Josh Lambert
Tax Counsel
Board of Equalization, Appeals Division
450 N Street, MIC:85
PO Box 942879
Sacramento, CA 95814
Tel: (916) 322-3284
Fax: (916) 324-2618

Attorney for the Appeals Division

BOARD OF EQUALIZATION

STATE OF CALIFORNIA

In the Matter of the Appeal of:	**HEARING SUMMARY**
	PERSONAL INCOME TAX APPEAL
PHILIP M. AKER	Case No. 839858

Year	Claim for Refund[1]
2010	$2,201.50

Representing the Parties:

For Appellant: Philip M. Aker

For Franchise Tax Board: Joel M. Smith, Tax Counsel

QUESTION: (1) Whether appellant has shown reasonable cause for failing to reply to the Franchise Tax Board's (FTB or respondent) Demand for Tax Return (Demand).

HEARING SUMMARY

Background

For the 2010 tax year, the FTB obtained information indicating that appellant received income that was sufficient to prompt a return-filing requirement. When appellant failed to file a 2010

[1] This amount consists of a notice and demand penalty.

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

return, on December 27, 2011, the FTB issued a Demand for the 2010 tax year, demanding that appellant provide a response by February 1, 2012, by either showing a return had been filed, explaining why a return was not required to be filed, or filing a return. On January 24, 2012, the FTB granted appellant's request for additional time to file a 2010 tax return (Deferral Letter), extending his deadline to file a return to March 2, 2012. (Resp. Op. Br., p. 1, Ex. A; Appeal Letter, attachments.)

When appellant did not file a return by March 12, 2012, the FTB issued a Notice of Proposed Assessment (NPA) for the 2010 tax year. In the NPA, the FTB estimated appellant's 2010 income to be $143,349, based upon the following: (1) wages reported by the City of Los Angeles City Controller in the amount of $96,987; (2) interest income reported from Los Angeles Federal Credit Union in the amount of $2,018; and (3) income reported on a Schedule K-1 from Vista Pistachio Partners in the amount of $14,965, Samar Pistachio Ranch in the amount of $14,719, and Palau Pistachio Ranch in the amount of $14,660. On the NPA, the FTB proposed an assessment of additional tax of $1,655.00, a late filing penalty of $413.75,[2] a notice and demand penalty (demand penalty) of $2,712.75, and an $88.00 filing enforcement cost recovery fee, plus interest. (Resp. Op. Br., p. 2; Appeal Letter, attachments.)

On June 15, 2012, appellant filed a 2010 tax return claiming the "single" filing status. The return reflected a California adjusted gross income (AGI) of $121,933 and the standard deduction of $3,670, resulting in taxable income of $118,263 and tax of $9,004. Appellant applied a personal exemption credit of $99 and an elderly exemption credit of $99, resulting in a total tax liability of $8,806. Appellant claimed withholding credits of $7,095 and applied an extension payment totaling $2,100, resulting in appellant claiming $390 in overpaid tax. (Resp. Op. Br., p. 2, Ex. B.)

The FTB accepted the return as filed and adjusted the demand penalty to $2,201.50. Appellant submitted a payment of $1,836.82 on August 3, 2012. The FTB considered appellant's email, sent April 2, 2014, as a claim for refund. The FTB denied the claim for refund by letter dated April 16, 2014. This timely appeal followed. (Resp. Op. Br., p. 2, Exs. C, D, & E.)

///

[2] The FTB states that it abated the late filing penalty because appellant had sufficient payments to satisfy the self-assessed tax. (Resp. Op. Br., p. 2.)

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

Contentions

Appeal Letter[3]

Appellant requests a reduction or elimination of the demand penalty. Appellant states that he agrees with the outline of the facts and law in the claim for refund denial letter, but that he would like to point out facts to support his request for the abatement of the penalty. Appellant states that he is employed by the City of Los Angeles and had state withholding credits of $7,096 accrued during the 2010 tax year. Appellant states that, when he filed for an extension of time to complete his 2010 state tax return, he paid an additional $2,100 with that extension request. Appellant states that the combined total withheld and paid with his extension was more than his total 2010 state tax liability of $8,806, which he believe indicates his sincere effort to comply with the state income tax program as he has been doing since he first filed California income taxes in 1969. (Appeal Letter.)

Appellant states that he understands the California law regarding timely compliance with a Demand and admits that he did not file during the period required by the original Demand and the Deferral Letter, but in spite of an illness during that period, he did file. Appellant asks that the penalty be reduced or eliminated in recognition of his continued compliance with California income tax regulations. (Appeal Letter.)

Respondent's Opening Brief

Respondent states that Revenue and Taxation Code (R&TC) section 19133 requires the FTB to impose a demand penalty if a taxpayer fails or refuses to file a return upon notice and demand that one be filed. Respondent states that appellant appears to contend that it was not necessary to respond to the FTB's Demand in a timely manner because no tax was owed. Respondent states that, the purpose and intent of R&TC section 19133 is to penalize a taxpayer who does not timely respond to a formal notice from the FTB. Respondent states that the law is not concerned with whether a taxpayer had any tax due and that "it is the failure of a taxpayer to respond to the notice and demand, and not the taxpayer's failure to pay the proper tax, that section 18683 was designed to penalize,"[4] citing the

---

[3] Appellant also submitted a reply brief that was identical to his appeal letter.

[4] R&TC section 18683 was renumbered to R&TC section 19133, operative January 1, 1994.

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

Appeal of Robert Scott, 83-SBE-094, decided by the Board on April 5, 1983.[5] Respondent states that appellant did not timely respond as required. Respondent states that the Deferral Letter required that appellant file a tax return by March 2, 2012, which he did not do. (Resp. Op. Br., p. 3.)

Respondent states that the FTB also properly imposed the demand penalty under California Code of Regulations, title 18, section (Regulation) 19133. Respondent states that the FTB can only impose the demand penalty if the taxpayer fails to timely respond to a current Demand in the manner prescribed. Respondent asserts that the FTB met this requirement because appellant did not file a tax return by March 2, 2012, as required by the Deferral Letter. Respondent states that the FTB can only impose the demand penalty if, in addition to the taxpayer's failure to timely respond to a current Demand, the FTB has also proposed an assessment of tax after the taxpayer failed to timely respond to a Request for Tax Return (Request) or a Demand at any time during the four taxable years preceding the taxable year for which the current Demand is issued. Respondent states that it met this second requirement because an NPA was issued after appellant did not timely file a return for the 2008 tax year, as required by a Request for the 2008 tax year and a subsequent deferral letter. Respondent states that it also proposed an assessment after appellant did not timely file a return for the 2009 tax year, as required by a Demand for the 2009 tax year and a subsequent deferral letter.[6] Respondent states that, since the FTB proposed an assessment of tax after appellant did not timely file returns for the 2008 and 2009 tax years, the second requirement for the imposition of the demand penalty under Regulation 19133 is satisfied. (Resp. Op. Br., p. 3, Exs. F, G, H, I, J, & K.)

Respondent states that it properly calculated the demand penalty. Respondent states that the demand penalty is computed at 25 percent of the amount of the taxpayer's total tax liability, which is determined without regard to payments. Respondent states that appellant reported a total tax liability of $8,806.00 and, accordingly, the FTB computed the demand penalty at $2,201.50, or $8,806.00 multiplied by 25 percent. (Resp. Op. Br., pp. 3-4.)

Respondent states that its imposition of the demand penalty is presumed correct and that

---

[5] Board of Equalization cases (designated "SBE") may generally be found at: www.boe.ca.gov.

[6] The NPA issued for the 2009 tax year included the proposed assessment of a demand penalty in the amount of $2,266. However, the demand penalty was subsequently withdrawn.

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

the demand penalty may be abated if the taxpayer can establish that the failure to timely respond to the demand was due to reasonable cause and was not due to willful neglect, citing R&TC section 19133. Respondent asserts that the taxpayer has the burden to show that reasonable cause exists for failing to timely respond to the Demand. Respondent states that, to establish reasonable cause, the taxpayer's reason for failing to timely respond to the Demand must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (Resp. Op. Br., p. 4.)

Respondent states that appellant appears to request an abatement on the grounds that he suffered from an illness during the relevant time period. Respondent states that illness or other personal difficulties which prevent a taxpayer from filing a timely return may be considered reasonable cause in some cases. Respondent states that, in order to show reasonable cause, the taxpayer must present credible and competent proof that the circumstances of the illness or other personal difficulty completely prevented the taxpayer from complying. However, respondent states that, if the difficulties simply caused the taxpayer to sacrifice the timeliness of one aspect of the taxpayer's affairs to pursue other aspects, the taxpayer must bear the consequences of that choice. (Resp. Op. Br., p. 4.)

Respondent states that appellant's "passing reference" to an illness does not constitute reasonable cause. Respondent states that it is sympathetic to the difficulty this illness may have caused appellant, but that appellant must present proof that the circumstances of the illness completely prevented him from filing a timely return. Respondent states that, based on the information provided to this point, the FTB cannot abate the demand penalty, but if appellant provides additional documentation regarding his illness, the FTB will consider it. Respondent states that, at this time, appellant has not met his burden of proof. (Resp. Op. Br., p. 4.)

Applicable Law

California imposes a penalty for the failure to file a return or to provide information upon respondent's demand to do so, unless reasonable cause prevented the taxpayer from responding to the demand. (Rev. & Tax. Code, § 19133.) Respondent may only impose a demand penalty if the taxpayer fails to respond to a current Demand and respondent issued an NPA under the authority of R&TC section 19087, subdivision (a), after the taxpayer failed to timely respond to a Request or a Demand at any time during the four taxable years preceding the year for which the current Demand is

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

being issued. (Cal. Code Regs., tit. 18, § 19133, subd. (b).)

When respondent imposes a demand penalty, the law presumes that the penalty was imposed correctly. (*Todd v. McColgan*, (1949) 89 Cal.App.2d 509; *Appeal of Yvonne M. Goodwin*, 97-SBE-003, Mar. 19, 1997.) The burden is on the taxpayer to prove that reasonable cause prevented him from responding to the Demand. (*Appeal of Kerry and Cheryl James*, 83-SBE-009, Jan. 3, 1983.) To establish reasonable cause, a taxpayer must show that the failure to respond to a Demand occurred despite the exercise of ordinary business care. (*Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982.) The taxpayer's reason for failing to respond must be such that an ordinarily intelligent and prudent business person would have acted similarly under the circumstances. (*Appeal of Joseph W. and Elsie M. Cummings*, 60-SBE-040, Dec. 13, 1960.)

Illness or other personal difficulties may be considered reasonable cause if the taxpayer presents credible and competent proof that he was continuously prevented from responding to the Demand. (*Appeal of Michael J. and Diane M. Halaburka*, 85-SBE-025, Apr. 9, 1985; *Appeal of Kerry and Cheryl James*, *supra*; *Appeal of Allen L. and Jacqueline M. Seaman*, 75-SBE-080, Dec. 16, 1975.) However, if the difficulties simply caused the taxpayer to sacrifice the timeliness of one aspect of his affairs to pursue other aspects, the taxpayer must bear the consequences of that choice. (*Appeal of Michael J. and Diane M. Halaburka*, *supra*; *Appeal of William T. and Joy P. Orr*, 68-SBE-010, Feb. 5, 1968.) A taxpayer's selective inability to perform tax obligations, while participating in regular business activities, does not establish reasonable cause. (*Watts v. Commissioner* (1999) T.C. Memo. 1999-416.)

A taxpayer's belief that a return, if prepared, would show no payment due provides no justification for neglecting to prepare and file that return. Even if a taxpayer's tax liability had been fully satisfied by withholding at the source, he would still have been required to file a return because his gross income comfortably exceeded the threshold for nonfilers. A taxpayer's mistaken belief that he need not file a return is not reasonable cause. (*Wolfington v. Commissioner*, T.C. Memo. 2014-45; *Henningsen v. Commissioner* (1956) 26 T.C. 528.)

STAFF COMMENTS

The FTB satisfied the regulatory prerequisite for the assessment of the demand penalty,

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

as the FTB previously issued a 2008 Request and a 2009 Demand to appellant and NPAs for those years. In addition, the demand penalty was properly imposed because the deadline provided in the Deferral Letter was March 2, 2012, and respondent did not receive appellant's tax return until June 15, 2012.

Appellant has not provided any evidence to show reasonable cause for failing to respond to the Demand and contends that the penalty should be abated based on his good compliance history. However, appellant does not have a good compliance history, as he did not timely file his return in the previous two years, requiring the issuance of a Request and a Demand and proposed assessments for those years.

Appellant will want to provide evidence to support his claim that he had an illness which prevented him from responding to the Demand. Due to the past notices and demands, it is clear that appellant was aware that he had a filing requirement, especially considering his substantial annual income.

Pursuant to Rules for Tax Appeals Regulation 5523.6, appellant should provide any additional evidence in support of his position to the Board Proceedings Division at least 14 days prior to the oral hearing.[7]

///

///

///

AkerP_jl

[7] Evidence exhibits should be sent to: Khaaliq A. Abd'Allah, Appeals Analyst, Board Proceedings Division, State Board of Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL