

1 Mai C. Tran
2 Tax Counsel
3 Board of Equalization, Appeals Division
4 450 N Street, MIC:85
5 PO Box 942879
6 Sacramento CA 95814
7 Tel: (916) 324-8244
8 Fax: (916) 324-2618

6 Attorney for the Appeals Division

7 **BOARD OF EQUALIZATION**
8 **STATE OF CALIFORNIA**

10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **TIM BARTH AND TERI BARTH**¹) Case No. 562294

	<u>Year</u>	<u>Claim for Refund Penalty</u>
	2008	\$951.75

16 Representing the Parties:

18 For Appellants: Elizabeth Crockett, Taxpayer Appeals Assistance Program²
19 For Franchise Tax Board: Kristen Magers, Tax Counsel

21 QUESTION: Whether appellants have established reasonable cause for the abatement of the notice
22 and demand (demand) penalty.

23 ///

24 ///

26 _____
27 ¹ Appellants reside in Sacramento County.

28 ² Appellants filed their own appeal letter. Brandon Knoll of the Taxpayer Appeals Assistance Program (TAAP) assisted appellants in this matter by filing appellants' reply brief dated August 24, 2011. Sara Rosenthal of TAAP filed appellants' reply brief dated November 14, 2011.

1 HEARING SUMMARY

2 Background

3 Appellants did not file a timely 2008 California income tax return. Respondent Franchise
4 Tax Board (respondent or FTB) received information which indicated that appellants had sufficient
5 income to prompt a California income tax filing requirement. Specifically, respondent discovered that
6 appellants received income from Mel Rapton Honda and SAFE Credit Union.³ Respondent issued a
7 Demand for Tax Return (Demand) to appellant-husband on February 2, 2010, requiring him to respond
8 by March 10, 2010, by either demonstrating that a return had been filed or explaining why he was not
9 required to file a return. The Demand was mailed to appellant-husband at an address in Carmichael,
10 California 95608-8001. (Resp. Op. Br., p. 1, Ex. A.)

11 Appellant-husband did not respond by March 10, 2010. Respondent subsequently issued
12 a Notice of Proposed Assessment (NPA) to appellant-husband dated April 6, 2010, for the 2008 tax
13 year. Respondent mailed the NPA to the same address in Carmichael, California 95608-8001 to which it
14 sent the Demand. The NPA proposed tax of \$8,928 based on wages from Mel Rapton Honda of
15 \$125,511 and interest income from SAFE Credit Union of \$26. After credit for withholding, the unpaid
16 amount of the proposed tax was \$3,647. Respondent also proposed a late filing penalty of \$911.75 and a
17 demand penalty of \$2,232.00. (Resp. Op. Br., pp. 1-2, Ex. B.)

18 On April 15, 2010, appellants filed their 2008 tax return, claiming married joint filing
19 status. Appellants reported a total tax liability of \$3,807 and withholding of \$5,281, resulting in an
20 overpayment of tax in the amount of \$1,474 (i.e., \$3,807 - \$5,281). Respondent accepted the return as
21 filed and the tax and demand penalty were adjusted accordingly. In addition, respondent rescinded the
22 late filing penalty. The demand penalty was recalculated to be 25 percent of the tax shown on the return
23 (\$951.75). The payment of the demand penalty was credited from the \$1,474.00 overpayment of tax and
24 the \$522.75 difference (i.e., \$1,474.00 - \$951.75) was refunded to appellants. According to
25 respondent's records, the refund was mailed to appellants at the same address as the Demand and the
26

27
28 ³ Through respondent's Integrated Non-Filer Compliance (INC) Program, respondent obtains wage and salary income
information from various sources such as information reported to the Employment Development Department by California
employers and payment information reported on federal information returns (Form 1099 series) by payors and distributors of
the payments.

1 NPA. (Resp. Op. Br., p. 2, Exs. C, D, E, & F.)

2 Appellants sent a letter to respondent dated May 27, 2010, in which appellants requested
3 an abatement of the \$951.75 demand penalty and a refund of that amount. On November 18, 2010,
4 respondent denied appellant's request for refund. Appellant then filed this timely appeal. (Resp. Op.
5 Br., p. 2, Ex. G.)

6 Overview

7 In summary, appellants assert below that, in the Spring of 2009, the United States Post
8 Office changed appellants' address, specifically the city and the zip code portions of their address.
9 Appellants' former address (prior to the address change by the United States Post Office) was:

10 Adelaide Way, Sacramento, CA 95481-0001

11 Appellants' current address (as of the Spring of 2009), resulting from the change by the
12 United States Post Office), is:

13 Adelaide Way, Carmichael, CA 95608-8001⁴

14 Respondent mailed the demand notice, dated February 2, 2010, to appellant-husband at
15 this address:

16 Adelaide Way, Carmichael, CA 95608-8001

17 As such, the notice was mailed to appellants' current address. In addition, the NPA and the refund were
18 likewise mailed to this address.

19 Contentions

20 Appellants

21 Appellants contend that they did not receive the Demand dated February 2, 2010.
22 Appellants contend that the United State Post Office changed their mailing address. Appellants indicate
23 that, while their physical address remained the same, their city address, and the corresponding ZIP code,
24 changed from Sacramento to Carmichael. Appellants concede that they were late in filing their 2008
25 return. However, appellants state that they overpaid their 2008 taxes and they have always received a
26 refund. Appellants request an abatement of the demand penalty and state that, going forward, they will
27

28 ⁴ Appellants' address before and after the change retained the same street address on Adelaide Way.

1 file their taxes timely. Appellants state that they filed the 2008 return at the same time they filed their
2 2009 return which demonstrates their intent to get current with their returns and they had no knowledge
3 of the Demand. In support, appellants provided copies of a blank check and mail they received at their
4 new address on Adelaide Way, Carmichael, California 95608.⁵ Appellants provided a copy of mail
5 received at their old address on Adelaide Way, Sacramento, California 95841, with a postmark date of
6 November 5, 2007. In addition, appellants provided copies of their personal check and various medical
7 records (with various dates in 2008) which indicate the old address located on Adelaide Way,
8 Sacramento, California 95841. (Appeal Letter, pp. 1-2, Attachments.)

9 In appellants' reply brief dated August 24, 2011, appellants state that, while the Demand
10 appears to have been sent to the correct Carmichael address, they never received the notice. Appellants
11 contend their address changed in the Spring of 2009 and they still receive mail addressed to their old
12 Sacramento mailing address, providing a copy of mail with a May 4, 2011 postmark date addressed to
13 the Sacramento mailing address. Appellants assert that this problem caused their mail to be lost.
14 Appellants further contend that, as respondent does not register its notices, it cannot be shown that
15 appellants received the Demand. Appellants argue that it is unreasonable to enforce a duty to respond to
16 the notices they never received. In addition, appellants contend that the demand penalty is severe since
17 the penalty is based on 25 percent of the tax without a consideration for payments made. Appellants
18 contend that they have always responded by filing a tax return and overpaying their taxes. (App. Reply
19 Br., pp. 1-2, Ex. A.)

20 In appellants' additional brief received by the Board on November 14, 2011, appellants
21 assert that they failed to respond to the notice and demand due to reasonable cause. Appellants assert
22 there was reasonable cause because appellants could not respond to a notice they never received.
23 Appellants assert that their mailing address was changed by the United States Post Office. Appellants
24 state that they did not move and never set up mail forwarding. They state that, after the address change,
25 mail was lost or delivered to the wrong address. Appellants contend that the cases which respondent
26 cites in support of its position, the *Appeal of W.L. Bryant*, 83-SBE-180, decided on August 17, 1983
27

28 ⁵ The Appeals Division notes that the postmark date on this one item of mail is unclear.

1 (*Bryant*), and the *Appeal of Jon W. and Antoinette O. Johnston*, 83-SBE-238, decided on October 26,
2 1983 (*Johnston*), are distinguishable from the present matter. Appellants contend that *Bryant* does not
3 state that the last-known address rule overcomes the reasonable cause exception. Appellants note that
4 the taxpayer in *Bryant* failed to argue why there was reasonable cause to abate the demand penalty.
5 Appellants note that, in *Bryant*, the taxpayer argued there was reasonable cause for failing to respond to
6 an NPA. Appellants contend that, contrary to *Bryant*, in this present matter, appellants could not have
7 done anything else to ensure they would receive their mail. (App. Addl. Br., p. 1.)

8 Appellants contend that, in *Johnston*, the Board held that the demand penalty may be
9 abated if such failure is due to reasonable cause and not willful neglect. Appellants assert that the
10 opinion misinterprets the *Appeal of Winston R. Schwyhart*, 75-SBE-035, decided by the Board on
11 April 22, 1975 (*Schwychart*). Appellants note that the taxpayer in *Schwychart* had his friend collect his
12 mail and send it to him at his new address and the friend lost the taxpayer's address and saved the
13 taxpayer's mail in a drawer. Appellants further note that, in *Schwychart*, the taxpayer argued that the
14 demand penalty should be abated because the mail was not forwarded. Appellants contend that none of
15 the cases support the position that the last-known address rule overcomes the reasonable cause
16 exception. Appellants further contend that *Delman v. Commissioner* (3rd Cir. 1967) 384 F.2d 929, 933,
17 is distinguishable because that case involved the Internal Revenue Code and a notice of tax deficiency,
18 not the California demand penalty. Appellants argue that there is a larger government interest in the
19 issuance of a statutorily-required deficiency notice, in which timelines are usually attached, whereas the
20 demand penalty does not have a set time limit like deficiency notices. (App. Addl. Br., p. 2.)

21 Respondent

22 Respondent contends that appellants have not demonstrated reasonable cause for the
23 abatement of the demand penalty since the Demand was sent to appellants' last-known and current
24 address. Respondent also contends that the penalty was properly imposed according to California Code
25 of Regulations, title 18, section (Regulation) 19133, subdivisions (b)(1) and (2). Respondent states that
26 it issued a Request for Return to appellants for a prior tax year (the 2006 tax year) and, when appellants
27 failed to respond, it issued an NPA for that tax year. (Resp. Op. Br., pp. 2-3.)

28 With respect to appellants' assertion that they were not afforded due process or notice

1 due to their claim that they never received the Demand, respondent contends that it is sufficient notice
2 for respondent to mail the Demand and the NPA to appellants' last-known address and, in this matter,
3 appellants' current address. Respondent cites R&TC section 18416 for the proposition that the mailing
4 of respondent's notice to the current address provided by a taxpayer is adequate notice whether or not
5 the taxpayer actually received notice. Respondent contends there is no requirement for respondent to
6 prove that appellants actually received the demand as asserted by appellants, citing the Board's
7 decisions in the *Appeal of W.L. Bryant, supra*, and the *Appeal of Jon W. and Antoinette O. Johnston,*
8 *supra*. Respondent also notes, according to its records, that appellants filed late returns for 2005 and
9 2006, in addition to the year on appeal. (Resp. Op. Br., p. 3.)

10 In response to appellants' contention that it is unreasonable to require them to respond to
11 something they never received, respondent notes that appellants have not offered any legal authority to
12 support this position. In addition, respondent argues that while appellants may have always filed a tax
13 return, they have not always complied with the statutory requirements and filed in a timely manner.
14 Respondent notes that appellants filed late returns for 2005, 2006, and 2008 and that appellants did not
15 receive a demand penalty for 2005 or 2006. Respondent asserts that appellants' argument that the non-
16 receipt of respondent's demand constitutes reasonable cause for an abatement of the demand penalty
17 ignores well-settled law. Respondent again argues that the mailing of the Demand to the current address
18 provided by a taxpayer is adequate notice whether or not the taxpayer actually received the notice, citing
19 R&TC section 18416, subdivision (a). Respondent contends that the purpose of this rule is to protect the
20 taxing agency and the statutory scheme of assessment and appeal from a failure by a taxpayer to inform
21 the taxing agency of a change in address, citing *Delman v. Commissioner, supra*. (Resp. Reply Br.,
22 pp. 1-2.)

23 In response to appellants' contention that the policy behind the last-known address rule
24 does not apply to the demand penalty, respondent asserts that R&TC section 18416 unequivocally
25 applies to any notice. Respondent also points out that the Board's past decisions state that the last-
26 known address rule applies to demands for tax returns. In addition, respondent contends that almost all
27 notices issued by it require some action by a taxpayer to avoid stated consequences. Respondent
28 contends that its need to establish that a Demand was sent to the last-known address in the case of a

1 demand penalty is in no way more or less necessary than it would be to establish that an NPA was sent
2 to the last-known address in the case of a proposed assessment. Respondent asserts that it would be no
3 less onerous for respondent to prove actual receipt of a Demand than it would be for respondent to prove
4 actual receipt of an NPA. Respondent contends that the policy reasoning behind the last-known address
5 rule is just as applicable to Demands as it is with NPAs. Respondent contends that appellants' statement
6 that they did not receive the Demand is tantamount to arguing respondent must prove actual receipt.
7 (Resp. Reply Br., pp. 2-3.)

8 Applicable Law

9 Demand Penalty

10 California imposes a penalty for the failure to file a return or to provide information upon
11 the FTB's notice and demand to do so, unless reasonable cause prevented the taxpayer from responding
12 to the request. (Rev. & Tax. Code, § 19133.) The FTB will only impose a demand penalty if the
13 taxpayer fails to respond to a current Demand for Tax Return and the FTB issued an NPA under the
14 authority of R&TC section 19087, subdivision (a), after the taxpayer failed to timely respond to a
15 Request for Tax Return or a Demand for Tax Return at any time during the four-taxable-years preceding
16 the year for which the current Demand for Tax Return is being issued. (Cal. Code Regs., tit. 18,
17 § 19133, subd. (b).)

18 Reasonable Cause

19 To establish reasonable cause, a taxpayer must show that the failure to reply to the notice
20 and demand or to request for information occurred despite the exercise of ordinary business care and
21 prudence. (*Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982.) The taxpayer's reason for
22 failing to respond to the notice and demand or the request for information must be such that an
23 ordinarily-intelligent and prudent businessperson would have acted similarly under the circumstances.
24 (*Appeal of Eugene C. Findley*, 86-SBE-091, May 6, 1986.) When the FTB imposes a delinquent filing
25 or notice and demand/failure to furnish information penalty, the law presumes that the penalty was
26 imposed correctly. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509.) The burden of proof is on the
27 taxpayer to show that reasonable cause exists to support an abatement of the penalty. (*Appeal of Eugene*
28 *C. Findley, supra.*)

1 Last-Known Address Rule

2 R&TC section 18416 sets out the statutory mailing guidelines that the FTB is required to
3 follow. The statute first provides that any notice may be given if sent by first class prepaid postage.
4 (Rev. & Tax. Code, § 18416, subd. (a).) Second, any notice mailed to a taxpayer's last-known address
5 is sufficient. (Rev. & Tax. Code, § 18416, subd. (b).) Third, the statute provides that the last-known
6 address shall be the address that appears on the taxpayer's last return filed with the FTB, unless the
7 taxpayer has provided to the FTB clear and concise written or electronic notification of a different
8 address, or the FTB has an address it has reason to believe is the most current address for the taxpayer.
9 (Rev. & Tax. Code, § 18416, subd. (c).)

10 It is well settled that respondent's mailing of a notice to the taxpayer's last-known
11 address is considered sufficient even if the notice never actually reaches the taxpayer. (*Appeal of*
12 *Yvonne M. Goodwin*, 97-SBE-003, Mar. 19, 1997; *Appeal of Jon W. and Antoinette O. Johnston*, *supra*.)
13 This "last-known address rule" protects the taxing agency and the statutory scheme of assessment and
14 appeal from a taxpayer's failure to inform the taxing agency of a change in address. (*Delman v.*
15 *Comm'r*, *supra* at 933.) If the taxpayer moves after filing his or her return, the taxpayer must take the
16 necessary steps to ensure the receipt of his or her mail. (*Appeal of Winston R. Schwyhart*, 75-SBE-035,
17 Apr. 22, 1975.)

18 For the FTB's notice to be proper, the law provides that it is not necessary for the FTB to
19 prove the notice was received by the taxpayer. (See *United States v. Zolla* (9th Cir. 1984) 724 F.2d 808,
20 810, cert. denied, 469 U.S. 830.) It is sufficient that the notice was mailed to the taxpayer's last-known
21 address and it was not returned to the FTB as undelivered. (*Id.*) As a general rule, a taxpayer's last-
22 known address is the address that appears on the taxpayer's most recently-filed tax return, unless the
23 FTB is given clear and concise notice of a different address. (*Appeal of W. L. Bryant*, *supra*.)

24 Due Process

25 The Board has previously held that "due process is satisfied with respect to tax matters so
26 long as an opportunity is given to question the validity of a tax at some stage of the proceedings."
27 (*Appeals of Walter R. Bailey*, 92-SBE-001, Feb. 20, 1992.)

28 ///

1 STAFF COMMENTS

2 Appellants assert that they have established reasonable cause to abate the demand penalty
3 because their mailing address was changed by the United States Post Office in the Spring of 2009 which
4 resulted in their failure to receive mail. Appellants should be prepared to discuss how the evidence in
5 the record supports their argument that the Spring 2009 mailing address change caused mail sent to the
6 new address (i.e., the correct address after the address change), including the February 2, 2010 Demand,
7 to be lost or misdelivered early in 2010. For example, appellants may wish to provide documentation of
8 any contact with the United States Post Office regarding this alleged situation. Most significantly,
9 appellants should be prepared to address how the mailing address change is relevant when respondent
10 mailed the Demand to the new address.

11 It appears the NPA (dated April 6, 2010) and the refund issued on May 25, 2010, were,
12 like the February 2, 2010 Demand, mailed to the new address. Appellants should be prepared to address
13 whether they received the NPA and the refund.

14 Respondent should be prepared to discuss when, and to what address, the Requests for
15 Tax Return for tax years 2005 and 2006 were issued and whether either of those documents were
16 returned by the Post Office as undeliverable. In addition, respondent should also be prepared to discuss
17 whether the Demand, the NPA, or the refund relating to the appeal year at issue were returned by the
18 Post Office as undeliverable. Respondent should also be prepared to discuss whether it has any
19 evidence to demonstrate appellants received the refund, such as a copy of a negotiated warrant.

20 Pursuant to California Code of Regulations, title 18, section 5523.6, if either party has
21 any additional evidence to present, such party should provide the evidence to the Board Proceedings
22 Division at least 14 days prior to the oral hearing.⁶

23 ///

24 ///

25 ///

26 Barth_mt

27 _____
28 ⁶ Evidence exhibits should be sent to: Claudia Madrigal, Appeals Analyst, Board Proceedings Division, State Board of
Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.