

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

In the Matter of the Appeal of:  
**D. ROGERS**

) OTA Case No. 21129197  
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**OPINION**

Representing the Parties:

For Appellant: D. Rogers

For Respondent: Christopher T. Tuttle, Tax Counsel III

**E. LAM**, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, D. Rogers (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$2,101 for the 2017 tax year.

Appellant elected to have this appeal determined pursuant to the procedures of the Small Case Program. Those procedures require the assignment of a single administrative law judge. (Cal. Code Regs., tit. 18, § 30209.1.) Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

**ISSUE**

Whether appellant is liable for the demand penalty.

**FACTUAL FINDINGS**

1. Appellant did not file a California tax return for the 2017 tax year by the due date of the return. FTB subsequently received third-party payor information indicating that appellant received sufficient income to trigger a California tax filing requirement for 2017.
2. On April 30, 2019, FTB issued to appellant a Demand for Tax Return (Demand) for the 2017 tax year, requiring appellant to either file a tax return or provide information explaining why appellant did not have a filing requirement. Appellant did not respond to the Demand.

3. On November 1, 2019, FTB issued a Notice of Proposed Assessment (NPA) to appellant for the 2017 tax year that proposed to assess, among other items, a demand penalty, plus applicable interest.<sup>1</sup> Appellant did not protest the NPA. Thereafter, the NPA became final on December 31, 2019. FTB subsequently began collection action.
4. On May 15, 2021, appellant filed the California tax return for the 2017 tax year. Appellant reported a tax liability of \$8,404, withholding of \$9,313, and claimed an overpayment of \$909. FTB accepted the return as filed and, as relevant here, reduced the demand penalty in the NPA to \$2,101 based on FTB's acceptance of the lower tax liability shown on appellant's 2017 California tax return.
5. On June 15, 2021, appellant filed a claim for refund for the amount paid for the demand penalty. FTB determined that appellant did not show reasonable cause to abate the demand penalty and denied appellant's claim.
6. This timely appeal followed.

#### DISCUSSION

R&TC section 19133 provides that if a taxpayer fails to file a return or furnish information upon notice and demand by FTB, then FTB may impose a penalty of 25 percent of the amount of tax determined pursuant to R&TC section 19087, unless the failure to respond to the notice and demand 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; 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 or a Demand. (*Appeal of Jones*, 2021-OTA-144P.)

Here, appellant failed to respond to the Demand for the 2017 tax year. In addition, FTB issued an NPA for the 2016 tax year after appellant failed to respond to the Request for Tax Return for 2016 tax year, which is one of the four tax years preceding the 2017 tax year at issue. Therefore, FTB properly imposed the demand penalty.

Appellant nonetheless argues that the demand penalty is improperly imposed because there was no tax due with the 2017 California tax return. As support, appellant cites R&TC section 19131, which provides that the late filing penalty is calculated based on the tax due with the return, reduced by any amount of tax paid on or before the date prescribed for payment of the

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<sup>1</sup> FTB also issued to appellant an NPA for the 2016 tax year after appellant did not respond to a Request for Tax Return for the 2016 tax year.

tax or credit claimed upon the return. (R&TC, § 19131(c).) However, the demand penalty is an entirely separate penalty that is imposed under R&TC section 19133, which provides that the penalty is calculated at 25 percent of the tax liability without regard to any amount of tax paid on or before the date prescribed for payment of the tax. (*Appeal of Jones, supra.*) Thus, FTB properly imposed the demand penalty for the 2017 tax year under R&TC section 19133.

Appellant also asserts reasonable cause arguments to abate the demand penalty. To establish reasonable cause, a taxpayer must show that the failure to timely respond to a demand occurred despite the exercise of ordinary business care. (*Appeal of Jones, supra.*) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*)

Appellant contends that appellant received erroneous guidance from using TurboTax software that indicated no tax was due for the 2017 tax year, which, according to appellant, caused the untimely filing of the 2017 tax return. However, even if appellant believed that there was no obligation to file a timely tax return, that fact is not relevant to the failure to timely respond to the Demand. The Demand stated that if appellant did not believe there was a tax filing obligation, appellant would need to provide such information to FTB. Therefore, this contention is unconvincing.

Appellant further contends that appellant suffered financial hardship caused by COVID-19 and was penalized for a tax obligation that was met through adequate withholdings from appellant's wages. However, appellant's alleged financial hardship does not explain the failure to timely respond to the Demand for the 2017 tax year, and therefore does not demonstrate reasonable cause to abate the demand penalty.<sup>2</sup>

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<sup>2</sup> Lastly, appellant contends that the failure to file the 2017 tax return was not due to willful neglect. Since appellant has not shown reasonable cause for the failure to respond to the Demand, Office of Tax Appeals does not need to discuss whether there was a lack of willful neglect.

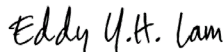
HOLDING

Appellant is liable for the demand penalty.

DISPOSITION

FTB's action is sustained in full.

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Eddy Y.H. Lam

Administrative Law Judge

Date Issued: 7/6/2022