19133(b); *Appeal of Jones*, 2021-OTA-144P.) As a result, the prerequisites of California Code of Regulations, title 18, section 19133 are satisfied.

Appellant argues that he moved and did not receive the Demand. R&TC section 18416 provides that any notice mailed to a taxpayer shall be sufficient if mailed to the taxpayer's last-known address, and the last-known address shall be the address that appears on the taxpayer's last return filed with FTB, unless the taxpayer has provided to FTB clear and concise written or electronic notification of a different address, or FTB has an address it has reason to believe is the most current address for the taxpayer.

FTB's records indicate that on February 24, 2014, appellant provided the address used on the 2013 Demand dated May 5, 2015, and the Demand was not returned as undeliverable.<sup>3</sup> Therefore, the 2013 Demand was mailed to appellant's last-known address. (See R&TC, § 18416; *Appeal of Halaburka* (85-SBE-025) 1985 WL 15809.) We also note that appellant

---

<sup>3</sup> FTB's records also indicate that appellant verified the address on September 15, 2015.

received the subsequent NPA and mailed a timely protest of the NPA using the same address, which shows that appellant received mail at that address and that this address did not change after the mailing of the Demand. As such, appellant has failed to show that he did not receive FTB's Demand for the 2013 tax year. (See *Appeal of Halaburka, supra.*) Therefore, we find that the 2013 Demand was sufficient, and that the demand penalty was properly imposed.

However, the amount of demand penalty should be recomputed and reduced based on the revised California source income of \$13,654.49 as determined in OTA's Opinion issued on February 1, 2021.

Issue 2: Whether appellant established reasonable cause for failing to timely reply to the Demand for the 2013 tax year.

To establish reasonable cause, a taxpayer must show that the failure to timely respond to the Demand occurred despite the exercise of ordinary business care. (*Appeal of Jones, supra.*) The taxpayer's reason for failing to respond to the Demand must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*)


Appellant argues that he did not receive the Demand because he moved and travelled often, including internationally. However, as previously noted, the 2013 Demand was sent to appellant's last known address and is valid and sufficient. In *Appeal of Schwyhart* (75-SBE-035) 1975 WL 3519, the Board of Equalization held that reasonable cause was not found where the taxpayer who had moved argued that the Demand was not sent to him by a friend with whom he had an informal arrangement to forward his mail. In this case, we find that appellant's travel is insufficient to find reasonable cause, as the standard of ordinary business care requires that taxpayers take adequate steps to ensure that they receive their mail. (*Ibid.*) Therefore, we find that appellant has not established reasonable cause for failing to timely respond to the Demand.

HOLDINGS


1. FTB properly imposed the demand penalty. In addition, the demand penalty should be recomputed and reduced based on the revised California source income of \$13,654.49 as determined in OTA’s Opinion issued on February 1, 2021.
2. Appellant has not established reasonable cause for failing to timely reply to the Demand for the 2013 tax year.

DISPOSITION

FTB’s action is sustained.

DocuSigned by:  
  
 CB1F7DA37831416...  
 \_\_\_\_\_  
 Josh Lambert  
 Administrative Law Judge

We concur:

DocuSigned by:  
  
 1A8C8E38740B4D5...  
 \_\_\_\_\_  
 Cheryl L. Akin  
 Administrative Law Judge

DocuSigned by:  
  
 272945E7B372445...  
 \_\_\_\_\_  
 Andrea L.H. Long  
 Administrative Law Judge

Date Issued: 3/30/2022