

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
MARK HAWKINS

) OTA Case No. 18053087
)
) Date Issued: August 22, 2019
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)
)

OPINION

Representing the Parties:

For Appellant: Mark Hawkins

For Respondent: Jean Cramer, Tax Counsel IV

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

A. ROSAS, Administrative Law Judge: Under Revenue and Taxation Code (R&TC) section 19045, appellant Mark Hawkins (Hawkins) appeals Franchise Tax Board’s (FTB) action proposing additional tax (\$18,556), a late-filing penalty (\$4,639), a notice and demand penalty (\$4,639), and a filing enforcement fee (\$81), plus interest, for the 2015 tax year. Hawkins waived his right to an oral hearing; therefore, we decide the matter based on the written record.

ISSUES

1. Whether Hawkins has demonstrated error in the proposed assessment of tax.
2. Whether Hawkins has established that his failure to file a 2015 return was due to reasonable cause and not due to willful neglect.
3. Whether Hawkins has established that his failure to timely respond to the Demand for Tax Return was due to reasonable cause and not due to willful neglect.
4. Whether the filing enforcement fee may be abated.

FACTUAL FINDINGS

1. Hawkins did not file a California income tax return for the 2015 tax year. FTB received information indicating that Hawkins may have earned sufficient income to have a filing

- requirement. FTB obtained a copy of his 2015 federal wage and income transcript, which shows Hawkins received non-employee compensation of \$230,643 and interest of \$63.¹
2. In April 2017, FTB sent Hawkins a Demand for Tax Return, stating that it had no record of receiving his 2015 return and requested that he file a 2015 return, provide evidence that he already filed, or explain why he was not required to file.
 3. After Hawkins failed to respond to the Demand for Tax Return by an extended deadline, FTB issued him a Notice of Proposed Assessment (NPA) in June 2017. The NPA proposed a tax liability of \$18,556 based on an estimated taxable income of \$230,706 and imposed a late-filing penalty of \$4,639, a notice and demand penalty of \$4,639,² and a filing enforcement fee of \$81, plus interest.
 4. Hawkins submitted to FTB a Quick Resolution Worksheet signed in August 2017. He marked two boxes that indicated that he did not wish to protest the proposed assessment and requested a 30-day deferral to file a 2015 return. On the same worksheet, he also marked a box indicating that he did wish to protest the proposed assessment because he disagreed with it.
 5. After Hawkins failed to file a 2015 return within the requested 30-day deferral period, FTB issued to Hawkins a Notice of Action dated December 6, 2017, affirming the NPA. This timely appeal followed.

DISCUSSION

Issue 1 - Whether Hawkins has demonstrated error in the proposed assessment of tax.

California law requires every individual subject to the California Personal Income Tax Law to make and file a return with FTB specifically stating his or her gross income from all sources and the deductions and credits allowable. (R&TC, § 18501(a).) If a taxpayer fails to file a return, FTB “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.” (R&TC, § 19087(a).) FTB bears the initial burden to show that its assessment of tax based on an estimate of income is

¹ For the 2015 tax year, based on this income, a single individual (regardless of age) with no dependents was required to file a California income tax return. (See R&TC, § 18501.)

² As to the issue of the notice and demand penalty, we also find that Hawkins failed to file a 2012 tax return after FTB issued him a demand for a 2012 return in January 2014, and FTB issued him an NPA for the 2012 tax year in May 2014.

reasonable and rational. (*Appeal of Myers* (2001-SBE-01) 2001 WL 37126924.) An assessment based on unreported income is presumed correct when the taxing agency introduces a minimal factual foundation to support the assessment. (*Palmer v. Internal Revenue Service* (9th Cir. 1997) 116 F.3d 1309, 1312; see also *Appeals of Bailey* (92-SBE-001) 1992 WL 44503.)

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.)

Here, FTB obtained information indicating that in 2015 Hawkins received income totaling approximately \$230,700. Based on this amount of income, Hawkins was required to file a tax return for the 2015 tax year. FTB's use of this income information to estimate his income is both reasonable and rational because he failed to file a return. (See *Appeals of Bailey, supra*; *Appeal of Tonsberg* (85-SBE-034) 1985 WL 15812.) Hawkins has not filed his 2015 return or provided any evidence to show error in FTB's proposed assessment. Thus, he failed to meet his burden of proving that the proposed assessment of tax was erroneous.

Issue 2 - Whether Hawkins has established that his failure to file a 2015 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. (R&TC, § 19131.) A taxpayer has the burden of establishing reasonable cause. (*Appeal of Myers, supra*; *Appeal of Scott* (83-SBE-094) 1983 WL 15480.) In general, 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; that is, cause existed as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances. (*Appeal of Bieneman* (82-SBE-148) 1982 WL 11825; *Appeal of Tons* (79-SBE-027) 1979 WL 4068.)

Here, Hawkins has not made any factual or legal arguments regarding his failure to file a 2015 return. He only states that the proposed assessment fails to account for a deduction for the 2015 tax year. However, his contention is irrelevant to the issue of reasonable cause for his failure to file. Hawkins has therefore not established reasonable cause for his failure to file his 2015 return.

Issue 3 - Whether Hawkins has established that his failure to timely respond to the 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. (R&TC, § 19133.) The burden is on the taxpayer to prove that reasonable cause prevented him from responding to the demand. (*Appeal of James* (83-SBE-009) 1983 WL 15396.) FTB will impose the demand penalty when a 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).)³ 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) 2019 WL 1187161; *Appeal of Hublou* (77-SBE-102) 1977 WL 4093.) 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, supra.*) The taxpayer's reasons for failing to respond to the demand must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Tons, supra.*)

Hawkins makes no contentions with respect to the demand penalty. He does not explain his failure to timely respond to the Demand for Tax Return. He has not provided evidence of any efforts he took to file his 2015 return in response to the demand. Thus, he has not shown reasonable cause for his failure to timely respond to the demand.

Issue 4 - Whether Hawkins has demonstrated that the filing enforcement fee should be abated.

If FTB mails a formal legal demand for a tax return to a taxpayer, a filing enforcement cost recovery fee is required to be imposed if the taxpayer fails or refuses to file the return within 25 days. (R&TC, § 19254(a)(2).) 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, because Hawkins failed or refused to file his return by the extended deadline, FTB properly imposed the filing enforcement fee and there is no basis for abating it.

³ This requirement is satisfied because Hawkins failed to file a 2012 tax return after FTB issued him a Demand for a 2012 return in January 2014, and FTB issued him an NPA for the 2012 tax year in May 2014.

HOLDINGS

1. Hawkins has failed to demonstrate error in the proposed assessment of tax.
2. Hawkins has failed to establish that his failure to file a 2015 return was due to reasonable cause and not due to willful neglect.
3. Hawkins has failed to establish that his failure to timely respond to the Demand was due to reasonable cause and not due to willful neglect.
4. Hawkins has failed to demonstrate that the filing enforcement fee may be abated.

DISPOSITION

We sustain FTB's action in full.

DocuSigned by:

Alberto Rosas

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Alberto T. Rosas

Administrative Law Judge

We concur:

DocuSigned by:

Tommy Leung

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Tommy Leung

Administrative Law Judge

DocuSigned by:

Nguyen Dang

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Nguyen Dang

Administrative Law Judge