

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:)	OTA Case No. 18011301
)	
FRANK HOMEN)	Date Issued: September 20, 2018
)	
)	
)	

OPINION

Representing the Parties:

For Appellant: Frank Homen

For Respondent: Bradley J. Coutinho, Tax Counsel

For Office of Tax Appeals: Neha Garner, Tax Counsel III

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19045,¹ Frank Homen (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) on appellant’s protest against a proposed assessment of additional tax of \$2,210.00, a late-filing penalty of \$552.50, a notice and demand penalty of \$1,714.50, and a filing enforcement fee of \$81.00, plus interest for the 2014 tax year.

Appellant waived his right to an oral hearing and therefore the matter is being decided based on the written record.

ISSUES

1. Whether appellant has shown error in respondent’s proposed tax assessment.
2. Whether appellant established that his failure to timely file a tax return for the 2014 tax year was due to reasonable cause and not due to willful neglect.
3. Whether appellant established that his failure to timely respond to a Demand for Tax Return for the 2014 tax year was due to reasonable cause and not due to willful neglect.
4. Whether the filing enforcement fee may be abated.

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

FACTUAL FINDINGS

1. Appellant failed to timely file a 2014 California personal income tax return. Respondent obtained information indicating that appellant had received income totaling \$105,681.80 from dividends, miscellaneous income, and income from stock sales. Thereafter, respondent issued a Demand for Tax Return dated April 26, 2016 to appellant, and allowed appellant until June 1, 2016, to timely respond. Respondent received appellant's response on May 5, 2016, in which appellant alleged that he did not have a filing requirement for the 2014 tax year.
2. By letter dated July 27, 2016, respondent sent appellant information indicating that appellant had received income from California sources during the 2014 tax year. The letter required appellant to file his 2014 return or substantiate why he was not required to file a return.
3. By response letter dated August 15, 2016, appellant requested that his tax debt be excused because he lost his business and home during 2014.
4. While not directly at issue herein, appellant also failed to file a return for 2010. On February 7, 2012, FTB issued a demand for appellant to file a 2010 return. Appellant did not timely respond to that demand, so FTB issued a Notice of Proposed Assessment (NPA) to appellant for that year on April 14, 2013.
5. Because appellant did not establish that he did not have a filing requirement for the 2014 tax year, respondent issued a Notice of Proposed Assessment for 2014 dated September 19, 2016, which proposed a tax liability of \$2,210.00, a \$552.50 late-filing penalty, a \$1,714.50 demand penalty, and an \$81.00 filing enforcement fee, plus interest.
6. Appellant protested the NPA by letter dated November 4, 2016. In his protest letter, appellant stated that while he still owned a business during 2014, he used the money from the business to pay for his personal expenses. Appellant also stated that he had no money and asked to be "pardoned."
7. After reviewing the information in appellant's protest letter, respondent determined that appellant still had a requirement to file his 2014 tax return and issued a Notice of Action dated December 27, 2016 that affirmed the NPA.
8. Appellant timely filed this appeal.

DISCUSSION

Issue 1 – Whether appellant demonstrated error in the proposed tax assessment.

Respondent’s determination is presumed to be correct, and a taxpayer has the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Myers*, 2001-SBE-001, May 31, 2001.²) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Magidow*, 82-SBE-274, Nov. 17, 1982.) A taxpayer’s failure to produce evidence that is within his or her control gives rise to a presumption that such evidence, if provided, would be unfavorable to the taxpayer’s case. (*Appeal of Cookston*, 83-SBE-048, Jan. 3, 1983.)

Section 17041 imposes a tax upon the entire taxable income of every resident of this state. Section 18501 requires every individual subject to the Personal Income Tax Law to make and file a return with the FTB “stating specifically the items of the individual’s gross income from all sources and the deductions and credits allowable” Section 19087, subdivision (a), provides:

If any taxpayer fails to file a return, or files a false or fraudulent return with intent to evade the tax, for any taxable year, the Franchise Tax Board, at any time, may require a return or an amended return under penalties of perjury or may make an estimate of the net income, from any available information, and may propose to assess the amount of tax, interest, and penalties due.

If the FTB makes a tax assessment based on an estimate of income, the FTB’s initial burden is to show why its assessment is reasonable and rational. (*Appeal of Myers, supra.*) The FTB’s use of information from various sources to estimate a taxpayer’s taxable income, when that taxpayer failed to file his own return, is a reasonable and rational method of determining taxable income. (See *Palmer v. Internal Revenue Service* (9th Cir. 1997) 116 F.3d 1309, 1313; *Giddio v. Commissioner* (1970) 54 T.C. 1530, 1533; *Andrews v. Commissioner*, T.C. Memo. 1998-316; *Appeals of Bailey*, 92-SBE-001, Feb. 20, 1992; *Appeals of Tonsberg*, 85-SBE-034, Apr. 9, 1985.)

² Pursuant to California Code of Regulations, title 18, section 30501(d)(3), precedential opinions of the State Board of Equalization (BOE) that were adopted prior to January 1, 2018, may be cited as precedential authority to the Office of Tax Appeals unless a panel removes, in whole or in part, the precedential status of the opinion. BOE’s precedential opinions are viewable on BOE’s website: <http://www.boe.ca.gov/legal/legalopcont.htm>.

Here, respondent obtained information indicating that appellant had received income in 2014 totaling \$105,681.80 from dividends, stock sales, and miscellaneous income reported on Forms 1099. Based on this amount of income, appellant was required to file a tax return for the 2014 tax year. Respondent's use of this income information to estimate appellant's income is both reasonable and rational because appellant failed to file his own return. (See *Appeals of Bailey, supra*; *Appeals of Tonsberg, supra*.) Furthermore, appellant acknowledged in his appeal letter that respondent's estimate of appellant's income is "probably correct." Appellant has not filed his return or provided any evidence to show error in the FTB's assessment. Thus, the assessment must be upheld.

Issue 2 - Whether appellant established that his failure to timely file a 2014 tax return was due to reasonable cause and not due to willful neglect.

California imposes a penalty for the failure to file a return on or before the due date, unless it is shown that the late filing is due to reasonable cause and not willful neglect. (§ 19131.) The penalty is computed at five percent of the amount of tax required to be shown on the return for every month that the return is late, up to a maximum of 25 percent. (§ 19131(a).) For purposes of calculating this penalty, the amount of tax required to be shown on the return is reduced by any timely tax payments, and any credits against the tax which may be claimed on the return. (§ 19131(c).)

A taxpayer has the burden of establishing reasonable cause. (*Todd v. McColgan, supra*; *Appeal of Myers, supra*; *Appeal of Scott*, 82-SBE-249, Oct. 14, 1982.) As a general matter, in order for a taxpayer to establish that a failure to act was due to reasonable cause, the taxpayer must show that the failure occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances. (*Appeal of Bieneman*, 82-SBE-148, July 26, 1982; *Appeal of Tons*, 79-SBE-027, Jan. 9, 1979.) Thus, for example, the United States Supreme Court concluded that each taxpayer has a personal, non-delegable obligation to file a tax return by the due date and, as such, a taxpayer's reliance on an agent to timely file a federal return does not constitute reasonable cause for a late filing. (*United States v. Boyle* (1985) 469 U.S. 241, 252.)

Here, appellant has not made any specific arguments regarding his failure to file a 2014 return. Appellant states only that he was unable to pay the tax liability.³ However, the penalty in question was imposed because appellant did not file a timely return; not because appellant failed to pay his tax liability. Furthermore, the law is clear that one is not excused from timely filing a return even if one is unable to pay the amount due. “One’s ability to pay a tax liability has no bearing on the ability to file one’s tax return.” (*Nasir v. Commissioner*, T.C. Memo. 2011-283.) Therefore, appellant has not established reasonable cause for his failure to timely file his 2014 personal income tax return.

Issue 3 - Whether appellant established that his failure to timely respond to respondent’s Demand for Tax Return was due to reasonable cause and not due to willful neglect.

California imposes a penalty for the failure to file a return upon notice and demand by FTB, unless the failure is due to reasonable cause and not willful neglect. (§ 19133.) The burden is on the taxpayer to prove that reasonable cause prevented him from responding to the demand. (*Appeal James*, 83-SBE-009, Jan. 3, 1983.) The penalty is 25 percent of the tax assessed pursuant to Section 19087 or of any deficiency tax assessed by FTB concerning the assessment for which the return was required. (§ 19133(a).) 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 FTB has issued an NPA in response to the taxpayer’s failure to respond to a similar demand within the four-year period preceding the year at issue. (Cal. Code Regs., tit. 18, § 19133(b).)⁴ The demand penalty is designed to penalize a taxpayer’s failure to respond to the demand, not a taxpayer’s failure to pay the proper tax. (*Appeal of Bryant*, 83-SBE-180, Aug. 17, 1983; *Appeal of Hublou*, 77-SBE-102, July 26, 1977.) To establish reasonable cause, a taxpayer must show that the failure to respond to a demand occurred despite the exercise of ordinary business care. (*Appeal of Bieneman*, 82-SBE-148, July 26, 1982.) The taxpayer’s reasons for failing to respond must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Tons*, 79-SBE-027, Jan. 9, 1979.)

³ The Office of Tax Appeals lacks authority to make adjustments to the amount of a tax assessment based on a taxpayer’s inability to pay. (*Appeal of Estate of R. Luebbert, Deceased, and V. Luebbert*, 71-SBE-028, Sep. 13, 1971.) However, as indicated in respondent’s brief, appellant may contact the FTB at the conclusion of this appeal regarding negotiating an installment payment agreement and/or an offer-in-compromise agreement with the FTB.

⁴ This requirement is satisfied here because appellant failed to file a 2010 tax return in response to FTB’s demand for one, and FTB issued an NPA to appellant for that year on April 9, 2012.

Appellant asserts that that he used his 2014 income to pay for his food, rent, and other necessary expenses, and that he has filed tax returns for the past 50 years. However, appellant's general assertions do not address and fail to explain his failure to timely respond to respondent's demand. As stated above, appellant had a filing requirement and has not provided evidence to show otherwise. Appellant has not provided evidence of how his personal difficulties precluded him from timely responding to the demand. Appellant has also not provided any evidence of steps taken to timely file his return in response to the demand or of the exercise of ordinary care and business prudence. Therefore, appellant has not shown reasonable cause for his failure to timely respond to the demand.

Issue 4 - Whether the filing enforcement fee may be abated.

Section 19254 provides that, if the FTB mails a formal legal demand for a tax return to a taxpayer, a filing enforcement cost recovery fee is required to be imposed when the taxpayer fails or refuses to file the return within the 25-day period. Once the fee is properly imposed, there is no language in the statute that excuses the fee under any circumstances, including for reasonable cause. (See *Appeal of Myers, supra.*) Here, the fee was properly imposed and there is no basis for abating it.

HOLDINGS

1. Appellant has failed to demonstrate error in respondent's proposed assessment for the 2014 tax year.
2. Appellant failed to establish that his failure to timely file a personal income tax return for the 2014 tax year was due to reasonable cause and not willful neglect.
3. Appellant failed to establish that his failure to timely respond to respondent's Demand for Tax Return for the 2014 tax year was due to reasonable cause and not due to willful neglect.
4. Appellant has failed to demonstrate that the filing enforcement fee should be abated.

DISPOSITION

Based on the foregoing, respondent's action is sustained.

DocuSigned by:
Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

We concur:

DocuSigned by:
Jeffrey I. Margolis
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Jeffrey I. Margolis
Administrative Law Judge

DocuSigned by:
Linda C. Cheng
8B585BFAC08946D...
Linda C. Cheng
Administrative Law Judge