

FACTUAL FINDINGS

2018 Tax Year

1. FTB obtained information indicating that appellant Condos received income and that he had not filed a California income tax return.
2. FTB issued a Demand for Tax Return (Demand) to appellant Condos on April 12, 2022.
3. Appellant Condos did not respond to the Demand.
4. On June 17, 2022, FTB issued a Notice of Proposed Assessment (NPA) to appellant Condos, proposing total tax of \$64,423, tax due of \$21,048 (after application of California tax withheld of \$43,375), a late-filing penalty of \$5,262, a demand penalty of \$16,105.75, a filing enforcement fee of \$97, and applicable interest. The NPA provided appellant Condos until August 16, 2022, to protest the proposed assessments.
5. Appellant Condos neither filed a 2018 tax return nor timely protested the NPA, which became a final tax liability.
6. On December 15, 2022, appellants faxed a letter to request waiver of the penalties imposed for 2018, which FTB subsequently denied on December 29, 2022.
7. Appellants filed their 2018 tax return on January 3, 2023, reporting wages and business income, total tax of \$57,150, tax due of \$13,775 (after application of California tax withheld of \$43,375), a late-filing penalty of \$3,444, and applicable interest. Appellants paid \$20,701 on December 23, 2022.
8. FTB sent appellants a State Income Tax Balance Due Notice of \$12,276.75 on January 17, 2023, which adjusted the late-filing penalty and demand penalty from \$5,262 and \$16,105.75 per the NPA to \$3,443.75 and \$14,287.50, respectively, based upon the revised tax reported on appellants' 2018 return. Appellants paid \$12,335.28 on February 21, 2023, in satisfaction of the balance due.

2019 Tax Year

9. FTB obtained information indicating that appellant Condos paid mortgage interest on California property, and that he had not filed a California income tax return.
10. FTB issued a Demand to appellant Condos on April 19, 2022.
11. Appellant Condos did not respond to the Demand.
12. On June 17, 2022, FTB issued an NPA to appellant Condos on June 17, 2022, estimating his taxable income and proposing total tax (and tax due) of \$15,944. The NPA also

proposed a late-filing penalty of \$3,986, a demand penalty of \$3,986, a filing enforcement fee of \$97, and applicable interest.

13. Appellant Condos neither filed a 2019 tax return nor timely protested the NPA, which became a final tax liability.
14. On December 15, 2022, appellants faxed a letter to request waiver of the penalties imposed for 2019, which FTB subsequently denied on December 29, 2022.
15. Appellants filed their 2019 tax return on February 6, 2023. They reported business income, California taxable income, total tax (and tax due) of \$6,007, and an underpayment of estimated tax penalty of \$211. Appellants paid \$6,218 on January 27, 2023.
16. Appellants also paid \$264.72 on February 21, 2023, and \$3,800 on February 28, 2023, in satisfaction of the balance due.³
17. Based on the revised tax reported on appellants' 2019 return, FTB adjusted the late-filing and demand penalties of \$3,968, each, as previously calculated on the NPA, to \$1,501.75, each.⁴

2018 and 2019 Claims for Refund and Appellants' Appeal

18. On February 22, 2023, appellants filed a claim for refund seeking refund of the penalties imposed for the 2018 and 2019 tax years.
19. FTB did not issue a refund claim denial for either tax year 2018 or 2019; therefore, FTB is deemed to have denied appellants' refund claims effective August 22, 2023, which was six months from the date of appellants' February 22, 2023 claims for refund.
20. Appellants' timely appeal for both tax years followed.

Prior Year Request/Demands and NPAs

21. As relevant to the imposition of the demand penalty for both the 2018 and 2019 tax years, FTB previously sent appellant Condos a request or Demand and resulting NPAs for the

³ When added to the \$6,218 return payment, this resulted in an overpayment of \$118.19, which FTB refunded to appellants on March 15, 2023.

⁴ FTB did not attach a copy of a notice to appellants regarding the two penalties.

2014, 2015, and 2016 tax years, respectively. FTB mailed these to appellants' last known address on file, an address in Greenbrae, California.⁵

22. The request for tax return for the 2014 tax year is dated December 16, 2015, and the related NPA is dated February 16, 2016.
23. The Demand for the 2015 tax year is dated April 4, 2017, and the related NPA is dated June 5, 2017.
24. The Demand for the 2016 tax year is dated March 15, 2018, and the related NPA is dated May 14, 2018.

DISCUSSION

Issue 1: Whether appellants have established reasonable cause to abate the late-filing penalty.

When FTB imposes a penalty, the law presumes that the penalty was imposed correctly, and the burden of proof is on the taxpayers to establish otherwise. (*Appeal of Xie*, 2018-OTA-076P.) To overcome the presumption of correctness attached to the penalty, taxpayers must provide credible and competent evidence supporting a claim of reasonable cause; otherwise, the penalty cannot be abated. (*Ibid.*) Unsupported assertions are not sufficient to satisfy the taxpayers' burden of proof. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.)

California imposes a penalty for the failure to file a return on or before the due date, unless it is shown that the failure is due to reasonable cause and not due to willful neglect. (R&TC, § 19131(a).) The penalty is 5 percent of the untimely paid tax per month or fraction thereof between the due date of the return and the date it is filed, up to 25 percent of that amount. (*Ibid.*)

Appellants filed their 2018 and 2019 tax returns on January 3, 2023, and February 6, 2023, respectively, over three and two years after the respective due dates. Thus, FTB properly imposed the late-filing penalty for both tax years unless appellants establish reasonable cause for their late-filed tax returns.

⁵ In their reply brief, appellants argue that FTB sent the notices to the wrong address, which they substantiate by attaching a copy of their 2013 income tax return. However, appellants filed that return on July 9, 2018, after FTB had mailed the 2014, 2015, and 2016 notices to appellants.

Reasonable Cause

For taxpayers to establish that their failure to act was due to reasonable cause, the taxpayers must show that the failure occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Belcher*, 2021-OTA-284P.)

Reliance on a tax professional's advice for questions of substantive tax law, such as whether a liability exists, may constitute reasonable cause, where certain conditions are met, including where the tax professional has competency in the subject tax law, and the tax professional's advice is based on the taxpayers' full disclosure of the relevant facts and documents. (*U.S. v. Boyle* (1985) 469 U.S. 241 (*Boyle*); *Appeal of Summit Hosting LLC*, 2021-OTA-216P.) However, reliance on an expert cannot function as a substitute for compliance with an unambiguous statute. (*Boyle, supra.*)

Illness or other personal difficulties may be considered reasonable cause if the taxpayers present credible and competent proof that they were continuously prevented from filing a tax return. (*Appeal of Head and Feliciano*, 2020-OTA-127P.) When taxpayers allege reasonable cause based on an incapacity due to illness or the illness of an immediate family member, the duration of the incapacity must approximate that of the tax obligation deadline. (*Ibid.*) However, if the difficulties simply caused the taxpayers to sacrifice the timeliness of one aspect of their affairs to pursue other aspects, the taxpayers must bear the consequences of that choice. (*Ibid.*) The taxpayers' selective inability to perform tax obligations, while participating in regular business activities, does not establish reasonable cause. (*Ibid.*)

Appellants argue that reasonable cause exists for the late-filing of appellants' 2018 and 2019 tax returns because: (1) appellant Condos had personal medical challenges; (2) appellant Condos, who was the primary wage earner for appellants, lost his job in March 2018; (3) appellants' accountant, who had been retained to prepare returns and did so through 2017, became sick in 2021 and could not file tax returns, and passed away on September 17, 2022; and (4) appellants learned of accountant's death on October 11, 2022, and hired new accountants to file returns in November 2022.

None of these arguments address why appellant Holmes, appellant Condos wife, was unable to comply with the filing deadlines for the 2018 and 2019 tax returns. Although

appellants argue that appellant Holmes was a homemaker who did not have the skills to file tax returns, it requires no special training or effort to ascertain a deadline and make sure it is met. (*Boyle, supra.*)

Appellants contend that they engaged an accountant to prepare and submit their tax returns and delegated and relied on their accountant to respond to all notices beginning in July 2018. “It is well established that taxpayers have a personal, non-delegable obligation to ensure their returns are filed timely, and reliance on an agent to perform this act does not constitute reasonable cause.” (*Appeal of Fisher, 2022-OTA-337P.*) The law is clear: the fact that a tax preparer was expected to attend to a matter does not relieve the taxpayers of the duty to comply with the statute, and an agent’s failure to file a tax return cannot constitute reasonable cause for the taxpayers. (*Ibid.*)

Additionally, despite his medical condition, appellant Condos was able to work in 2018 and 2019. He earned wages and business income in 2018. He also earned business income in 2019. Taxpayers must bear the consequences of their choice to pursue other aspects of their affairs, and reasonable cause is not established based on their selective inability to perform tax obligations during the course of participating in regular business activities. (*Appeal of Head and Feliciano, supra.*) Additionally, appellants have not provided credible and competent proof that they were continuously prevented from filing their 2018 and 2019 tax returns.⁶ Accordingly, appellants have not shown that the late-filing penalty should be abated.

Issue 2: Whether appellants have established reasonable cause to abate the demand penalty.

R&TC section 19133 imposes a penalty when a taxpayer fails to file a return or provide information upon FTB’s notice and demand to do so, 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 timely respond to a current Demand in the manner prescribed, and (2) FTB has proposed an assessment of tax under the authority of R&TC section 19087(a), after the taxpayer failed to timely respond to a Request for Tax Return or a Demand in the manner prescribed, for any taxable year that is within the four-taxable-year period immediately preceding the taxable year for which the current Demand is issued. (Cal. Code Regs., tit. 18, § 19133(b).)

⁶ Appellants also argue the COVID-19 pandemic should be considered in this appeal; however, for the 2019 tax year, the filing and payment due date was postponed to July 15, 2020, to account for that pandemic.

Both conditions are met for the 2018 and 2019 tax year demand penalties. Appellants did not timely respond to both of the Demands, and FTB previously sent Demands and NPAs for the 2014, 2015, and 2016 tax years, which are all within the preceding four tax years for the 2018 tax year. The 2015, 2016, and 2018 tax years are similarly within the preceding four tax years for the 2019 tax year.⁷ Therefore, FTB properly imposed the demand penalty for the 2018 and 2019 tax years unless appellants establish reasonable cause for their failure to respond to the Demands for the 2018 and 2019 tax returns.

To establish such reasonable cause, taxpayers must establish that the failure to respond to the Demand in the manner prescribed occurred despite the exercise of ordinary business care and prudence, or that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Shanahan*, 2024-OTA-039P.)

The reasonable cause analysis for the late-filing penalty discussed above equally applies to the demand penalty. Appellants have not established reasonable cause with the argument they relied on a tax professional for the demand notices when there is no evidence that appellants contacted their tax professional or made any efforts to contact FTB upon receiving the 2018 and/or 2019 Demand or NPA. Appellants did not respond until after the NPAs became final. No evidence has been submitted that appellant Condos' medical condition continuously prevented him from responding to FTB's Demands. Therefore, appellants have not established reasonable cause for that appellant Condos was unable to properly respond to the demand notices due to his medical condition.

Appellants also argue that the delivery address used by FTB for tax years 2014, 2015, and 2016 Demands and NPAs was erroneous, and appellants informed FTB of their address

⁷ Appellants cite to a nonprecedential decision issued by OTA for appellants' 2016 tax year, *Appeal of Condos and Holmes*, 2021-OTA-145, in which OTA abated the demand penalty issued by FTB. However, OTA subsequently issued its precedential Opinion in *Appeal of Jones*, 2021-OTA-144P, which supersedes appellants' nonprecedential decision for the 2016 tax year. In *Appeal of Condos and Holmes*, *supra*, OTA concluded that because FTB had issued NPAs for tax years 2012, 2013, and 2014 in 2016 and 2017, and the appeal year was tax year 2016, FTB had not issued the 2012, 2013 and 2014 NPAs in the past four calendar years preceding 2016. However, *Appeal of Jones*, *supra*, holds that the prior year NPAs must be issued during the four tax years preceding the tax year on appeal. Additionally, California Code of Regulations, title 18, section 19133 was amended, operative October 19, 2021, to clarify that the interpretation in *Appeal of Jones*, *supra*, is correct. Additionally, even if OTA were to apply the same reasoning as used in *Appeal of Condos and Holmes*, *supra*, the demand penalty would be found to be properly imposed for both the 2018 and 2019 tax years at issue in this appeal since both the 2014 and the 2015 Request/Demand and NPAs were also issued during the prior four calendar years. The 2014 request was issued in 2015 and the 2014 NPA was issued in 2016 which is within four calendar years of both 2018 and 2019. The 2015 Demand and NPA were issued in 2017, which again, is within four calendar years of both 2018 and 2019.

change on their 2013 tax return. Therefore, appellants appear to argue that prior Demands and NPAs do not apply for the purpose of imposing the demand penalty for the 2018 and 2019 tax years. However, appellants filed their 2013 tax return on July 9, 2018, after FTB had mailed all Demands and NPAs for tax years 2014, 2015, and 2016. Any notice mailed to a taxpayer is sufficient if mailed to the taxpayer’s last known address, which is established by the last return filed with FTB, unless the taxpayer has notified FTB of a change of address or FTB has some reason to believe there is a more current address for the taxpayer. (R&TC, § 18416(b), (c).) Here, nothing in the record indicates that appellants notified FTB of their address change or that FTB otherwise had reason to believe that appellants had a more current address.

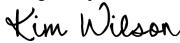
Thus, nothing in the record establishes reasonable cause for abatement of the demand penalties.

HOLDINGS

1. Appellants have not established reasonable cause to abate the late-filing penalties.
2. Appellants have not established reasonable cause to abate the demand penalties.


DISPOSITION

FTB’s actions are sustained.

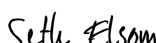
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 Kim Wilson
 Hearing Officer

We concur:

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 Andrew Wong
 Administrative Law Judge

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 Seth Elsom
 Hearing Officer

Date Issued: 11/14/2024