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Tax Appeals Assistance Program
C/O Golden Gate University
536 Mission Street
San Francisco, CA 94105

May 10, 2018

Regarding: Appeal of Eric Grab and Christine Grab
Case Number: 1036804
Re: Reply Brief

Refunds:	<u>Year</u>	<u>Amount</u>
	2008	\$1,429.89
	2011	\$3,854.74
	2013	\$4,479.72
	2014	\$6,799.11

Issues

Appellants concede all issues for tax year 2008. Appellants assert that their inquiries into 2008 were simply to uncover how amounts were calculated. Remaining issues are:

- 1) Did Appellants timely respond to Respondent's Notice and Demand request under 19133 for tax years 2011, 2013, and 2014?
- 2) If Appellants did not timely respond to Respondent's Notice and Demand request, have Appellants established their failure to respond is due to reasonable cause under 19133 for tax years 2011, 2013, and 2014?
- 3) Have Appellants established that they are entitled to a refund of the tax year 2011 collection cost recovery fee?

Facts

2011 Tax Return

By April 2012, Appellants were still trying to file their 2010 return. Their lateness in the 2010 return has already been described to respondents (litigation with a tenant who had turned their property into a marijuana grow house, Eric's frequent traveling, and the health of Eric's parents who Appellants cared for). Appellants attempted to remedy the situation chronologically by resolving their 2010 return before filing a new 2011 return.

In addition to still working on their 2010 return, Appellants also faced extraordinary obstacles. In 2012, Appellants were caring for Eric's elderly and sick parents. Eric father

suffered from dementia. Eric's mother suffered from atrial fibrillation and cardiomyopathy, among other diseases such as glaucoma. Nearly every weekend between January 2012 to October 2013, Christine drove to her Eric's parent's home to help care for the them. The drive took an hour and a half. (*See* real estate listing for Eric's parent's home showing their address in Winchester, in contrast with Appellant's address at the time in San Diego.) When Eric's father could no longer maintain his finances or property assets, Appellants began the process of moving Eric's parents closer to themselves for the parent's own safety and wellbeing. (*See* father-in-law's doctor's note that he could not sign for himself.)

Moreover, the first few months of this time period, Christine was pregnant. Christine gave birth via a cesarean section. Appellant's son was born with a health issue that required surgery. After surgery, their son suffered from acid reflux which affected his ability to sleep. He woke up many times throughout the night, requiring care from Appellants.

Meanwhile, Eric's signed on with his new employer, Sonic, which was promptly sold to Rovi. These jobs required that Eric travel to different parts of the state, different states, or different countries. In 2011, while Appellants were still resolving their 2010 return, Eric traveled about 4 times a month. (*See* travel chart and credit card statements.) In 2012, He traveled approximately once a month. (*See* travel chart and credit card statements.)

Furthermore, during this time, Christine unknowingly suffered from Membranous nephropathy. This disease can cause mental confusion, discussed more below. (*See* Kidney Internet explanation).

2013 Tax Return

By April 2014, Christine was diagnosed with Membranous nephropathy. Membranous nephropathy is an autoimmune disease which weakens blood cells' ability to filter blood. This causes the body to lose protein and causes renal failure. This disease can manifest itself in high cholesterol (*See* Christine's lab reports in which she has high cholesterol) and foamy urine (which Christine noticed prior to her diagnosis). Membranous nephropathy allows protein to escape from the body through urine, damaging the kidneys. This can result in low albumin. Low albumin causes a wide range of symptoms, such as confusion, dizziness, and low energy.

Living with this disease, Christine cared for their baby, who post-surgery had acid reflux and would not sleep. In addition, just a month after her diagnosis, Eric's father passed away (*See* death certificate). At the news of his father's death, Eric returned home from a work trip in Las Vegas, NV. Later that same month, Eric still had to travel to Russia and Germany. His travels continued to take him away from his home about three times a month. (*See* travel chart and credit card statements.)

2014 Tax Return

By April 2015, Christine's health disease persisted. (*See* Mayo Clinic receipt where Christine went in search of treatment.) Eric was still required to travel about three times a month. (*See* travel chart and credit card statements.) Appellants continued to try resolving their oldest outstanding returns first as sequentially makes sense. (*See* Christine's letters asserting her focus, FTB Exhibit T, U, V, Y.) In 2015, Appellants still received notices for their 2013 return, but received no explanation of why money was in suspense or why it was not applied to their 2014

balance. Only after multiple calls to government agencies were Appellants able to get this money applied.

Argument

Appellants assert two arguments in response to the notice and demand penalties. First, they assert that the notice and demand penalties were wrongly imposed. Appellants did in fact respond to Respondent's notices, thereby meeting the purpose of the penalties. Alternatively, if found that Appellants did not satisfy the notice and demand penalties, Appellants assert that failure to respond was justified by reasonable cause. Finally, Appellants assert that Respondents improperly applied the collection cost and recovery fee since no balance was due.

A. The Notice and Demand Penalties do not apply since Appellants timely responded to Respondent's notices.

Respondent imposes demand penalties under Revenue and Taxation section 19133 for appellants' failure to timely reply to Respondent's tax year 2011, 2013, and 2014 demands. Revenue and Taxation section 19133, by its title, is a penalty for failure or refusal to furnish information. While Respondent's main desire is for the taxpayer to file a return, filing a return is not the purpose of section 19133. The penalty for filing a late return falls under a delinquent filing penalty, section 19131. In *Reitman Atlantic Corporation*, the Board explained that Revenue and Taxation section 19131 imposes a late penalty for failure to file a return, but section 19133 applies to taxpayers failing or refusing to furnish information *or* failing or refusing to file an appeal. (*Reitman Atlantic Corporation*, 2001-SBE-002, May 31, 2001.)

Section 19133 serves to persuade people into furnishing information by answering the Respondent's notice. This answer need not be in the form of a return. As the Board stated in *W.L. Bryant*, this section serves to "penalize the failure of a taxpayer to respond to the notice and demand, not for the taxpayer's failure to pay the proper tax." (*Appeal of W.L. Bryant*, 83-SBE-180, Aug 17, 1983.) The purpose of a Notice and Demand penalty is simply to elicit a response. Section 19133 imposes itself and threatens a substantial and potentially crippling twenty-five percent penalty so as to not be ignored by taxpayers. A penalty that imposes a quarter of the taxed amount cannot be taken lightly. Thus, Respondent must only impose this penalty when the *purpose* behind the penalty is met.

Here, the penalty does not apply. Respondents sent each Appellants multiple notices and Appellants sent multiple responses back.

For tax year 2011, Respondent sent a Notice of Proposed Assessment to Eric on January 4, 2013 and to Christine on January 25, 2013. Christine responded on January 30, 2013. It sent another notice to Eric on March 11, 2013 and to Christine on March 29, 2013 and July 22, 2013. Christine responded on August 8, 2013. It sent a notice to Eric on August 27, 2013. Christine responded on September 6, 2013. It sent another notice to Eric on October 8, 2013. Christine responded on November 11, 2013. It sent a notice to Christine on November 18, 2013, and to Eric on November 26, 2013 and on December 18, 2013. Christine responds on January 17, 2014 and on March 24, 2014. It finally still sent a notice Eric on May 20, 2014, despite Appellants filing their tax return in March, 2011. Christine responds on August 11, 2014.

The same exchange also applied to tax year 2013 and 2014. For 2013, Respondent sent a notice to Eric on January 27, 2015, and one to Christine on April 22, 2015. Appellants respond

by asking for an extension, which is granted. Respondents sent more notices to Christine on August 10, 2015, December 22, 2015, and January 27, 2016, despite Christine paying the amount due and responding January 19, 2016.

For 2014, Respondents sent Eric a notice on March 9, 2016. They sent another to Christine on April 26, 2016, despite Eric responding on April 17, 2016 with information that his wife was suffering from kidney failure. Respondent sent more notices; to Eric on May 9, 2016, to Christine on July 6, 2016, to Eric on August 24, 2016, and to Christine on November 29, 2016.

Respondent's notices provided different dates and deadlines for each appellant. Appellants here file jointly yet Respondent sent notices to each appellant individually. This practice doubled the dates and deadlines Appellants had to navigate, resulting in an unnecessarily confusing system for Appellants. Despite this, Appellants responded multiple times. Because Appellants remained in communication with Respondent for all years in contention, they met the purpose behind the penalty. The demand penalties must not stand.

B. The Notice and Demand Penalty must be abated for reasonable cause.

Even if this Board considers the imposition of the demand penalties proper, Appellants were justified in their late filing because they had reasonable cause and not willful neglect. (Rev. & Tax. Code, §§ 19131(a).)

Reasonable cause is such cause that would prompt an ordinarily intelligent and prudent businessperson to so act under similar circumstances (*Reitman Atlantic Corporation*, 2001-SBE-002, May 31, 2001.) The taxpayers must present credible and competent proof that their circumstances completely prevented them from filing a timely return or complying with the notice and demand. (*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.) Here, multiple causes conflated to result in late filing for all three years, particularly the combined illnesses of Appellants' family, the financial necessity to which Appellants relied upon Eric's work, and lack of information from Respondent as to where and how Appellant's tax payments were.

i. Appellants had qualifying illnesses that met reasonable cause.

In *Halaburka*, the Board held that the taxpayers did not meet reasonable cause because they were not "continuously prevented"¹ from filing a return. (*Appeal of Michael J and Diane M. Halaburka*, 85-SBE-025.) Here, Appellants battled a confluence of issues such that the ordinarily intelligent business person would find continuously preventative. Christine not only battled her kidney disease but raised her newborn son who had acid reflux post-surgery and cared for Eric's ailing parents while her husband was required to travel for work.

In the case of *John Michael Haynes*, the Board found reasonable cause when a taxpayer's children had pneumonia, wife suffered a ruptured appendix and the taxpayer suffered a mental and physical collapse. Similarly here, Appellants' family members were affected at the same time. While Christine was not diagnosed with Membranous nephropathy until 2014, her disease went unchecked and untreated for an indeterminate amount of time. (Cite why symptoms go unchecked for kidney diseases). One symptom of the disease is mental confusion. Christine, like

¹ By requiring a "continually prevented" test, the Board of Equalization narrows the definition of reasonable cause beyond the intent of California legislators.

the taxpayer, suffered from such mental issues. Furthermore, Appellants' family members were also suffering. Their newborn baby had severe acid reflux that required hospitalization. Eric's mother suffered from glaucoma that slowly blinded her, and from severe heart diseases. Eric's father also suffered from dementia, to the extent that he could not maintain his own financial records or sell his house, relying on Appellants' assistance. Eric's father then died within one month of Christine's kidney diagnosis. Like the taxpayer in *Haynes*, Appellants here should be granted reasonable cause.

ii. Appellants had qualifying work pressures that met reasonable cause.

An ordinarily intelligent and prudent businessperson would try to keep employment so as to provide for his or her family. While Eric had reasonable cause from his family's illnesses, he also had reasonable cause because of his frequent traveling. The Board held in *Malakoff* that "work pressures" without evidence to support them is not enough to constitute reasonable cause. (*Appeal of Elmer R. and Barbara Malakoff*.) Here however, Eric was their primary income earner. (*See tax returns.*) Appellants lived in California, one of the most expensive states to live in, while Eric also needed to consider his aging parents, his wife's disease, and his new child. Eric found work at Sonic and Rovi, under the provision that he travels. Eric acted to provide for his family as any ordinarily intelligent and prudent businessperson would.

iii. Respondents gave Appellants reasonable cause by not providing information on money held in suspense.

An ordinarily intelligent and prudent businessperson would not file a return unless she knew how much of her tax was already paid. Here, Respondents ignored Appellant's inquiries into how their payments applied until after Appellants contacted the state governor's office. On July 10, 2017 Appellants received a response from Respondent's Executive and Advocate Services department. Page three includes a brief paragraph as to why a joint payment does not post to individual taxpayer's accounts. (*See letter from Christopher Calhoun, p. 3.*)

This retroactive explanation cannot remedy the time in which Appellants spent each tax year trying to understand if or where their payments had been applied. (*See Christine's letters FTB Exhibit T, U, V, Y.*)

C. The Collection Cost Fee is not applicable.

Respondent shall impose a collection fee when the taxpayer fails to pay the tax, penalty, tax addition, interest or other liability imposed. (Rev. & Tax. Code, § 19254.) Respondent here asserts a fee for failure to pay 2011 taxes. Here, Appellants had paid all amounts due. (*See Tax Year Summary, FTB Exhibit B.*) Respondent concedes it received Appellant's payments and held the payments in "suspense." (FTB Brief, p. 11, footnote 21.) Because Respondent received Appellants' payments, imposing a collection fee for money not received is improper. On the surface, imposing the fee in such manner appears as a means merely for Respondents to improperly generate extra income.

Conclusion

Appellants should not bear the weight of a penalty meant to penalize non-responsiveness when they did in fact respond. Alternatively, Appellants were justified in their late filing due to reasonable cause. Finally, Respondent cannot impose a collection fee for non-payment when it had received payment. Respondent's position must be reversed. Appellants must be refunded the penalties, fees and corresponding interest for tax years 2011, 2013 and 2014.

Please contact me with any questions or concerns you have in this matter.

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