

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

ADRIALYN VARILLA HEDMAN

) OTA Case No. 18011124

) Date Issued: March 16, 2018

OPINION

Representing the Parties:

For Appellant:

Adrialyn Varilla Hedman
Keith Olin Hedman

For Respondent:

Andrew Amara, Tax Counsel III

For Office of Tax Appeals:

Tom Hudson, Tax Counsel III

ROBINSON, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19045,¹ Adrialyn Varilla Hedman (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) on appellant's protest against a proposed assessment of \$1,258 in additional tax, a late-filing penalty of \$314.50, a notice and demand penalty of \$710.25, a filing enforcement fee of \$79.00, and applicable interest, all for the 2014 tax year.²

ISSUES

1. Has appellant established error in respondent's proposed assessment of additional tax?
2. Has appellant established reasonable cause for failing to file a 2014 California return?
3. Has appellant established reasonable cause for failing to respond in a timely manner to FTB's demand for tax return?
4. Did FTB properly impose the filing enforcement fee?

¹ Unless otherwise indicated, all statutory references are to sections of the California Revenue and Taxation Code.

² The opening brief initiating this appeal filed September 19, 2016, was signed by both Keith Olin Hedman and Adrialyn Varilla Hedman, husband and wife. Attached to the opening brief was a Notice of Action assessing additional tax, penalties and interest against appellant-wife alone. Thus, the appeal is only related to the liabilities of appellant-wife, with appellant's husband serving as a co-representative for appellant-wife.

FACTUAL FINDINGS

1. Appellant did not file a California income tax return for the 2014 tax year but had sufficient income to create a tax-filing obligation.
2. Appellant earned taxable wages during 2014 from New York Life Insurance Company.
3. On January 28, 2016, respondent issued a demand for a tax return to appellant requiring her to file a 2014 tax return, provide a copy of a previously filed return, or explain why no return was required.
4. A timely response to this notice, dated January 30, 2016, over signature blocks for “Adrialyn Varilla Hedman, Executrix” and “Keith Olin Hedman, EXECUTOR,” was submitted to the FTB. In that response, appellant and her husband alleged that “two different companies ... committed fraud on us drastically changing our tax filing” and expressing their belief that the Internal Revenue Service was going to look into recovering funds from those companies (and others) on their behalf.
5. The FTB wrote to appellant on March 11, 2016, stating that it had determined that appellant had a tax return filing requirement and demanding that appellant file a 2014 California income tax return by April 8, 2016.
6. Appellant did not reply to respondent’s March 11, 2016 correspondence or file a 2014 return by the April 8, 2016 deadline.
7. The FTB wrote to appellant on April 22, 2015, stating that it had determined that appellant had a 2013 tax return filing requirement and demanding that appellant file a 2013 tax return by May 27, 2015. Appellant did not timely respond to this demand. Based on income earned from New York Life Insurance Company, the FTB issued a Notice of Proposed Assessment (NPA) to appellant for 2013 on June 22, 2015, proposing to assess \$2,293.75 in tax, penalties and interest for that year.
8. Respondent issued a NPA to appellant for 2014 on July 1, 2016, based on an estimated income of \$62,506, which consisted of wage income appellant received from New York Life Insurance Company. The NPA proposed to assess a net tax liability of \$1,258.00 plus a late-filing penalty of \$318.50, a demand penalty of \$710.25, a filing enforcement fee of \$79.00, and applicable interest.
9. Appellant timely protested the NPA for 2014 claiming that she did not earn income from capital gains and that she is entitled to a refund because she and her husband had “over

\$40,000 in medical bills in 2014 and also over \$40,000 in legal bills.” Appellant additionally claims that she is a victim of fraud and is waiting for correspondence relating thereto from the IRS.

10. Respondent issued a Notice of Action dated September 14, 2016, affirming the NPA for 2014.

DISCUSSION

Issue 1 - Has appellant established error in respondent’s proposed assessment of additional tax?

It is well-settled that once respondent shows that its assessment was reasonable and rational, its determination is presumed to be correct (*Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001), and the taxpayer has the burden of proving error (*Todd v. McColgan* (1949) 89 Cal.App.2d 509). California Code of Regulations, title 18, section 30705, subdivision (c), states that unless there is an exception provided by law, “the burden of proof requires proof by a preponderance of the evidence.”³ Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) A taxpayer’s failure to produce evidence that is within her control gives rise to a presumption that such evidence, if provided, would be unfavorable to the taxpayer’s case. (*Appeal of Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.)

Appellant has not shown any error in the proposed assessment of additional tax for the 2014 tax year. Appellant has not provided any evidence about her income and expenses. Appellant contends that she is entitled to large deductions for medical expenses and legal bills, but she has not offered any documentation or any other substantiation.

Appellant is claiming that she had no taxable income in 2014. Section 17071 incorporates Internal Revenue Code (IRC) section 61, which defines gross income generally as all income from whatever source derived “subject only to the exclusions specifically enumerated elsewhere in the Code.” (*United States v. Burke* (1992) 504 U.S. 229, 233.) The sweeping definition of income in IRC section 61 specifically includes compensation for services, gross income derived from business, gains derived from dealings with property,

³ A preponderance of evidence means that the taxpayer must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc., v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.)

interest, royalties, dividends, annuities, pensions, etc. Income includes any “accession to wealth.” (*Commissioner v. Glenshaw Glass Co.* (1955) 348 U.S. 426, 431; *Appeals of Robert E. Wesley and Jerry J. Couchman*, 2005-SBE-002, Nov. 15, 2005.) A taxpayer recognizes income if she realizes an economic gain and that gain primarily benefits her personally. (*United States v. Gotcher* (5th Cir. 1968) 401 F.2d 118.)

In this appeal, appellant has asserted that “wages are non-taxable.” This assertion is unsupported. Compensation in any form, including wages for services, constitutes taxable income. (*Appeals of Fred R. Dauberger, et al.*, 82-SBE-082, Mar. 31, 1982.) Respondent’s proposed assessment is based upon wage information reported by the New York Life Insurance Company. Appellant has produced no evidence that respondent’s proposed assessment is incorrect or erroneous. Without such evidence, there is no basis to overturn respondent’s determination that the additional taxes assessed on appellant’s estimated income are due.

Issue 2 - Has appellant established reasonable cause for failing to file a 2014 California income tax return?

California imposes a penalty for failing to file a valid return on or before the due date, unless it is shown that the failure is due to reasonable cause and not due to willful neglect. (§ 19131.) The penalty is computed at 5 percent of the tax due, after allowing for timely payments, for every month that the return is late, up to a maximum of 25 percent. (§ 19131, subd. (a).) Here, the revised penalty appears to have been correctly calculated and appellant has not disputed the amount or shown any computational error.

The burden is on the taxpayer to establish reasonable cause for the failure to timely file. (*Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982.) To establish reasonable cause, the taxpayer “must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinary intelligent and prudent businessman to have so acted under similar circumstances.” (*Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982; *Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.)

Although appellant states that she has filed a 2014 income tax return, respondent’s records reflect that no return was received for the 2014 tax year. Further, appellant has not provided any evidence of filing a 2014 tax return. Without proof that a 2014 tax return was filed, it is reasonable to conclude that no tax return was filed.

Despite claiming to have filed a tax return without receiving “critical documents back from the IRS,” appellant previously and inconsistently argued that she was unable to file her 2014 tax return without those documents. Appellant has not reconciled these statements. In any event, it is well-established that a taxpayer’s difficulty in obtaining necessary information or documentation generally does not constitute reasonable cause for failing to file a timely return. (*Appeal of J.B. and P.R. Campbell*, 85-SBE-112, Oct. 9, 1985.) We have no basis for concluding that appellant could not have made reasonable estimates of her income in order to file a timely California income tax return for 2014. Accordingly, appellant has not satisfied her burden of proving that her failure to file a 2014 tax return was due to reasonable cause and not willful neglect.

Issue 3 - Has appellant established reasonable cause for failing to respond in a timely manner to FTB’s demand for a tax return?

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 demand in a timely manner. (§ 19133.) The penalty is 25 percent of the total tax, determined without regard to payments and withholding credits. The FTB will impose the demand penalty upon a late or unfiled return if the taxpayer fails to respond to a demand for a tax return and the FTB issues a NPA under the authority of section 19087, subdivision (a), after the taxpayer failed to timely respond to a demand for a tax return at any time during the four taxable years preceding the year for which the current demand for a tax return is being issued.⁴ (Cal. Code Regs., tit. 18, § 19133, subd. (b).) The demand penalty is designed to penalize the failure of a taxpayer to respond to a notice and demand, and not a taxpayer’s failure to pay the proper tax. (*Appeal of W. L. Bryant*, 83-SBE-180, Aug. 17, 1983; *Appeal of Frank E. and Lilia Z. Hublou*, 77-SBE-102, July 26, 1977.) When the FTB imposes the demand penalty, the law presumes that the penalty was imposed correctly. (*Appeal of Stephen C. Bieneman, supra.*) To establish reasonable cause, a taxpayer must show that the failure to respond to a demand occurred despite the exercise of ordinary business care. (*Id.*) The taxpayer’s reasons for failing to respond must be such that an ordinarily intelligent and prudent businessperson would have

⁴ The requirement that it be shown that appellant failed to timely respond to a demand for return at any time during the four taxable years preceding the year for which the current demand has been issued has been met here. On April 22, 2015, respondent made a demand for appellant to file a tax return for the 2013 tax year. Appellant did not timely respond to that demand and respondent issued an NPA to appellant for that year on June 22, 2015.

acted similarly under the circumstances. (*Appeal of Howard G. and Mary Tons, supra.*)

Here, the demand penalty appears to have been calculated correctly and appellant has not disputed the amount or the method of computation. As previously discussed with reference to the late-filing penalty, appellant argues that she was unable to file her 2014 tax return without certain unspecified documents that have not been returned to her by the IRS. An ordinarily intelligent and prudent businessperson would have filed a tax return in response to respondent's demand on the basis of *estimated* income and expenses, even if certain documents were not immediately available. Furthermore, it is not clear why appellant could not have obtained all of the necessary information or documentation by an alternative means that would not have required waiting for the IRS to return documents.

In sum, appellant has not sustained her burden of proving that reasonable cause existed for failing to file a tax return for 2014 following respondent's demand. The penalty was properly imposed.

Issue 4 - Did FTB properly impose the filing enforcement fee?

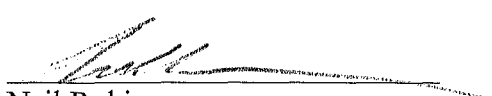
Section 19254 authorizes the imposition of a filing enforcement fee when the FTB has mailed a notice to a taxpayer that the continued failure to file a return may result in the imposition of the fee. Respondent mailed the demand letter with the required language on March 11, 2016. Once the fee is properly imposed, there is no language in the statute that would excuse the fee under any circumstances, including for reasonable cause. (See *Appeal of Michael E. Myers, supra.*) The fee has been properly imposed in conformity with section 19254. Accordingly, we have no basis for overturning the fee.

HOLDINGS

1. Appellant has not established that there was error in respondent's calculation of tax.
2. Appellant has not established reasonable cause for failing to file a 2014 California tax return.
3. Appellant has not established reasonable cause for failing to respond to FTB's demand for a 2014 tax return.
4. FTB properly imposed the filing enforcement fee.

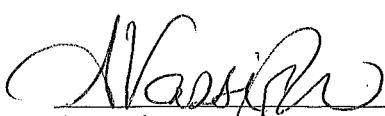
DISPOSITION


Respondent's action is sustained in full.



Neil Robinson
Administrative Law Judge

We concur:



Amanda Vassigh
Administrative Law Judge

Tommy Leung
Administrative Law Judge