William J. Stafford
Tax Counsel III
Board of Equalization, Appeals Division
450 N Street, MIC:85
PO Box 942879
Sacramento CA 95814
Tel: (916) 206-0166
Fax: (916) 323-3387

Attorney for the Appeals Division

BOARD OF EQUALIZATION

STATE OF CALIFORNIA

In the Matter of the Appeal of:	**HEARING SUMMARY**[2]
	PERSONAL INCOME TAX APPEAL
MARIE R. SANDERS[1]	Case No. 522825

Year	Claim For Refund
2007	$1,555.21

Representing the Parties:

For Appellant: Paul Delgadillo, TAAP[3]

For Franchise Tax Board: Marguerite Mosnier, Tax Counsel III

QUESTIONS: (1) Whether appellant was provided with proper notice of the notice and demand (demand).

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[1] Appellant currently resides in Orange County, California.

[2] This appeal was originally scheduled for the June 21-24, 2011 Board meeting on the oral hearing calendar. At appellant's request, this matter was rescheduled for the October 25-28, 2011 Board meeting on the oral hearing calendar.

[3] Samantha Lohman-Creer, from the Tax Appeals Assistance Program (TAAP), submitted appellant's reply brief. Paul Delgadillo is appellant's current TAAP representative.

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(2) Whether appellant has shown reasonable cause for a refund of the demand penalty.

HEARING SUMMARY

Background

Appellant failed to file a 2007 California tax return by the original due date of April 15, 2008, or the extended due date of October 15, 2008. (FTB OB, p. 1.) Having received information from various reporting sources that appellant received sufficient income to trigger the 2007 filing requirement,[4] the FTB issued a notice dated February 9, 2009, demanding that, by March 11, 2009, appellant file a return or explain why no return was required. (App. Ltr., Ex. 10.) The demand specifically stated that "You must file even if you are due a refund." (*Id.*) The demand was mailed to the same address that appellant is currently using on appeal (*id.*), and the appeal file has no record indicating that the United States Postal Service (Post Office) returned the demand as undelivered, and appellant has not alleged such on appeal.

When appellant neither filed a return nor demonstrated why a return was not required by the deadline of March 11, 2009, the FTB issued a Notice of Proposed Assessment (NPA) on April 13, 2009 (FTB OB, Ex. A), based on the income information it received from the various reporting sources. The NPA set forth a proposed assessment of $2,219.04, which consisted of a proposed additional tax of $286.00, a late filing penalty of $100.00, a demand penalty of $1,687.75, a filing enforcement fee of $119.00, and interest of $26.29. As was the case for the demand notice, the NPA was mailed to the same address that appellant is currently using on appeal (*id.*), and the appeal file has no record indicating that the Post Office returned the NPA as undelivered.

Appellant filed her 2007 California return on or about June 12, 2009.[5] The FTB processed appellant's return and reduced the demand penalty to $1,555.25, based on the tax that appellant reported on her 2007 return. After applying payments and credits, appellant had a credit

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[4] For 2007, the FTB estimated that appellant had income of $100,705, based on records from various reporting sources, which showed that appellant received $100,705 in wages from Southern California Permanente Medical Group.

[5] The FTB's records indicate that appellant filed her return on June 15, 2009; however, appellant submitted a USPS tracking receipt, indicating that she mailed a package on June 12, 2009.

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balance, which the FTB refunded.

On August 17, 2009, appellant sent an email to the FTB, requesting that the demand penalty be abated. The FTB treated this correspondence as a claim for refund, which the FTB denied on November 5, 2009. (App. Ltr., Ex 10.) Appellant then filed this timely appeal.

Contentions

Appellant

Appellant states that she did not receive a copy of the demand notice and would have responded by the due date if she had received it. Appellant further states that she was unable to file her 2007 return in a timely manner due to "unforeseen, personal reasons"—but she does not provide further clarification. She also states that she has lived at the same address for 25 years and that she finds it "difficult to believe that the [demand] notice went undelivered." (App. Ltr., p.1; App. Reply Br., p.2.) Appellant contends the fact that she did not receive the demand notice constitutes reasonable cause for her failure to respond to that notice in a timely manner. (App. Reply Br., p. 2.)

Appellant states that she received the NPA dated April 13, 2009, and she asserts that she responded to it by the "demand date" and by providing her return and a letter of protest. Furthermore, appellant states that after she received the NPA, she hired an enrolled agent named James Campbell, who wrote to the FTB on appellant's behalf. However, as of the date of her appeal letter, appellant asserts that neither she nor Mr. Campbell have received a response from the FTB. Appellant further states that she received three phone messages from a Mr. Brian Wooten (Mr. Wooten), but appellant asserts that (i) Mr. Wooten never disclosed that he was an agent for the State of California, (ii) two of Mr. Wooten's calls were made from Mississippi and Missouri, respectively, as evidenced by the phone numbers left on appellant's "Caller ID", which caused appellant to be suspicious of the calls, and (iii) appellant returned one of Mr. Wooten's phone calls, only to get a voicemail, which did not state a title or position. Appellant states that given Mr. Wooten's failure to properly identify himself, along with the fact that appellant had already hired an enrolled agent to handle this tax matter, she saw no merit in returning any calls received from Mr. Wooten. Finally, appellant asserts that lack of information from Mr. Wooten denied appellant the opportunity of directly interfacing with someone from the state—who could have resolved her tax issues in a simple manner—and denied her due process.

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Finally, appellant states that she received a letter dated November 5, 2009 from Mr. Wooten but "Mr. Wooten had apparently overlooked that fact that I never received the 02/02/2009 notice and did not willfully ignore the State's request for filing." Appellant further asserts that "Official State of California information I received related to my appeal letter stated that the taxpayer has up to 2 years from the date of filing, i.e. April 15, 2008, to file a return, **if there would be an overpayment of tax or not (sic) tax due**." She contends that she was owed a refund so "this statement applied to my filing." (Emphasis in original.) (App. Ltr., pp. 1-2.)

The FTB

The FTB contends that the demand penalty was properly imposed and appellant has the burden of proving that she failed to reply timely due to reasonable cause to support abatement of that penalty. Here, according to the FTB, appellant only contends that she never received the demand notice but does not present any evidence to establish reasonable cause. Thus, the FTB contends that appellant has not carried her burden of proving that the demand notice was not mailed to her last known address. (Resp. Op. Br., pp. 3-4.)

The FTB also notes that appellant has a history of filing late returns and not responding to FTB notices. For example, the FTB asserts that appellant did not file a timely 2006 return and did not timely respond to the FTB's request for return that was issued in relation to the 2006 tax year. Furthermore, the FTB asserts that appellant filed her 2006 return late on July 8, 2008. Also, the FTB states that it issued a demand notice to appellant for the 2008 tax year, but as of the May 11, 2010, appellant still had not responded to the 2008 demand notice or filed her 2008 return. (Resp. Op. Br., p. 4.)

Applicable Law

Proper Notice

In general, notices sent by the FTB to a taxpayer's last known address are presumed to have been received. (*Appeal of Ronald A. Floria*, 83-SBE-003, Jan. 3, 1983.)[6] For a notice to be proper, the law provides that it is not necessary for the FTB to prove the notice was received by the

[6] Board of Equalization cases are generally available for viewing on the Board's website (www.boe.ca.gov).

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taxpayer. (See *United States v. Zolla* (9th Cir. 1984) 724 F.2d 808, 810, cert. denied, 469 U.S. 830.) It is sufficient that the notice was mailed to the taxpayer's last known address and it was not returned to the FTB as undelivered. (*Ibid*.) As a general rule, a taxpayer's last known address is the address that appears on the taxpayer's most recently filed tax return, unless the FTB is given clear and concise notice of a different address. (*Appeal of W. L. Bryant*, 83-SBE-180, Aug. 17, 1983.)

If a taxpayer claims that he or she did not receive the notice, the taxpayer bears the burden of proving the notice was not mailed to the taxpayer's last known address. (See *Grencewicz v. Commissioner*, T.C. Memo. 1990-597.) What is relevant is the FTB's knowledge of the taxpayer's last known address, rather than the taxpayer's actual most current address. (See *Reding v. Commissioner*, T.C. Memo. 1990-278, aff. T.C. Memo. 1990-536.) If the taxpayer moves after filing his or her return, the taxpayer must take the necessary steps to ensure receipt of his or her mail. (*Appeal of Winston R. Schwyhart*, 75-SBE-035, Apr. 22, 1975.)

Demand Penalty

California imposes a penalty for the failure to file a return or provide information upon the FTB's demand to do so, unless reasonable cause prevented the taxpayer from responding to the request. (Rev. & Tax. Code, § 19133.) The burden is on a taxpayer to prove that reasonable cause prevented the taxpayer from timely responding to the demand. (*Appeal of Kerry and Cheryl James*, 83-SBE-009, Jan. 3, 1983.)

The FTB will only impose a demand penalty if the taxpayer fails to respond to a current Demand for Tax Return and the FTB issued an NPA under the authority of R&TC section 19087, subdivision (a), after the taxpayer failed to timely respond to a Request for Tax Return or a Demand for Tax Return at any time during the four-taxable-years preceding the year for which the current Demand for Tax Return is being issued. (Cal. Code Regs., tit. 18, § 19133, subd. (b).)

STAFF COMMENTS

Demand Penalty

Appellant claims that she never received the demand notice. Here, the demand notice was mailed to appellant at her address in Aliso Viejo, California (the same address that appellant claims she has had for the last 25 years), and the appeal file contains no evidence that the demand letter was

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returned by the Post Office as undelivered. Based on the foregoing facts, it appears that appellant was provided with proper notice of the demand. In addition, the FTB's demand notice appears to comply with the requirements of California Code of Regulations, title 18, section 19133, subdivision (b), given that the FTB previously issued an NPA for the 2006 tax year, after appellant failed to timely respond to a 2006 Request for Tax Return. At the hearing, appellant should be prepared to explain any other circumstances that she believes may constitute reasonable cause for her failure to respond to the demand notice.

Additional Evidence

If appellant has any further evidence that she wishes to submit, pursuant to California Code of Regulations, title 18, section 5523.6, appellant should provide her evidence to the Board Proceedings Division at least 14 days prior to the oral hearing.[7]

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[7] 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.

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