

1 Neha Garner
2 Tax Counsel III
3 Board of Equalization, Appeals Division
4 450 N Street, MIC:85
5 PO Box 942879
6 Sacramento, CA 95814
7 Tel: (916) 323-3094
8 Fax: (916) 324-2618

6 Attorney for the Appeals Division

7 **BOARD OF EQUALIZATION**

8 **STATE OF CALIFORNIA**

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10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **KAMALDIP S. GHEI**) Case No. 796875

	<u>Year</u>	<u>Claim for Refund</u> <u>Penalty</u>
	2011	\$2,509.75

16 Representing the Parties:

17 For Appellant: Tax Appeals Assistance Program (TAAP)¹
18 For Franchise Tax Board: Anne Mazur, Specialist

20 QUESTION: Whether appellant has established reasonable cause for the abatement of the notice and
21 demand (demand) penalty.

23 HEARING SUMMARY

24 Background

25 Appellant did not file a timely return for the 2011 tax year. The Franchise Tax Board
26 (FTB or respondent) obtained information which indicated that appellant received enough income to
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28 ¹ Appellant filed the appeal letter. Andrew S. Quinn of TAAP filed appellant’s reply brief. Kellen Furlin of TAAP filed appellant’s supplemental brief.

1 prompt the filing of a return.² On February 27, 2013, respondent mailed a Demand for Tax Return
2 (Demand) to appellant, demanding that, by April 3, 2013, he either file a 2011 tax return or, in the
3 alternative, explain why a 2011 return was not required. On March 28, 2013, respondent granted a
4 deferral (Deferral Letter) for appellant to respond until May 3, 2013. On April 23, 2013, respondent
5 granted an additional deferral (Deferral Letter) for appellant to respond until June 2, 2013. (Resp.
6 Opening Br., p. 1, Exs. A, B & C.)

7 Appellant did not reply to the Demand for his 2011 return by the due date indicated on
8 the Demand letter or the subsequent Deferral Letters. Subsequently, on July 22, 2013, respondent issued
9 a Notice of Proposed Assessment (NPA) to appellant for the 2011 tax year based on appellant's wages
10 of \$179,658.00 reported to the Employment Development Department (EDD), as well as dividend
11 income of \$5,115.00, miscellaneous income of \$6,292.00, and brokerage income that was based on a
12 percentage of sales reported on Forms 1099-B of \$360,997.56. The NPA estimated appellant's taxable
13 income to be \$548,293.56 and a tax liability before payment credits of \$48,639.00, and allowed an
14 income tax withholding of \$14,562.00.³ In addition, respondent imposed penalties of \$8,519.25 for the
15 late filing of appellant's return, an additional penalty of \$12,159.75 for the failure to file upon demand,
16 and a filing enforcement fee of \$78.00 plus interest. (Resp. Opening Br., pp. 1-2, Ex. D.)

17 On August 30, 2013, appellant filed his 2011 California tax return.⁴ Appellant reported
18 taxable income of \$134,050, a tax liability of \$10,039 and claimed withholding credits of \$14,562 plus
19 excess disability insurance (SDI) of \$102. Appellant claimed an overpaid tax amount of \$4,625, which
20 he requested be applied to his 2012 estimated tax. (Resp. Opening Br., p. 2, Ex. E.)

21 Respondent accepted appellant's return and withdrew the NPA.⁵ Since appellant failed to
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23 ² Respondent stated that, for the 2011 tax year, single individuals with no dependents realizing gross income of at least
24 \$15,152, or adjusted gross income (AGI) of at least \$12,122, were required to file a California income tax return.

25 ³ Respondent stated that it calculated the tax using the applicable standard deduction and tax rate for the single filing status.
26 Respondent stated that it did not allow a personal exemption credit because appellant's federal AGI exceeded the applicable
27 phase-out threshold.

28 ⁴ Respondent noted that appellant's federal return was also filed late on August 29, 2013, after that return was requested by
the Internal Revenue Service (IRS) on June 5, 2013.

⁵ As a result of the withdrawal of the NPA, respondent stated that it did not impose the late filing penalty, the demand
penalty, and the filing enforcement fee as indicated on the NPA.

1 file the return by June 2, 2013, which was the deferred response deadline on the third Demand (i.e., the
2 Deferral Letter dated April 23, 2013), respondent imposed a demand penalty of \$2,509.75 (i.e.,
3 \$10,039.00 x 25 percent). After applying payment credits to satisfy appellant's account balance,
4 respondent transferred the remaining overpayment of \$2,126.06 to appellant's 2012 estimated tax.
5 (Resp. Opening Br., p. 2, Ex. F.)

6 Appellant filed a claim for refund on October 18, 2013, requesting the abatement of the
7 demand penalty. Respondent denied appellant's claim for refund on November 25, 2013, asserting that
8 appellant failed to establish reasonable cause for the failure to timely respond to the Demand. This
9 timely appeal followed. (Resp. Opening Br., p. 2, Ex. G.)

10 Contentions

11 Appellant

12 Appellant requests the abatement of the demand penalty. Appellant contends that he has
13 a good history of filing timely tax returns. Appellant contends that he switched accountants, which
14 resulted in a miscommunication and caused the return to be further delayed. Appellant contends that he
15 had assumed his previous accountant had filed his returns but, when he could not contact the accountant
16 after numerous attempts, he had his new accountant prepare the returns as soon as he was notified his
17 returns were in fact not filed. Appellant contends that he did not have any further tax liabilities that
18 exceeded his 2011 withholding amount and that he had an overpayment of \$4,625 from the 2011 tax
19 year, which he requested be applied toward his 2012 tax year liability. (Appeal Letter.)

20 On reply, appellant contends that he relied on the advice of his accountant with respect to
21 the Demand because he withheld more tax than he was liable for and he did not have any further tax
22 liability. Appellant contends that he provided his accountant with all of the information regarding his
23 income items and any additional information he would have provided would have only increased the
24 amount of the refund he received. Appellant attaches an August 1, 2014 letter from his accountant,
25 Hemant Lavu, in which Mr. Lavu asserts that he reviewed all of appellant's tax documents and drafted
26 the initial return. Mr. Lavu also indicates that he then realized appellant had more tax withheld than
27 what he was liable for and that, since appellant was still gathering additional business expense

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1 documentation, he advised appellant that his return could be filed later for several reasons.⁶ Mr. Lavu
2 also asserts that, when he learned about the Demand, his advice to appellant was that his return could be
3 filed later since no taxes were due and that appellant was due a refund. (App. Reply Br., p. 1, Ex. A.)

4 Citing *United States v. Boyle* (1985) 469 U.S. 241, appellant asserts that the failure to
5 timely file a tax return is not excused by a taxpayer's reliance on an agent. However, appellant contends
6 that the Supreme Court stated that "When an accountant or attorney advises a taxpayer on a matter of tax
7 law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most
8 taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. . . ."
9 Appellant contends that this appeal does not involve a tax return that was not timely filed or a late filing
10 penalty in which reliance on his accountant would not constitute reasonable cause. Appellant contends
11 that his case involves a demand penalty and that he relied on the advice of his accountant in the delay of
12 filing his return because he knew he would receive a refund since his withholding was greater than his
13 tax liability. (App. Reply Br., pp. 1-2.)

14 Appellant contends that "this is not a case of an ordinary filing date, but a Demand for
15 Tax Return filing date." Appellant contends that his accountant advised him that he could file his return
16 late because he was due a refund and that this was not based on a fixed statutory filing date. Appellant
17 argues that it was reasonable for him to rely on his accountant. (App. Reply Br., p. 2.)

18 In his supplemental brief, appellant argues that reasonable cause exists because appellant
19 acted as an ordinarily prudent business person would have under the circumstances. Appellant argues
20 that *Boyle* stands for the proposition that, if a taxpayer relies on the improper advice of an accountant or
21 tax attorney as to a matter of tax law, such as whether the taxpayer has a tax liability, failing to file a
22 return in reliance on that advice may be considered reasonable cause. Appellant argues that he showed
23 Mr. Lavu the demand letters and asked for advice on what he needed to do. Appellant contends that he
24 had already asked for two deferrals on his own and asked Mr. Lavu if he needed to ask for a third
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26 ⁶ Mr. Lavu asserts that he advised appellant that ". . . we can file his tax return later due to the several reasonable causes:
27 (1) he did not have any further tax liability; (2) he provided me with a complete and accurate picture of his income items;
28 (3) the additional information that was being gathered would only increase the amount of refund due to the taxpayer; and
(4) Mr. Ghei fully disclosed all relevant facts and documents." Mr. Lavu further asserts that "[w]hen I learned about the
Demand For Tax Return Letter from the FTB, my advice was we could file the return later, as no taxes were owed." (App.
Reply Br., Ex. A.)

1 deferral. Appellant contends that Mr. Lavu had all of the relevant facts and documents, advised
2 appellant not to ask for a third deferral, and indicated that he would take care of the demand letters.
3 Appellant contends that he needed the advice of his accountant and that respondent's contention that its
4 Demand is clear and unambiguous should not be the key to determining whether reasonable cause
5 existed to abate the demand penalty. (App. Supplemental Br., pp. 2-3.)

6 Respondent

7 Respondent contends that appellant has not shown reasonable cause for the abatement of
8 the demand penalty. Respondent contends that it properly imposed the demand penalty pursuant to
9 R&TC section 19133, because appellant failed to timely respond to the current Demand and failed to
10 timely respond to a Demand at any time during the four-year period preceding the taxable year for
11 which the current Demand pertains. Respondent contends that it issued NPAs following appellant's
12 failures to timely respond to Demands for the 2007, 2008, and 2009 tax years. Respondent contends
13 that the demand penalty is proper because it was imposed within four years of preceding tax years
14 where respondent issued NPAs following appellant's failure to timely file a return upon the receipt of a
15 Demand. Respondent also contends that, when it imposes a demand penalty, the law presumes that the
16 penalty is correct. (Resp. Opening Br., p. 3, Ex. H, I & J.)

17 Respondent asserts that appellant has the burden of establishing reasonable cause for the
18 abatement of the penalty, which means that appellant must show that the failure to file a return in
19 response to a Demand letter occurred despite the exercise of ordinary business care and prudence.
20 Respondent also contends that each taxpayer has a personal, non-delegable obligation to file a tax
21 return by the due date, respond to a notice and demand by respondent that a return be filed, and to
22 furnish information requested by respondent. Citing *United States v. Boyle, supra*, respondent argues
23 that a taxpayer's reliance on an agent, such as an accountant or tax attorney, to file a return by the due
24 date, to respond on the taxpayer's behalf to a notice and demand from respondent, or to reply to a
25 request for information by respondent, is not reasonable cause. (Resp. Opening Br., p. 3, Ex. K.)

26 In response to appellant's contention that his return was filed late due to a
27 miscommunication with his accountant and that he believed his prior accountant had filed the return,
28 respondent argues that appellant is confusing the demand penalty with the penalty for failing to file his

1 return by the original due date. Respondent contends that, even though appellant filed his return late on
2 August 30, 2013, no late filing penalty was imposed because appellant had sufficient income tax
3 withholding credits to cover his tax liability. Respondent contends that the demand penalty was
4 imposed due to appellant's failure to respond to the Demand by the deferral date and argues that
5 payments and credits are not considered. Respondent also argues that, even if appellant believed his
6 accountant had responded to the Demand, appellant ultimately had the responsibility. (Resp. Opening
7 Br., p. 3.)

8 On reply, and in response to appellant's argument for reasonable cause, respondent
9 asserts that the statement from appellant's accountant is inconsistent. Respondent contends that
10 Mr. Lavu stated that appellant "provided him with a complete and accurate picture of his income items"
11 and that appellant "fully disclosed all relevant facts and documents," but that appellant "was still
12 gathering additional business expense documentation" that would only serve to increase his anticipated
13 refund. Respondent contends that Mr. Lavu further stated that, when he learned about the Demand, his
14 advice was to file the returns later since there was no tax due to excessive withholding. Respondent
15 contends that Mr. Lavu either had all the relevant facts and documents or he did not. Respondent also
16 contends that Mr. Lavu does not state when he learned of the Demand and it is not clear whether he
17 became aware of the Demand before or after the specified response date. Respondent also notes that
18 Mr. Lavu's statement was notarized but was not signed under penalty of perjury. (Resp. Reply Br., pp.
19 1-2.)

20 Respondent also argues that the Demand letter clearly stated that, if appellant did not
21 respond to the Demand by the reply date indicated, a demand penalty would be assessed at 25 percent
22 of appellant's total tax without regard to payments and that appellant must file even if he is due a
23 refund. Respondent contends that this information is set forth in the March 28, 2013 Deferral Letter
24 and also in the April 23, 2013 Deferral Letter. Therefore, respondent contends that, after reading such
25 clear and unambiguous warnings, it is surprising that Mr. Lavu would advise appellant he need not file
26 by the response dates even if he was due a refund. Respondent argues that this suggests that Mr. Lavu
27 did not actually see the Demand, but even if he did, it was unreasonable for appellant to rely on it when
28 appellant needed no special knowledge to ascertain that a response was required by the specified dates,

1 regardless of whether such dates were “fixed filing dates.” (Resp. Reply Br., p. 2.)

2 Respondent contends that the requirement to respond to the Demand must have been
3 understood by appellant because he requested two deferrals for additional time to file his return in
4 response to the original Demand. Respondent contends that this was not the first time it demanded that
5 appellant file a return. Respondent contends that it demanded that appellant file his 2009 return and his
6 failure to do so by the specified response date resulted in a demand penalty of \$4,223 even though his
7 timely payments exceeded his 2009 tax liability. Respondent argues that appellant knew from recent
8 experience that the consequence of his failure to timely respond to the Demand would result in a
9 penalty of 25 percent of his tax liability. (Resp. Reply Br., p. 3, Ex. M.)

10 Applicable Law

11 Demand Penalty

12 California imposes a penalty for the failure to file a return or provide information upon
13 the FTB’s demand to do so, unless reasonable cause prevented the taxpayer from responding to the
14 request. (Rev. & Tax. Code, § 19133.) The penalty is computed as 25 percent of the total tax,
15 determined without regard to timely payments or other credits. (*Appeal of Elmer R. and Barbara*
16 *Malakoff*, 83-SBE-140, June 21, 1983; *Appeal of Frank E and Lilia Z. Hublou*, 77-SBE-102, July 26,
17 1977.) The FTB will only impose a demand penalty if two conditions are met: (1) the taxpayer fails to
18 respond to a current Demand for Tax Return *and* (2) at any time during the four taxable years preceding
19 the year for which the current Demand for Tax Return is being issued, the FTB had issued an NPA
20 under the authority of Revenue and Taxation Code (R&TC) section 19087, subdivision (a), after the
21 taxpayer failed to timely respond to a Request for Tax Return or a Demand for Tax Return. (Cal. Code
22 Regs., tit. 18, § 19133, subd. (b).)

23 The demand penalty is designed to penalize the failure of a taxpayer to respond to a
24 notice and demand, and not the taxpayer’s failure to pay the proper tax. (*Appeal of W. L. Bryant*,
25 83-SBE-180, Aug. 17, 1983; *Appeal of Frank E and Lilia Z. Hublou*, *supra*.) The burden is on the
26 taxpayer to prove that reasonable cause prevented him from timely responding to the demand. (*Appeal*
27 *of Kerry and Cheryl James*, 83-SBE-009, Jan. 3, 1983.) To overcome the presumed correctness of
28 respondent’s assessment of the demand penalty, a taxpayer must produce credible and competent

1 evidence supporting his contentions. (*Appeal of Yvonne M. Goodwin*, 97-SBE-003, Mar. 19, 1997.)

2 Demand penalties may be abated if the taxpayer's failure to provide information or to file
3 a return is due to reasonable cause and not willful neglect. (Rev. & Tax. Code, § 19133.) Without
4 evidence to the contrary, it is presumed that respondent's determinations of penalties are correct.
5 (*Appeal of Robert Scott*, 83-SBE-094, Apr. 5, 1983.) An appellant bears the burden of showing that the
6 imposition of a penalty was improper. (*Appeal of Kerry and Cheryl James*, *supra*.)

7 To establish reasonable cause for the abatement of a demand penalty, a taxpayer must
8 show that the failure to properly respond "occurred despite the exercise of ordinary business care and
9 prudence, or that cause existed as would prompt an ordinary intelligent and prudent businessman to have
10 so acted under similar circumstances." (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9,
11 1979; see also *Appeal of Elmer R. and Barbara Malakoff*, *supra*.) Illness and other personal difficulties
12 that prevent a taxpayer from timely responding to a demand notice may constitute reasonable cause
13 under some circumstances. However, a taxpayer must be prevented from timely providing information,
14 and not merely sacrificing the timeliness of one aspect of the taxpayer's affairs to pursue other aspects.
15 (*Appeal of Michael J. and Diane M. Halaburka*, 85-SBE-025, April 9, 1985; *Appeal of William T. and*
16 *Joy P. Orr*, 68-SBE-10, Feb. 5, 1968.) In addition, this Board has held that a taxpayer's belief that no
17 penalties will apply because no tax was due does not constitute reasonable cause for the failure to
18 respond timely to a notice and demand letter. (*Appeal of Frank E. and Lilia Z. Hublou*, *supra*.)

19 Each taxpayer has a personal and non-delegable obligation to file a tax return by the due
20 date, to respond to a notice and demand from the FTB that a return be filed, and to furnish information
21 requested by the FTB. (*Appeal of Thomas K. and Gail G. Boehme*, 85-SBE-134, Nov. 6, 1985; *Appeal*
22 *of Roger D. and Mary Miller*, 86-SBE-057, Mar. 4, 1986.) A taxpayer's reliance on an agent, such as an
23 accountant, to file a return by the due date, to respond on the taxpayer's behalf to a notice and demand
24 letter from the FTB, or to reply to a request of information by the FTB, is not reasonable cause. (*United*
25 *States v. Boyle*, *supra*.) In *Boyle*, the Supreme Court stated that it is reasonable for a taxpayer to rely on
26 the advice of an accountant or attorney when that accountant or attorney advises a taxpayer as to a
27 matter of tax law. However, the Supreme Court also held that one does not need to be a tax expert to
28 know that tax returns have fixed filing dates and taxes must be paid when due. (*Id.*, at 251-252.) In

1 addition, the Supreme Court held that a taxpayer's reliance on an accountant or attorney cannot be a
2 substitute for compliance with an unambiguous statute. (*Id.*)

3 STAFF COMMENTS

4 According to California Code of Regulations section (Regulation) 19133, respondent
5 may only impose a demand penalty if a taxpayer failed to respond to a current Demand, and respondent
6 has previously issued an NPA after the taxpayer failed to timely respond to a Request or Demand at any
7 time during the four-taxable-year period preceding the taxable year for which the current Demand for
8 Tax Return was issued. (Cal. Code Regs., tit. 18, § 19133, subd. (b).) Respondent also issued a Request
9 or Demand to appellant for the 2007, 2008, and 2009 tax years and, when appellant did not timely
10 respond, NPAs were issued.⁷ Thus, respondent properly imposed the demand penalty as prescribed by
11 that regulation.

12 Respondent issued three demand letters to appellant for the 2011 tax year: (1) a
13 Demand for Tax Return letter dated February 27, 2013, which included a response date of April 3,
14 2013; (2) a Deferral Letter dated March 28, 2013, in which respondent granted appellant's request for
15 additional time to file his 2011 return until May 3, 2013; and (3) a Deferral Letter dated April 23,
16 2013, in which respondent granted appellant's request for additional time to file his 2011 return until
17 June 2, 2013. In the April 23, 2013 Deferral Letter, respondent stated the following:

18 **Demand to File Penalty** - If you do not file the tax return within the time period
19 specified in this letter, we impose a penalty of 25 percent of the total tax amount before
20 applying any payments or credits. Therefore, you may owe penalties and interest even
21 if your tax return shows the tax was paid timely. This penalty is in addition to the 25
22 percent delinquent filing penalty. We impose the penalty from the date of the Notice of
23 Proposed Assessment. (Revenue and Taxation Code Section 19133[.])

24 The parties should be prepared to discuss whether the circumstances of appellant's lack of response by
25 the June 2, 2013 deferral date provides a basis to find that reasonable cause, not willful neglect, caused
26 the lack of response, as appellant did not file a tax return until August 30, 2013, which was after

27 ⁷ With its opening briefing, respondent provided the 2007 Request, dated February 9, 2009; the 2008 Request, dated
28 January 11, 2010; and the 2009 Demand, dated February 2, 2011. Respondent also provided the 2007, 2008, and 2009
NPA's, dated February 22, 2010, March 22, 2010, and April 5, 2011, respectively.

1 respondent issued its NPA for the 2011 tax year and approximately three months after the extended
2 June 2, 2013 deadline imposed.

3 Appellant asserts that he relied on his accountant's advice and that his accountant had
4 full knowledge of the facts. While ignorance of the law does not constitute reasonable cause, it
5 appears that appellant should have known that a demand penalty would be imposed since he
6 previously requested and received deferrals. Because appellant requested and received deferrals of
7 time to prepare the return indicates that, notwithstanding any advice he may have received, he
8 understood that the Demand required the filing of the return. Furthermore, it appears to staff that
9 appellant should have known from recent experience that the consequence of failing to timely respond
10 to the Demand would result in a demand penalty, regardless of whether he was due a refund, since a
11 similar instance occurred in the 2009 tax year. As stated earlier, the Demand indicated that, if
12 appellant did not respond to the Demand by the date indicated, a demand penalty would be assessed.
13 The duty to respond to the Demand was clear and it required no special training or effort to ascertain
14 the deadline for filing a response to the Demand and to make sure the Demand deadline was met. (See
15 *United States v. Boyle, supra.*) It is also not clear if appellant's accountant had full knowledge of the
16 facts based on the accountant's August 1, 2014 letter.⁸ Even if appellant's accountant was fully
17 apprised of the facts, it seems doubtful that a taxpayer exercising ordinary business care and prudence
18 would reasonably rely on such advice. Appellant will need to establish that an ordinarily intelligent
19 and prudent businessperson would not have responded to such a Demand under these circumstances.

20 Finally, regarding *United States v. Boyle*, this Supreme Court decision stands for the
21 proposition that a taxpayer's reliance on an agent, such as an accountant or an attorney, to file a timely
22 return or to make a timely payment of tax is not reasonable cause. Consistent with this, a taxpayer
23 cannot rely on his agent as for whether he should respond to a demand for a tax return. As the language
24 quoted above from the April 23, 2013 Deferral Letter clearly provides, an individual requires no special
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26 ⁸ Staff also notes that appellant's initial appeal letter does not state that he relied on the advice of his accountant in not
27 responding to the Demand by the extended deadline. Instead, it states that he thought his old accountant had filed the tax
28 returns but that he could not get into contact with the accountant, causing appellant to go to a new accountant. The argument
that appellant relied on the advice of his accountant in not complying with the Demand was not raised until appellant's reply
brief.

1 training to understand the demand made or to make sure that the demand was met. Consequently,
2 Board staff finds that appellant's reliance on *United States v. Boyle* to be inappropriate. Under *United*
3 *States v. Boyle*, reasonable cause may exist if a taxpayer relies on a tax professional for *substantive* tax
4 advice.

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