

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
D. CLARK

) OTA Case No. 22039950
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OPINION

Representing the Parties:

For Appellant: Allan Yue, TAAP Student Representative
For Respondent: Ronald Hofsdal, Tax Counsel IV

N. RALSTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, D. Clark (appellant) appeals an action by the Franchise Tax Board (respondent) denying appellant’s claim for refund of \$837.25 for the 2018 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 has shown reasonable cause to abate the demand penalty.

FACTUAL FINDINGS

1. Appellant did not timely file a 2018 tax return.
2. Respondent sent appellant a Demand for Tax Return (Demand) on November 30, 2020. The Demand asked appellant to file a 2018 tax return by December 30, 2020, and advised appellant that if he failed to comply with the request, he would be assessed a demand penalty.

3. Appellant did not respond to respondent's Demand. On February 19, 2021, respondent issued a Notice of Proposed Assessment (NPA) to appellant, proposing an assessment of \$4,854.92, which included a demand penalty of \$1,639.75. The NPA states that appellant may either file a valid 2018 tax return, submit a copy of a previously filed 2018 tax return, or timely protest the proposed assessment by April 20, 2021.
4. Respondent previously issued to appellant the following notices: a Request for Tax Return on June 13, 2017, for the 2015 tax year, a Demand on April 10, 2018, for the 2016 tax year, and a Demand on September 16, 2019, for the 2017 tax year. Appellant did not respond to these notices. Respondent issued subsequent NPAs to appellant on August 14, 2017, June 11, 2018, and November 25, 2019, for the 2015, 2016, and 2017 tax years, respectively.
5. On June 17, 2021, appellant and his spouse filed their 2018 California Resident Income Tax Return, reporting a refund of \$942.
6. Respondent processed appellant's tax return and issued a Notice of Tax Return Change, which reduced the demand penalty to \$837.25.
7. Appellant and his spouse filed a claim for refund asserting that their failure to respond to the Demand was due to reasonable cause.
8. Respondent subsequently denied appellant's claim for refund and 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). A demand penalty is properly imposed if two criteria are met: (1) the taxpayer fails to timely respond to a current Demand, and (2) at any time during the preceding four tax years, respondent issued an NPA following the taxpayer's failure to timely respond to a Request or Demand. (Cal. Code Regs., tit. 18, § 19133(b)(1)-(2).)

The first requirement is met because respondent issued a Demand for the 2018 tax year to appellant on November 30, 2020, but did not receive a response. The second requirement is also met because appellant failed to respond to prior demands for tax return for the 2015, 2016 and 2017 tax years, which respondent thereafter issued an NPA for each tax year. Therefore,

respondent properly imposed the demand penalty for the 2018 tax year. (See *Appeal of Jones*, 2021-OTA-144P.)

When a demand penalty is properly imposed, the burden is on the taxpayer to prove that reasonable cause prevented the taxpayer from timely responding to the Demand. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) To establish reasonable cause, a taxpayer must show that the failure to respond to the 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. (*Ibid.*)

Appellant does not dispute that the demand penalty was properly imposed, but rather, argues that his failure to respond to the Demand was due to reasonable cause. Specifically, appellant asserts that both appellant and his wife suffered serious illnesses during the past five years, appellants were affected by Covid-19, and that appellant's tax preparer of 35 years also was affected by Covid-19.

Here, respondent issued the Demand on November 30, 2020, which required appellant to respond by December 30, 2020. While appellant and his spouse undoubtedly suffered serious illnesses, appellant has not specified the dates of the illnesses. Thus, it is not known whether the illnesses prevented appellant from responding to the Demand during the relevant time period. Appellant has also failed to explain how Covid-19 prevented him from responding to the Demand during the relevant time period. Further, appellant was provided with the opportunity to provide additional information to support his contentions that the failure to respond to the Demand was due to reasonable cause but declined to do so. As noted, the burden is on appellant to show that that the failure to respond to the Demand was due to reasonable cause. Appellant is required to provide credible and competent evidence to support a claim of reasonable cause. (See *Appeal of Belcher*, 2021-OTA-284P.) Appellant's failure to provide evidence within his control gives rise to a presumption that such evidence would be unfavorable to his case. (*Appeal of Bindley*, 2019-OTA-179P.) Thus, appellant has failed to establish that his failure to respond to respondent's demand was due to reasonable cause.

HOLDING

Appellant has failed to establish reasonable cause to abate the demand penalty.

DISPOSITION

Respondent's action denying appellant's claim for refund is sustained.

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Natasha Ralston
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Natasha Ralston
Administrative Law Judge

Date Issued: 12/7/2022