

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:)	OTA Case No. 18032539
)	
RAYMOND R. PRAZEN)	Date Issued: November 2, 2018
)	
)	
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OPINION

Representing the Parties:

For Appellant:	Raymond R. Prazen, Taxpayer
For Respondent:	Anne Mazur, Specialist

KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19045,¹ Raymond R. Prazen (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in denying appellant’s protest of a proposed assessment for the 2015 tax year of: \$7,518 in tax, a failure-to-file penalty of \$1,879.50, a demand penalty of \$1,879.50, a filing enforcement fee of \$84, plus interest. This matter is being decided based on the written record because appellant waived his right to an oral hearing.

ISSUES

1. Whether appellant established that FTB’s proposed tax assessment is erroneous or otherwise incorrect.
2. Whether appellant established a basis for abating the: (1) failure-to-file penalty, (2) demand penalty, or (3) filing enforcement fee.

¹ All section references are to the Revenue and Taxation Code unless otherwise indicated.

FACTUAL FINDINGS

1. Appellant, a California resident, was licensed to practice law in California during the tax year at issue.² Appellant currently works at Prazen & Associates in San Diego, California.
2. Appellant has not filed a state income tax return with FTB for any year after the 2009 tax year. Additionally, since October 24, 1994, FTB's records reflect that appellant has only voluntarily filed returns for the following tax years: 1993, 1999, 2008, and 2009.³
3. FTB issued Demands for Tax Return (Demand) to appellant with respect to his 2011, 2012, 2013 and 2014 tax years on May 19, 2015, June 30, 2014, March 4, 2015, and December 15, 2015, respectively.⁴ Appellant failed to respond to those Demands. Accordingly, FTB issued Notices of Proposed Assessment (NPAs) for those years on July 20, 2015, December 29, 2014, May 4, 2015, and February 16, 2016, respectively. Those NPAs, which have become final assessments, estimated Appellant's gross income for 2011, 2012, 2013 and 2014 as \$103,841, \$106,312, \$108,885, and \$111,574, respectively.
4. On June 15, 2017, FTB issued a Demand to appellant for the tax year at issue, 2015, which notified appellant that failure to respond by July 19, 2017, would result in imposition of a demand penalty. When appellant failed to respond to the Demand, FTB issued an NPA on August 14, 2017, proposing to assess tax of \$7,518, based on estimating appellant's gross income to be \$114,363 during 2015, which FTB determined was the average income reported by attorneys licensed in California. The NPA also proposed a failure-to-file penalty of \$1,879.50, a demand penalty of \$1,879.50, a filing enforcement cost recovery fee of \$84, plus interest.

² Appellant was licensed since 1976, except for a period of time during 2009 and 2010 when he was suspended for professional misconduct.

³ Although FTB's records only indicate that appellant has filed returns for the four tax years indicated, FTB indicates that for several other years during the period 1994 to 2009, appellant eventually filed returns in response to enforcement actions taken against him.

⁴ FTB indicates that it has been taking filing enforcement actions against appellant since 1999; however, FTB only provided documentation for Demands and proposed assessments that FTB issued during 2011 through 2015. Therefore, we do not further address any other tax year.

5. By letter dated October 12, 2017, appellant protested the NPA, stating that he did not believe he earned enough income to trigger a filing requirement in California, and that he would “attempt to review [his] records . . . and file a return if necessary.”
6. FTB responded via letter dated December 8, 2017, requesting that appellant file a return, or provide supporting documentation establishing that no return was required, within 30 days. When appellant failed to respond, FTB issued a Notice of Action (NOA) on February 13, 2018.
7. Appellant appealed the 2015 NOA by letter dated March 14, 2018, stating that he “had a very minimal income in 2013 [sic]” and did not believe he owed taxes for that reporting period. Appellant also stated he would file a tax return for 2015, if necessary.
8. By opening brief dated May 30, 2018, FTB contends that it has the authority to estimate income from any available information.

DISCUSSION

FTB’s Proposed Tax Assessment

California’s personal income tax is imposed on the entire taxable income of a California resident. (§ 17041(a).) Every individual subject to this tax with income over a specified amount must file a tax return with FTB. (§ 18501(a).) In the case of a single individual under the age of 65, with no dependents, the filing threshold for 2015 was at least \$13,005 in adjusted gross income, or \$16,256 in gross income. (§ 18501(a), (b).) Except where specifically excluded, gross income means all income from whatever source derived, including income derived from a business. (§ 17071; Int.Rev. Code, § 61.) Adjusted gross income means gross income, minus specified deductions, such as trade or business expenses. (§ 17072; Int.Rev. Code, § 62.)

In the case of a failure to file a return, FTB may issue a proposed tax assessment based on an income estimate and may make such estimate using any available information. (§ 19087(a).) FTB’s proposed assessment is presumed correct once FTB shows a reasonable and rational basis for the estimation. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.)⁵ The tax agency has wide latitude in estimating income when

⁵ Precedential opinions of the Board of Equalization (BOE or board) 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. The board’s precedential opinions are viewable on its website: <www.boe.ca.gov/legal/legalopcont.htm>.

the taxpayer fails to file a return or provide the information necessary to ascertain their tax liability. (*Palmer v. Internal Revenue Service* (9th Cir. 1997) 116 F.3d 1309, 1312; *Andrews v. Commissioner*, T.C. Memo. 1998-316 [use of data from the Bureau of Labor Statistics is an acceptable and reasonable method to estimate income]; *Appeal of Walter R. Bailey*, 92-SBE-001, Feb. 20, 1992.)

Here, appellant failed to file a return and offered no documentation to support his contention that he is not required to file a return for 2015. Therefore, it was proper for FTB to estimate appellant's income. Appellant is a licensed attorney in California; therefore, we find FTB's use of the average income reported by California licensed attorneys to be both reasonable and rational. Additionally, FTB's 2015 income estimates are in line with its estimates of appellant's income for the prior four tax years, and appellant did not appeal the NOAs issued on FTB's assessments for these tax years. Although appellant now complains that FTB's estimate is too high for 2015, we have no basis to adjust FTB's estimate in the absence of income information that only appellant is able to provide. Therefore, we find that appellant failed to establish that FTB's proposed assessment is overstated or otherwise incorrect.

The failure-to-file penalty

Section 19131 imposes a penalty for the failure to timely file a return, unless it is shown that the late filing is due to reasonable cause and not willful neglect. (§ 19131(a).) The amount of the penalty is five percent of the tax due, after allowing for timely payments, for every month or fraction of a month that the return is late, up to a maximum 25 percent penalty. (§ 19131(a).) The penalty will be abated if a taxpayer establishes that the failure to file was due to reasonable cause and not willful neglect. (§ 19131(a).)

FTB correctly asserts that the failure-to-file penalty applies at the maximum rate of 25 percent of appellant's estimated tax liability of \$7,518, because appellant has not filed a tax return and five or more months have elapsed from the due date of the 2015 tax return. Appellant does not request abatement of the penalty for reasonable cause, and has provided no evidence to show that his failure to file a return was due to reasonable cause. Instead, appellant contends that the estimated tax liability (and thus, the penalty calculated thereon) is overstated. We sustained FTB's estimated tax assessment above; therefore, we have no basis to find that the penalty was improperly imposed or calculated, or to abate the penalty.

The Demand Penalty

California imposes a penalty for the failure to file a return upon notice and demand, unless the failure is due to reasonable cause and not willful neglect. (§ 19133.) As relevant, the penalty is 25 percent of either: the total tax assessed pursuant to section 19087 (pertaining to a failure to file a return or the filing of a false or fraudulent return), or of any deficiency tax assessed by FTB concerning the assessment for which the return was required. (§ 19133; Cal. Code Regs., tit. 18, § (Regulation or Reg.) 19133(a).) With respect to a failure to file a personal income tax return, Regulation 19133 provides that the demand penalty will only be imposed by FTB if:

- (1) the taxpayer fails to timely respond to a current Demand for Tax Return in the manner prescribed, and
- (2) the FTB has proposed an assessment of tax under the authority of Revenue and Taxation Code section 19087, subdivision (a), after the taxpayer failed to timely respond to a Request for Tax Return or a Demand for Tax Return in the manner prescribed, at any time during the four-taxable-year period preceding the taxable year for which the current Demand for Tax Return is issued.

(Reg. 19133(b).)

First, appellant failed to respond to FTB's June 15, 2017, Demand for the current tax year: 2015. Second, FTB issued an NPA to appellant for the 2012 tax year on December 29, 2014, after appellant failed to respond to the 2012 Demand. Appellant offers no evidence to show that his failure to respond to the Demand was due to reasonable cause. Therefore, we find that FTB properly imposed a demand penalty in the amount of 25 percent of the \$7,518 tax liability that FTB estimated pursuant to section 19087, and that appellant failed to establish a basis for abatement of this penalty.⁶

The filing enforcement cost recovery fee

FTB is required to impose a filing enforcement cost recovery fee if a person fails to file a tax return required under the Corporation Tax Law or Personal Income Tax Law within 25 days after FTB mails to that person a formal legal demand to file a return. (§ 19254(a)(2).) There is no exception for reasonable cause. Here, our inquiry is limited to determining whether FTB complied with the statutory notice requirements for imposing the fee. FTB mailed the Demand

⁶ We note that FTB also issued Demands and NPAs for additional tax years. Nevertheless, based on our finding that the Demand penalty was properly imposed due to the 2012 filing enforcement actions described above, it is not necessary for us to discuss additional filing enforcement actions taken by FTB for other tax years.

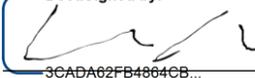
on June 15, 2017, and to date appellant has not filed a return or established that he was not required to file a return. Therefore, under these facts, imposition of the filing enforcement cost recovery fee is mandatory.

HOLDINGS

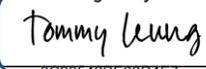
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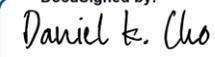
DISPOSITION

Respondent’s action is sustained.

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Andrew J. Kwee
Administrative Law Judge

We concur:

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Tommy Leung
Administrative Law Judge

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Daniel K. Cho
Administrative Law Judge