

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18011039
MARK WEHBERG)
) Date Issued: May 28, 2019
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OPINION

Representing the Parties:

For Appellant: Mark Wehberg

For Respondent: Maria Brosterhous, Tax Counsel IV

For Office of Tax Appeals: Linda Frenklak, Tax Counsel IV

A. VASSIGH, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19045, Mark Wehberg (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in proposing an assessment of \$1,493.95 in additional tax, a late-filing penalty of \$373.49, a notice and demand penalty of \$373.49, and a filing enforcement fee of \$79.00, plus applicable 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 the proposed assessment of tax for the 2014 tax year;
2. Whether appellant has shown reasonable cause for his failure to file a 2014 return;
3. Whether appellant has shown reasonable cause for the failure to timely respond to FTB’s Demand for Tax Return; and
4. Whether the filing enforcement fee was properly imposed.

FACTUAL FINDINGS

1. Appellant did not file a timely 2014 California income tax return.
2. Voicestep Telecom LLC (Voicestep), a California limited liability company (LLC), filed a Schedule K-1 reporting \$26,877 of income for appellant for 2014.
3. FTB sent appellant a Demand for Tax Return dated April 20, 2016, requesting him to respond by May 25, 2016, by filing a 2014 return or explaining why a 2014 return was not required.
4. For the 2014 tax year, a single individual under age 65 with no dependents realizing a California gross income of \$16,047 or a California adjusted gross income of \$12,838 was required to file a California income tax return, while a single individual age 65 or older with no dependents realizing a California gross income of \$21,447 or a California adjusted gross income of \$18,238 was required to file a California income tax return.
5. After appellant failed to respond to the Demand for Tax Return by the due date, FTB issued to appellant a Notice of Proposed Assessment (NPA) dated July 1, 2016. The NPA proposed a tax liability, after personal exemption credit, of \$1,493.95¹ based on an estimated taxable income of \$26,877.00, and imposed a notice and demand penalty of \$373.49, a late-filing penalty of \$373.49, and a filing enforcement fee of \$79.00, plus interest.
6. Appellant protested the NPA by filing a Quick Resolution Worksheet dated July 7, 2016, with an attached letter dated July 7, 2017. In the July 7, 2017 letter, appellant stated that he never received the Demand for Tax Return, he was not a member of a California LLC during 2014, and he did not receive a Schedule K-1.
7. FTB issued a Notice of Action (NOA) dated November 28, 2016, affirming the NPA.² FTB sent the NOA to the same address that it had sent the Demand for Tax Return. This timely appeal followed.
8. During the appeal process, additional briefing was requested from both parties. Appellant was requested to discuss whether he contacted Voicestep concerning the 2014

¹ Respondent erroneously states in its opening brief that the proposed total tax amount listed on the NPA is \$1,601.95, which is the amount of proposed tax listed on the NPA before applying an exemption credit of \$108.00.

² Although the NOA states that it is a revision of the NPA, the only change is the amount of accrued interest.

Schedule K-1 issued to him and to produce any supporting documents, such as an amended 2014 Schedule K-1 or relevant correspondence between Voicestep and himself. FTB was requested to discuss whether it issued appellant a proposed assessment after he failed to timely respond to a Demand for Tax Return or a Request for Tax Return at any time during the four-taxable year period preceding the 2014 tax year, as required by California Code of Regulations, title 18, section (Regulation) 19133, and to produce supporting documents.

9. Appellant did not file an additional brief.
10. FTB filed an additional brief, and produced with it a Demand for Tax Return, dated March 13, 2013, for the 2011 tax year. FTB also produced an NPA for tax year 2011 that it issued to appellant on May 13, 2013, after he failed to respond to the Demand for Tax Return for that year.

DISCUSSION

Issue 1 - Whether appellant has shown error in the proposed assessment of tax.

R&TC section 18501 (a) requires every individual subject to the California Personal Income Tax³ to make and file a return with FTB, “stating specifically the items of the individual’s gross income from all sources and the deductions and credits allowable.” R&TC section 19087 (a) provides that if any taxpayer fails to file a return, FTB at any time “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.”

When FTB proposes a tax assessment based on an estimate of income, FTB’s initial burden is to show that its assessment is reasonable and rational. (*Appeal of Myers* (2001-SBE-001) 2019 WL 1187160.) When a taxpayer fails to file a valid return and refuses to cooperate in the ascertainment of his or her income, FTB is given “great latitude” in estimating income. (*Appeals of Bailey* (92-SBE-001) 1992 WL 44503 [estimate based on third-party information reporting]; *Appeal of Tonsberg* (85-SBE-034) 1985 WL 15812 [use of third-party information reporting].) “A taxpayer is not in a good position to criticize respondent’s estimate of his or her

³ It appears that appellant may have been a resident of Maryland during the tax year in question, based on his last known address. California residents are taxed upon their entire taxable income (regardless of source), while nonresidents are only taxed on income from California sources. (R&TC, §§ 17041, subds. (a), (b), and (i), 17951.) Part-year residents are taxed on their income earned while residents of this state, as well as all income derived from California sources. (R&TC, § 17041, subds. (b) & (i).)

liability when he or she fails to file a required return and, in addition, subsequently refuses to submit information upon request.” (*Appeals of Dauberger et al.* (82-SBE-082) 1982 WL11759.) An assessment based on unreported income is presumed correct when the taxing agency introduces a minimal factual foundation to support the assessment. (*In re Olshan* (9th Cir. 2004) 356 F.3d 1078, 1084 [quoting *Palmer v. Internal Revenue Service* (9th Cir. 1997) 116 F.3d 1309, 1312]; see also *Appeals of Bailey, supra.*)

Once FTB has met its initial burden by linking the taxpayer with an income-producing activity, the taxpayer has the burden of proving that the assessment is arbitrary or erroneous. (*Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932, 935; *Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Myers, supra.*) Unsupported assertions are not sufficient to satisfy the taxpayer’s burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

Appellant failed to file a 2014 return, even after FTB issued him a Demand for Tax Return. As a result, FTB estimated appellant’s 2014 income based on information reported on a 2014 Schedule K-1. Appellant argues that FTB improperly issued the proposed assessment because he did not earn income from Voicestep in 2014. He indicates that Voicestep erroneously issued the Schedule K-1. Appellant states that Voicestep “was supposed to be fixing it.” However, appellant has not substantiated his assertion that Voicestep erroneously issued the 2014 Schedule K-1, which reports that appellant received \$26,877 of income during 2014. Appellant has not provided a copy of an amended Schedule K-1 for 2014 from Voicestep or any correspondence between Voicestep and himself concerning this matter. Appellant was afforded an opportunity to file a reply brief and an additional brief but chose not to do so. Appellant has failed to meet his burden of proving that the proposed assessment of tax was erroneous.

Issue 2 - Whether appellant has shown reasonable cause for his failure to file a 2014 return.

R&TC section 19131 provides that FTB shall impose a late-filing penalty when a taxpayer fails to file a tax return on or before its due date or extended due date unless the taxpayer establishes that the late filing was due to reasonable cause and was not willful neglect. “Reasonable cause” means “such cause as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances.” (*Appeal of Xie*, 2018-OTA-076P, July 23, 2018.)

Appellant has not provided any facts or legal argument showing that reasonable cause prevented him from timely filing his 2014 return other than to assert that the Schedule K-1 was

issued in error and Voicestep “was supposed to be fixing it.” As discussed above with respect to the proposed assessment, appellant has failed to substantiate his assertion that Voicestep erroneously issued the 2014 Schedule K-1 and he has not produced a copy of an amended 2014 Schedule K-1 issued by Voicestep or any correspondence between Voicestep and himself concerning this matter. Appellant has therefore failed to meet his burden of proving that his failure to timely file a 2014 return was due to reasonable cause.

Issue 3 - Whether appellant has shown reasonable cause for the failure to timely respond to FTB’s Demand for Tax Return.

R&TC section 19133 imposes a penalty when a taxpayer fails to file a return or provide information upon FTB’s notice and demand to do so, unless the failure is due to reasonable cause and not willful neglect. FTB will only impose a notice and demand penalty if the taxpayer fails to respond to a current Demand for Tax Return and at any time during the preceding four taxable years, FTB issued an NPA following the taxpayer’s failure to timely respond to a Request for Tax Return or a Demand for Tax Return. (Cal. Code Regs., tit. 18, § 19133, subd. (b).)

With its additional brief, FTB produced a 2011 Demand for Tax Return, as well as a 2011 NPA, that was subsequently issued to appellant. FTB issued the NPA for the 2011 tax year on May 13, 2013, based on appellant’s failure to respond to the March 13, 2013 Demand for Tax Return for that year. Based on the evidence in the appeal record, FTB’s imposition of the notice and demand penalty was properly imposed pursuant to R&TC section 19133.

There is no dispute that appellant failed to respond to the Demand for Tax Return for the 2014 tax year by the deadline of May 25, 2016. Although appellant asserted at protest that he did not receive the Demand for Tax Return, he does not make this contention on appeal. However, we note that R&TC section 18416 provides that FTB may send any notice by first-class prepaid postage, and it is sufficient if such notice is mailed to a taxpayer’s last-known address. The last-known address is the address that appears on the taxpayer’s last return filed with FTB, unless the taxpayer has provided to FTB clear and concise written or electronic notification of a different address or FTB has an address that it has reason to believe is the most current address for the taxpayer. FTB sent the Demand for Tax Return to the same address that it later sent the NOA upon which this appeal is based. Appellant clearly received the NPA, which he protested, and the NOA, which he appealed. Appellant used the same address in his appeal letter. As such, we have no basis to conclude that the Demand for Tax Return was sent to

the wrong address, and therefore, appellant presumably received it. For the reasons discussed above with respect to the late-filing penalty, appellant has not met his burden of proving that his failure to timely respond to the Demand for Tax Return was due to reasonable cause.

Issue 4 - Whether the filing enforcement fee was properly imposed.

R&TC section 19254 (a)(2) requires FTB to impose a filing enforcement fee in the event a taxpayer fails to file a return within 25 days after FTB mails a Demand for Tax Return to the taxpayer. There are no reasonable cause exceptions or other exceptions that permit an abatement of this fee. Appellant did not respond to the Demand for Tax Return within this 25-day period. The filing enforcement fee was thus properly imposed.

HOLDINGS

1. Appellant has not shown error in the proposed assessment of tax for the 2014 tax year.
2. Appellant has not shown reasonable cause for the late filing of his 2014 return.
3. Appellant has not shown reasonable cause for the failure to timely respond to FTB's Demand for Tax Return.
4. The filing enforcement fee was properly imposed.

DISPOSITION

FTB's actions are sustained in full.

DocuSigned by:
Amanda Vassigh
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Amanda Vassigh
Administrative Law Judge

We concur:

DocuSigned by:
Alberto Rosas
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Alberto T. Rosas
Administrative Law Judge

DocuSigned by:
Tommy Leung
0C90542BE88D4E7...
Tommy Leung
Administrative Law Judge