

LAW SUMMARY
REASONABLE CAUSE ABATEMENT
DELINQUENT FILING PENALTY
NOTICE AND DEMAND/FAILURE TO FURNISH PENALTY

The law provides that the Franchise Tax Board (FTB) shall impose a delinquent filing penalty when a taxpayer fails to file a tax return on or before its due date, unless the taxpayer establishes that the late filing was due to reasonable cause and was not due to willful neglect. (Revenue and Taxation Code section 19131.)

The law also provides that the FTB may impose a penalty when a taxpayer fails or refuses to furnish information requested by the FTB in writing, or fails or refuses to file a return subsequent to receiving a "Demand for Tax Return" (referred to as "notice and demand/failure to furnish information penalty"). This penalty may be abated if the taxpayer's failure to respond is due to reasonable cause and not willful neglect. (Revenue and Taxation Code section 19133.)

As applicable to individual taxpayers, the FTB will issue a "Demand for Tax Return" only if the FTB has proposed an assessment of tax against the taxpayer as provided for in Revenue and Taxation Code section 19087(a), at any time during the four-taxable-year period preceding the taxable year for which the current Demand for Tax Return is issued. (Cal. Code of Regs., tit. 18, section 19133.)

1. The Burden of Proof is on the Taxpayer to Establish Reasonable Cause For Abatement of Either Penalty

When the FTB imposes a delinquent filing or notice and demand/failure to furnish information penalty, the law presumes that the penalty was imposed correctly. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 201 P.2d 414.)

The burden of proof is on the taxpayer to show that reasonable cause exists to support abatement of the penalty. (*Appeal of David A. and Barbara L. Beadling*, 77-SBE-021, February 3, 1977.)

To establish reasonable cause, a taxpayer must show that the failure to file the return and/or reply to the notice and demand or request for information occurred despite the exercise of ordinary business care and prudence. (*Appeal of Stephen C.*

Bieneman, 82-SBE-148, July 26, 1982; *Appeal of Howard G. and Mary Tons*, 79-SBE-027, January 9, 1979.) The taxpayer's reason for failing to file and/or failing to respond to the notice and demand or request for information must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Joseph W. and Elsie M. Cummings*, 60-SBE-040, December 13, 1960; *Appeal of J.B. Ferguson*, 58-SBE-024, September 15, 1958.)

In order to overcome the presumption of correctness of the penalties, the taxpayer must provide credible and competent evidence to support the claim of reasonable cause; otherwise the penalties will be not be abated. (*Appeal of James C. and Monablanche A. Walshe*, 75-SBE-073, October 20, 1975; *Appeal of David A. and Barbara L. Beadling*, 77-SBE-021, February 3, 1977.)

2. Taxpayer's Responsibility to File Return and/or to Respond to Notice and Demand or Request for Information

Even if the taxpayer is unaware of a filing requirement, ignorance of the law is not an excuse for failing to file a timely return. (*Appeal of J. Morris and Leila G. Forbes*, 67-SBE-042, August 7, 1967; *Appeal of Diebold, Incorporated*, 83-SBE-002, January 3, 1983.)

Each taxpayer has a personal, non-delegable obligation to file the tax return by the due date, to respond to a notice and demand from the FTB that a return be filed, and to furnish information requested by the FTB. (*Appeal of Thomas K. and Gail G. Boehme*, 85-SBE-134, November 6, 1985; *Appeal of Roger D. and Mary Miller*, 86-SBE-057, March 4, 1986.)

A taxpayer's reliance on an agent, such as an accountant or a tax attorney, to file the return by the due date, to respond on the taxpayer's behalf to a notice and demand from the FTB, and/or to reply to a request for information by the FTB, is not reasonable cause. (*United States v. Boyle* (1985) 469 U.S. 241, 83 L.Ed.2d 622.)

3. Difficulty in Obtaining Information or Documents Needed to File the Return, Respond to the Notice and Demand, Or Respond to the Request for Information

Generally, a taxpayer's inability to file a return by the due date, provide a timely response to a notice and demand, or furnish requested information because of lack of necessary information or documents, is not considered reasonable cause. (*Appeal of William T. and Joy P. Orr*, 68-SBE-010, February 5, 1968.) The fact that tax information is lost, lacking, inaccurate, or difficult to obtain is insufficient to meet the taxpayer's burden of establishing reasonable cause. (*Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982; *Appeal of Elmer R. and Barbara Malakoff*, 83-SBE-140, June 21, 1983; *Appeal of Roger W. Sleight*, 83-SBE-244, October 26, 1983.)

In order to establish reasonable cause, the taxpayer must establish why a timely return could not have been filed and/or why a timely response to a notice and demand or request for information could not have been provided without the missing information. The taxpayer also must establish the efforts the taxpayer made to obtain the information in time to file the return and/or to respond to the notice and demand or request for information.

When the taxpayer receives a notice and demand, the taxpayer should respond to the notice and demand and file the return based on information that is available to the taxpayer at that time. The taxpayer then can file an amended return when he or she receives the missing information.

4. Illness/Personal Difficulties of the Taxpayer/Work Pressures

Illness or other personal difficulties which prevent a taxpayer from filing a timely return or from responding to a notice and demand or request for information may be considered reasonable cause in some cases. However, if the difficulties simply cause 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. (*Appeal of W.L. Bryant*, 83-SBE-180, August 17, 1983; *Appeal of Michael J. and Diane M. Halaburka*, 85-SBE-025, April 9, 1985; *Appeal of William T. and Joy P. Orr*, 68-SBE-010, February 5, 1968.)

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 filing a timely return and/or complying with the notice and demand or request for information. (*Appeal of Allen L. and Jacqueline M. Seaman*, 75-SBE-080, December 16, 1975; *Appeal of Kerry and Cheryl James*, 83-SBE-009, January 3, 1983.)

A taxpayer's inability to file a return and/or respond to a notice and demand or request for information in a timely fashion because of the press of business affairs or work pressures is not reasonable cause. (*Appeal of Loew's San Francisco Hotel Corp.*, 73-SBE-050, September 17, 1973; *Appeal of William T. and Joy P. Orr*, 68-SBE-010, February 5, 1968; *Appeal of Elmer R. and Barbara Malakoff*, 83-SBE-140, June 21, 1983.)

5. Complexity of the Tax Law

Complexity of the tax law which leads to a delay in computing tax liability, and therefore a delay in filing the return and/or responding to a notice and demand or request for information, is not reasonable cause. (*Appeal of Philip C. and Anne Berolzheimer*, 86-SBE-172, November 19, 1986; *Appeal of Roger W. Sleight*, 83-SBE-244, October 26, 1983.)

However, if a taxpayer relies on improper advice of an accountant or tax attorney as to a matter of tax law, such as whether the taxpayer has a tax liability, failing to file a return in reliance on this advice may be considered reasonable cause if certain conditions are met. (*Rohrbaugh v. United States* (7th Cir. 1979) 611 F.2d 211, as cited in *United States v. Boyle* (1985) 469 U.S. 241, 83 L.Ed.2d 622.) These conditions include: (1) the person relied on by the taxpayer is a tax professional with competency in the subject tax law, and (2) the tax professional's advice is based on the taxpayer's full disclosure of the relevant facts and documents.

6. Taxpayer Has the Burden to Show that the Notice and Demand or Request for Information was Not Mailed to the Taxpayer's Last Known Address

If the taxpayer claims that he or she did not receive the notice and demand or request for information, the taxpayer bears the burden of proving that the notice and demand/request for information was not mailed to the taxpayer's last known address.

(*Grancewicz v. Commissioner*, T.C. Memo. 1990-597; *Mollet v. Commissioner* (1984) 82 T.C. 618, 625, affd. without published opinion (11th Cir. 1985) 757 F.2d 286.) What is relevant is FTB's knowledge of the taxpayer's last known address, rather than the taxpayer's actual most current address. (*Reding v. Commissioner*, T.C. Memo. 1990-278 [59 T.C.M. 793], affd. T.C. Memo. 1990-536; *Freiling v. Commissioner* (1983) 81 T.C. 42, 49.) If the taxpayer moves after filing his or her return, the taxpayer must take the necessary steps to insure receipt of his or her mail. (*Appeal of Winston R. Schwyhart*, 75-SBE-035, April 22, 1975; *Appeal of Terry R. Lash*, 86-SBE-021, February 4, 1986.)

In order for the notice and demand penalty to be proper, the law provides that it is not necessary for the FTB to prove that the notice and demand letter was received by the taxpayer. (*United States v. Zolla* (9th Cir. 1984) 724 F.2d 808, 810, cert. denied, 469 U.S. 830, 105 S.Ct. 116.) It is sufficient that the notice and demand letter was mailed to the taxpayer's last known address, and that it was not returned to the FTB by the United States Postal Service.

7. Taxpayer Has the Burden to Show That a Timely Return was Filed or That a Timely Response was Provided to a Notice and Demand or Request for Information

The taxpayer bears the burden of proof on a claim that a delinquent filing penalty and/or a notice and demand/failure to furnish information penalty should not be imposed because the taxpayer filed a timely return or provided a timely response to a notice and demand or request for information. (*Appeal of Thomas T. Crittenden*, 74-SBE-043, October 7, 1974; *Appeal of La Salle Hotel Co.*, 66-SBE-071, November 23, 1966.)

8. Ultimate Determination That There is No Tax Liability

The fact that the FTB ultimately determines, after review of a taxpayer's delinquent return, that the taxpayer's tax liability has been satisfied by allowable credits (such as withholding) or previous payments (such as payments of estimated tax) does not excuse the failure to file a return in response to a notice and demand. (*Appeal of Elmer R. and Barbara Malakoff*, 83-SBE-140, June 21, 1983; *Appeal of Sal J. Cardinalli*, 81-SBE-

018, March 2, 1981; *Appeal of Frank E. and Lilia Z. Hublou*, 77-SBE-102, July 26, 1977.)

9. Computation of Notice and Demand/Failure to Furnish Information and Delinquent Filing Penalties

The notice and demand/failure to furnish information penalty is computed at twenty-five percent (25%) of the amount of the taxpayer's total tax liability, which is determined without regard to payments. (*Appeal of Elmer R. and Barbara Malakoff*, 83-SBE-140, June 21, 1983; *Appeal of Eugene C. Findley*, 86-SBE-091, May 6, 1986; *Appeal of Robert Scott*, 83-SBE-094, April 5, 1983.)

The delinquent filing penalty is computed at five percent (5%) of the tax due, after allowing for timely payments, for every month that the return is late, up to a maximum of twenty-five percent (25%). (Revenue and Taxation Code section 19131.)