

1 Linda Frenklak, Tax Counsel III
2 Board of Equalization, Appeals Division
3 450 N Street, MIC: 85
4 PO Box 942879
5 Sacramento CA 95814
6 Tel: (916) 445-9406
7 Fax: (916) 324-2618

8 Attorney for the Appeals Division

9 **BOARD OF EQUALIZATION**
10 **STATE OF CALIFORNIA**

11 In the Matter of the Appeal of:) **HEARING SUMMARY**
12) **PERSONAL INCOME TAX APPEAL**
13 **HENDRIKA BOUWMEESTER**¹) Case No. 490302

14 Year Claim
2006 \$975
For Refund

15 Representing the Parties:

16 For Appellant: Peter Kwok, TAAP²
17 For Franchise Tax Board: Marguerite Mosnier, Tax Counsel III

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19 **QUESTION:** Whether appellant has shown the late filing penalty imposed by respondent should
20 be abated.

21 HEARING SUMMARY

22 Background

23 Appellant did not file a timely California tax return for 2006. Respondent obtained
24 information indicating that appellant had sufficient income to require the filing of a tax return for
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26 ¹ Appellant resides in Los Angeles County, California

27 ² Appellant filed her Appeal Letter, Ugochukwu Opiegebe of the Tax Appeals Assistance Program (TAAP) filed appellant's
28 reply brief, and this Board's records indicate that Peter Kwok of TAAP is currently appellant's representative.

1 2006. (Resp. Opening Br., p. 1.) On February 19, 2008, respondent issued a notice and demand that
2 required appellant to file a return or explain why no return was required by no later than March 26,
3 2008. (*Id.* p. 1, Exhibit A.) On March 1, 2008, appellant filed a return for tax year 2006, reporting a
4 tax due of \$3,900; she also calculated a late filing penalty of \$975 and interest of \$317 and reported
5 the combined sum (\$1,292) on line 66 of her 2006 return. (*Ibid.* Exhibit B.) Respondent processed
6 her return and accepted the return as filed. (*Ibid.*) Appellant remitted the full payment due for tax
7 year 2006. (*Ibid.*)

8 Appellant subsequently requested abatement of the late filing penalty, which
9 respondent treated as a claim for refund. (Resp. Opening Br , p. 3.) Respondent issued a Notice of
10 Action of the Franchise Tax Board Upon Taxpayer's Claim for Refund (NOA) dated March 2, 2009,
11 which states that respondent is denying appellant's claim for refund of the amount paid as a late filing
12 penalty for tax year 2006.³ (Appeal Letter, Attachment.) Appellant filed this timely appeal.

13 Appellant's Contentions

14 Appellant, who is a real estate agent, contends that she is entitled to have the late filing
15 penalty waived due to the difficult circumstances she encountered. According to appellant, she was
16 late filing her 2006 return due to the fact that she was suffering from major depression triggered as a
17 result of violent domestic abuse perpetrated by her 16-year-old son from January 12, 2007, to
18 January 13, 2007. On January 15, 2007, appellant met with a therapist at Kaiser Permanente who
19 instructed her to go to the police and get therapy for her son. On January 16, 2007, her son came to
20 appellant's house with his father (appellant's estranged husband)⁴ to pick up his clothes and school
21 books. Appellant asserts that she has not seen her son again and that he now lives with his father.
22 Appellant met with the therapist at Kaiser Permanente for a number of sessions through June 6, 2007,
23 and also participated in weekly group therapy at Peace Over Violence, which she ended in August of
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25 ³ In the NOA, respondent refers to appellant's letter dated July 30, 2008, requesting abatement of the late filing penalty. A
26 copy of appellant's July 30, 2008 letter is not in the file. The NOA also states that a notice of tax due was issued on or about
27 March 27, 2008, reflecting the amount due, including penalty and interest. Respondent does not refer to such a notice in its
28 opening brief and a copy of the notice is not in the file. It is not clear from the record whether appellant remitted full
payment of the amount due for tax year 2006 at the time she filed her 2006 return or not until after receiving such a notice.

⁴ In her supplemental brief, appellant refers to her estranged husband and the therapist notes refer to him as her ex-husband,
but states that appellant is separated but not yet legally divorced.

1 2007 for financial reasons.⁵ Appellant asserts that as a result of her protracted depression following
2 the January 12 and 13, 2007 incidents, it became increasingly harder for her to work, and she stopped
3 working for nearly a year and only returned fully to work in January 2009. Appellant contends that
4 she was too incapacitated from her depression to file her 2006 return by the April 15, 2007 deadline.
5 Appellant states that she subsequently filed her returns (on March 1, 2008) for two tax years together
6 (including 2006) because a friend spent two days at her house making sure she filed her returns.
7 Appellant contends that she paid off her balance due for tax year 2006 with the money she earned
8 from her first sale in 2009. She asserts that she did not give respondent all of the information
9 pertaining to the exceptional circumstances she went through that caused her not to file a timely return
10 because it was still too difficult, she was too passive and too much in denial. On appeal, appellant
11 submitted copies of the April 15, 2007 police report and the attached written statement by appellant
12 dated March 31, 2007, and photographs of the household damage her son caused while enraged at
13 appellant on January 12 and 13, 2007. Attached to her Appeal Letter are copies of the Kaiser
14 Permanente therapist's January 15, 2007, initial consultation report and patient information sheet, as
15 well as his January 24, 2007, May 16, 2007 and June 6, 2007 progress notes. Attached to her reply
16 brief are copies of the Peace Over Violence therapist's notes.

17 Citing *United States v. Boyle* (1985) 469 U.S. 241, appellant argues that the ordinary
18 business care and prudence standard only applies to the "ordinary person" who is physically and
19 mentally capable of knowing, remembering, and complying with the statutory requirements. Citing
20 *Brown v. United States* (M.D. Tenn. 1985) 630 F.Supp. 57, appellant further argues that where the
21 taxpayer is unable to meet the standard of ordinary business care and prudence due to infirmity, the
22 late filing penalty should be abated. Appellant asserts that the *Appeal of Michael J. and Diane M.*
23 *Halaburka*, 85-SBE-025, April 9, 1985, which is relied upon by respondent, is distinguishable and not
24 relevant because that appeal involved a husband and wife who filed joint returns and based on the
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26 ⁵ Staff notes that the Peace Over Violence therapist notes attached to appellant's reply brief indicates that the therapy ended
27 on August 30, 2007, whereas the Kaiser Permanente's therapist notes attached to the Appeal Letter state that the Peace Over
28 Violence therapy group therapy ended in the summer of 2008 for financial reasons.

1 advise of an accountant friend they made an informed and conscious decision not to file a return
2 because a refund was due. Furthermore, appellant contends that in *Halaburka* the Board found no
3 evidence that both spouses were incapacitated for the entire period at issue and therefore no reasonable
4 cause was found for the late filing of the joint return. In contrast, appellant contends that she is a
5 single parent who solely filed her return and was diagnosed with clinical depression of the major
6 category in January 2007 and continued therapy beyond April 15, 2007.

7 Lastly, appellant argues that it is unfair and prejudicial for respondent to refer to
8 appellant's alleged late filings of returns for other taxable years, which are not at issue in this appeal
9 and have been settled. Citing *Appeal of Duane H. Laude*, 76-SBE-096, Oct. 6, 1976, appellant
10 contends that with respect to tax matters it is well settled that each year should be looked at
11 individually. Appellant therefore asks the Board to disregard respondent's reference to "previous"
12 defaults in determining whether she has established reasonable cause for the abatement of the late
13 penalty for tax year 2006

14 Respondent's Contentions

15 Respondent contends that the penalty is presumed to be correct and appellant has failed
16 to meet her burden of showing with credible and competent evidence that her failure to file her 2006
17 return was due to reasonable cause and not to willful neglect. Respondent argues that it is unclear why
18 appellant could not file her 2006 return until March 1, 2008, when the domestic abuse incidents ended
19 in January 2007. In addition, respondent contends that appellant has a history of filing late returns and
20 not responding to its notices. Specifically, respondent asserts that it sent appellant "Demand for Tax
21 Return" letters for tax years 2000, 2001, 2002, 2003, 2004, 2005, and 2007, appellant failed to file
22 returns by the deadlines set forth in these letters, and respondent subsequently issued a Notice of
23 Proposed Assessment for each of these tax years. Respondent further asserts that appellant has not yet
24 filed her return for tax year 2007. Respondent contends that appellant's pattern of failing to file timely
25 returns, even in response to its requests and demands, considerably weakens her argument that her
26 failure to timely file her 2006 return was due solely to the depression she experienced following the
27 domestic abuse incidents in January 2007.

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1 Applicable Law

2 Individuals must file California income tax returns on or before April 15, or on or before
3 the extended due date of October 15, following the tax year. (Rev. & Tax. Code, §§ 18566, 18567,
4 subd. (a).) Revenue and Taxation Code (R&TC) section 19131 provides that a delinquent filing penalty
5 of 5 percent shall be added to the tax for each month that a return is filed late, not to exceed 25 percent
6 of the additional tax, unless the taxpayer can establish reasonable cause and no willful neglect.⁶ The
7 taxpayer bears the burden of proving that both conditions existed. (*Appeal of Terry R. Lash*, 86-SBE-
8 021, Feb. 4, 1986.) It is well established that the taxpayer has the burden of proving the late filing of her
9 tax return was due to reasonable cause and not due to willful neglect. (*Paramount Development*
10 *Associates, Inc.*, 83-SBE-250, Dec. 14, 1983.) On appeal, there is a presumption of correctness of the
11 penalties assessed by respondent. (*Appeal of Robert Scott*, 83-SBE-094, Apr. 5, 1983.) To establish
12 reasonable cause, the taxpayer “must show that the failure to file timely returns occurred despite the
13 exercise of ordinary business care and prudence, or that such cause existed as would prompt an ordinary
14 intelligent and prudent businessman to have so acted under similar circumstances.” (*Appeal of Howard*
15 *G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.)

16 In *Appeal of Allen L. and Jacqueline M. Seaman*, 75-SBE-080, Dec. 16, 1975, respondent
17 imposed a late filing penalty because the married taxpayers filed a late joint return. On appeal, the
18 taxpayers asserted that there was reasonable cause for their failure to file a timely joint return because
19 the husband was unable to sign a timely return due to his being hospitalized with an illness. The Board
20 in that opinion stated, “[a]lthough illness may constitute ‘reasonable cause’ if it can be shown that the
21 taxpayer was prevented from filing a timely return because of it (citation omitted), appellants have
22 offered no evidence to show that the circumstances of Mr. Seaman’s illness were such as to prevent
23 either the preparation or signing of a timely return.” The Board further determined that the taxpayers
24 could have filed a timely joint return even if the husband had been unable to sign it. (*Ibid.*) Similarly, in
25 *Appeal of Kerry and Cheryl James*, 83-SBE-009, Jan. 3, 1983, the taxpayer requested abatement of a
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28 ⁶ The United States Supreme Court defined willful neglect as a “conscious, intentional failure or reckless indifference.”
(*United States v. Boyle*, *supra*, 469 U.S. at 245-246.) Respondent does not appear to allege the existence of willful neglect on
the part of appellant.

1 notice and demand penalty imposed under R&TC section 19133, because she had a heart problem
2 requiring a doctor's care. The Board there stated, "[w]hile illness may constitute 'reasonable cause' if it
3 can be shown that the taxpayer was prevented from complying with Franchise Tax Board requirements,
4 appellant has offered no evidence to show that the circumstances of her heart problem were such as to
5 prevent compliance with the Franchise Tax Board's requests." In previous appeals, the Board has
6 determined that a taxpayer's discovery of reportable income after the original due date (*Appeal of Elixir*
7 *Industries*, 83-SBE-248, Dec. 14, 1983), a taxpayer's difficulty in obtaining necessary information
8 (*Appeal of J.B. and P.R. Campbell*, 85-SBE-112, Oct. 9, 1985; *Appeal of Stephen C. Bieneman*, 82-
9 SBE-148, July 26, 1982; *Appeal of William T. and Joy P. Orr*, 68-SBE-010, Feb. 5, 1968.), a taxpayer's
10 difficulty in resolving accounting problems (*Appeal of Cerwin-Vega International*, 78-SBE-070,
11 Aug. 15, 1978), a taxpayer's difficulty in determining income with exactitude (*Appeal of Roger W.*
12 *Sleight*, 83-SBE-244, Oct. 26, 1983; *Appeal of Avco Financial Services, Inc.*, 79-SBE-084, May 9,
13 1979), a taxpayer's unresolved business matters (*Appeal of Bild Industries, Inc.*, 82-SBE-212, Sept. 21,
14 1982), or the failure of the taxpayer's accountant to properly account for income (*Appeal of M.B. and*
15 *G.M. Scott*, 82-SBE-249, Oct. 14, 1982), did not constitute reasonable cause for abating penalties.

16 Staff Comments

17 The parties should be prepared to discuss whether appellant's failure to file a timely
18 2006 return was due to reasonable cause and not due to willful neglect, in light of her alleged major
19 depression suffered at the time the return was due (April 16, 2007). Respondent does not appear to
20 address appellant's contention that her failure to file a timely 2006 return was due to the resulting
21 *depression* she endured as a direct result of the trauma she experienced on January 12, 2007, and
22 January 13, 2007. A taxpayer's illness or impairment may constitute reasonable cause if it can be
23 shown that the taxpayer was prevented from complying with the statutory requirement to timely file a
24 return; here, it appears that appellant may have provided evidence sufficient to show that her illness
25 was such as to prevent compliance with the filing deadline. Specifically, the June 6, 2007 notes
26 appear to indicate an assessment of recurrent major depression by providing the following
27 information: "296.35C DEPRESSION, MAJOR, RECURRENT, IN PARTIAL REMISSION,
28 V61.20F PERSONAL CONDITION, PARENT CHILD RELATIONSHIP PROBLEM." (Appeal

1 Letter, Attachment.) However, staff notes that not all of the evidence provided by appellant supports
2 the diagnosis of major depression (see the Kaiser Permanente therapist notes dated January 15, 2007).
3 Staff also notes that there is no evidence in the record that shows appellant was ever prescribed any
4 medication for depression. The Kaiser Permanente therapist notes dated April 16, 2007, (the due date
5 for the filing of the 2006 return)⁷ and the therapist notes dated April 30, 2007, both list a diagnosis of
6 “Phase of life,” but do not note depression. The May 16, 2007, therapist notes state that no diagnosis
7 was found and appellant would return in two weeks. The June 6, 2007 notes state that appellant is
8 working on her self-care, she is taking two months off, and she is feeling much better. They also
9 indicate that appellant would return in one month. It is unclear to staff whether the statement that
10 appellant will be taking two months off refers to her work or her therapy. At the hearing, appellant
11 may want to be prepared to discuss the time period in 2007 when she purportedly did not work as a
12 real estate agent due to her depression. Staff further notes that the Peace Over Violence counseling
13 progress notes indicate that appellant went to sessions between March 12, 2007 and May 7, 2007
14 (there are no therapist comments for this period, but there are therapist comments for the periods
15 February 12, 2007 through February 26, 2007, and May 14, 2007, through August 30, 2007.) (App.
16 Reply Br., Attachment.)

17 The parties should also be prepared to discuss whether the Board should consider the
18 factor that appellant was late in filing returns for other tax years when determining whether appellant
19 is entitled to abatement of the late filing penalty for tax year 2006.

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27 ⁷ April 15, 2007 was a Sunday.
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