

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:  
**W. SMAIL**

) OTA Case No. 19014236  
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**OPINION**

Representing the Parties:

For Appellant: W. Smail

For Respondent: Greg W. Heninger, Program Specialist II

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, W. Smail (appellant) appeals an action by respondent Franchise Tax Board (FTB) in proposing an assessment of tax of \$12,772, a late-filing penalty of \$3,193, a notice and demand (demand) penalty of \$3,193, and a filing enforcement cost recovery fee of \$84, plus interest, for the 2016 tax year.

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

**ISSUES**

1. Whether appellant has shown error in FTB’s proposed assessment of tax.
2. Whether appellant has shown that the late-filing penalty should be abated.
3. Whether appellant has shown that the demand penalty should be abated.
4. Whether the filing enforcement cost recovery fee should be abated.
5. Whether interest should be abated.

**FACTUAL FINDINGS**

1. FTB’s Filing Enforcement program annually matches records obtained from various reporting sources against filed tax returns to identify individuals who may not have fulfilled their legal requirement to file a California income tax return. FTB determined

- that appellant had a filing requirement for the 2016 tax year after receiving Form W-2 information indicating that appellant earned California wages of \$170,365.<sup>1</sup>
2. On February 22, 2018, FTB sent appellant a Demand for Tax Return (Demand) stating that it had no record of receiving his 2016 tax return despite receiving information indicating he may have a filing requirement. The Demand required that appellant file a 2016 tax return, provide evidence he already filed his return, or explain why he was not required to file a return. Appellant failed to respond to the Demand.<sup>2</sup>
  3. FTB sent appellant a Notice of Proposed Assessment (NPA) for the 2016 tax year on April 23, 2018. The NPA estimated appellant's income to be \$170,365, based on Form W-2 wages reported by appellant's employer in the same amount. After reducing the estimated income by the standard deduction of \$4,129, the NPA estimated appellant's taxable income to be \$166,236. The NPA proposed an assessment of additional tax of \$12,772, a late-filing penalty of \$3,193, a demand penalty of \$3,193, and a filing enforcement cost recovery fee of \$84, plus interest.
  4. Appellant protested the NPA and, subsequently, FTB issued a Notice of Action on November 28, 2018, which affirmed the NPA. This timely appeal followed.

### DISCUSSION

#### Issue 1: Whether appellant has shown error in FTB's proposed assessment of tax.

R&TC section 17041 imposes a tax “upon the entire taxable income of every resident of this state . . . .” R&TC section 18501 requires every individual subject to the personal income tax 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 . . . .” R&TC section 19087(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.

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<sup>1</sup> Appellant's federal Wage and Tax Statement for the 2016 tax year confirms this wage amount.

<sup>2</sup> FTB previously issued to appellant a Demand on January 28, 2015, and an NPA on March 30, 2015, for the 2013 tax year. In addition, FTB previously issued to appellant a Demand on May 25, 2016, and an NPA on July 25, 2016, for the 2014 tax year.

If FTB proposes a tax assessment based on an estimate of income, FTB's initial burden is to show why its proposed assessment is reasonable and rational. (*Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.) Federal courts have held that the taxing agency need only introduce some evidence linking the taxpayer with the unreported income. (See *Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932.) When a taxpayer fails to file a valid return, FTB's use of information from various sources to estimate a taxpayer's taxable income is a reasonable and rational method of determining taxable income. (See *Palmer v. Internal Revenue Service* (9th Cir. 1997) 116 F.3d 1309, 1313; *Appeals of Bailey* (92-SBE-001) 1992 WL 44503.)

Once FTB has met its initial burden, the assessment is presumed correct and the taxpayer has the burden of proving it to be wrong. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Myers, supra.*) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) In the absence of credible, competent, and relevant evidence showing error in FTB's determination, FTB's proposed assessment must be upheld. (*Appeal of Seltzer* (80-SBE-154) 1980 WL 5068.) A taxpayer's failure to produce evidence that is within his or her control gives rise to a presumption that such evidence is unfavorable to his or her case. (*Appeal of Cookston* (83-SBE-048) 1983 WL 15434.) Income tax deductions are a matter of legislative grace, and a taxpayer who claims a deduction has the burden of proving by competent evidence that he or she is entitled to that deduction. (*New Colonial Ice Co. v. Helvering* (1934) 292 U.S. 435; *Appeal of Walshe* (75-SBE-073) 1975 WL 3557.)

Here, FTB relied upon Form W-2 information indicating that appellant earned California wages of \$170,365 for the 2016 tax year, which exceeds the gross income threshold levels necessary to establish a California filing requirement.<sup>3</sup> When appellant failed to file a return, FTB used that income information to estimate his taxable income and proposed an assessment of tax. FTB's use of this income information is both reasonable and rational because appellant failed to file his own return. (See *Appeal of Wesley and Couchman* (2005-SBE-018) 2005 WL 3106917.) Thus, FTB has met its initial burden, the proposed assessment is presumed correct, and the burden is on appellant to prove error.

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<sup>3</sup> A California resident who was a single individual under 65 years old, with no dependents, such as appellant, has a California filing requirement for the 2016 tax year if the individual's California gross income exceeds \$16,597 or the individual's California adjusted gross income (AGI) exceeds \$13,278.

Appellant does not dispute that he has a filing requirement. Rather, appellant argues that the proposed assessment of tax does not account for entitled deductions. Appellant also asserts that he will file a return. However, appellant failed to file a return and has not provided any evidence to establish that he is entitled to further deductions. “A taxpayer is not in a good position to criticize respondent’s estimate of his or her 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 WL 11759.) Thus, we find that appellant failed to establish error in FTB’s proposed assessment of tax.

Issue 2: Whether appellant has shown that the late-filing penalty should be abated.

Individual taxpayers have until April 15 of the year following the tax year to timely file their personal income tax returns. (R&TC, § 18566.) 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 was due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) To establish reasonable cause, the taxpayer must show that the failure to timely file a return occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Curry* (86-SBE-048) 1986 WL 22783.) Appellant provides no argument or evidence to show reasonable cause for failing to timely file his tax return. Therefore, appellant has not shown that the late-filing penalty should be abated.

Issue 3: Whether appellant has shown that the demand penalty should be abated.

If any taxpayer fails or refuses to furnish any information requested in writing by FTB or fails or refuses to make and file a return upon notice and demand by FTB, then, unless the failure is due to reasonable cause, FTB may add a penalty of 25 percent of the amount of any tax assessment pertaining to the assessment of which the information or return was required. (R&TC, § 19133.) Pursuant to California Code of Regulations, title 18, section (Regulation) 19133, FTB will only impose a demand penalty if: (1) the taxpayer fails to respond to a current Demand in the manner prescribed; and (2) FTB has proposed an assessment of tax under the authority of R&TC section 19087(a), after the taxpayer failed to timely respond to a Request for Tax Return or a Demand in the manner prescribed, at any time during the four-

taxable-year period preceding the taxable year for which the current Demand is issued. (Cal. Code Regs., tit. 18, § 19133(b)(1)-(2).)

FTB previously issued to appellant a Demand and an NPA that satisfy the prerequisites imposed by Regulation 19133. Appellant provides no argument or evidence to show reasonable cause for failing to timely respond to the Demand for the 2016 tax year. Therefore, appellant has not shown that the demand penalty should be abated.

Issue 4: Whether the filing enforcement cost recovery fee should be abated.

R&TC section 19254(a)(2) requires FTB to impose a filing enforcement cost recovery fee in the event a taxpayer fails to make and file a tax return within 25 days after FTB mails a Demand to the taxpayer. There is no reasonable cause exception that permits an abatement of this fee. (*Appeal of Myers, supra.*) FTB mailed the Demand on February 22, 2018, and to date, appellant has not filed a return. Thus, the filing enforcement cost recovery fee was properly imposed and may not be abated.

Issue 5: Whether interest should be abated.

Imposing interest on a tax deficiency is mandatory. (R&TC, § 19101(a).) Interest is not a penalty but is compensation for the taxpayer's use of money after it should have been paid to the state. (*Appeal of Yamachi (77-SBE-095) 1977 WL 3905.*) There is no reasonable cause exception to the imposition of interest. (*Appeal of Goodwin (97-SBE-003) 1997 WL 258474.*) The Office of Tax Appeals has jurisdiction to determine whether FTB's failure to abate interest pursuant to R&TC section 19104 was an abuse of discretion. Pursuant to R&TC section 19104, FTB may abate all or a part of any interest on a deficiency to the extent that interest is attributable in whole or in part to any unreasonable error or delay committed by FTB in the performance of a ministerial or managerial act. Appellant has not alleged, and the record does not reflect, that FTB committed an unreasonable error or delay. Therefore, we find that interest should not be abated.

HOLDINGS

1. Appellant has not shown error in FTB’s proposed assessment of tax.
2. Appellant has not shown that the late-filing penalty should be abated.
3. Appellant has not shown that the demand penalty should be abated.
4. The filing enforcement cost recovery fee should not be abated.
5. Interest should not be abated.

DISPOSITION

FTB’s action is sustained.

DocuSigned by:  
  
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 Josh Lambert  
 Administrative Law Judge

We concur:

DocuSigned by:  
  
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 John O. Johnson  
 Administrative Law Judge

DocuSigned by:  
  
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 Michael F. Geary  
 Administrative Law Judge

Date Issued: 6/11/2020