

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

T. LEMAITRE) OTA Case No. 18010751
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)**OPINION**

Representing the Parties:

For Appellant:

T. Lemaitre

For Respondent:

Eric A. Yadao, Tax Counsel III

For Office of Tax Appeals:

Neha Garner, Tax Counsel III

R.TAY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, T. Lemaitre (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing an assessment of tax of \$336, the notice and demand penalty (demand penalty) of \$2,383, and a filing enforcement fee of \$79, plus interest, for the 2014 tax year.

Appellant waived the right to an oral hearing; therefore, we decide this matter based on the written record.

ISSUES

1. Whether appellant has shown FTB erred in its proposed assessment of the demand penalty for the 2014 tax year.
2. Whether appellant is entitled to abatement of the filing enforcement fee for the 2014 tax year.

FACTUAL FINDINGS

1. Appellant was a California resident in 2014, but failed to file a timely 2014 California income tax return. Although appellant failed to file a timely income tax return, appellant made timely tax payments in the form of withholdings, other estimated tax payments, and overpayments applied from prior years.

2. FTB sent appellant a Demand for Tax Return dated January 13, 2016, requesting that appellant file his 2014 income tax return or provide an explanation as to why appellant did not have a filing requirement. Appellant did not respond to this notice.
3. On March 14, 2016, FTB issued a Notice of Proposed Assessment (NPA) for 2014, which contained a proposed assessment of tax, the late-filing penalty, the demand penalty, and a filing enforcement fee, plus interest.¹
4. Appellant protested the NPA in a letter dated May 6, 2016, but he did not submit his 2014 income tax return during the protest proceeding. FTB affirmed the NPA by issuing a Notice of Action dated January 11, 2017. Appellant filed a timely appeal.²
5. After filing this appeal, appellant filed a joint 2014 California income tax return with his spouse (who is not a party to this appeal) on March 30, 2018, which FTB accepted subject to audit. Based on appellant's self-reporting on the joint late-filed return, FTB revised its proposed assessment of tax and penalties.

DISCUSSION

Issue 1: Whether appellant has shown FTB erred in its proposed assessment of the demand penalty for the 2014 tax year.

FTB may impose a penalty for a taxpayer's failure to file a return or to provide information upon FTB's demand to do so, unless the failure is due to reasonable cause and not willful neglect. (R&TC, § 19133.) The demand penalty is designed to penalize the failure of a taxpayer to respond to a notice and demand, and not a taxpayer's failure to pay the proper tax. (*Appeal of Bryant* (83-SBE-180) 1983 WL 961596; *Appeal of Hublou* (77-SBE-102) 1977 WL 4093.)

California Code of Regulations, title 18, section (Regulation) 19133 provides that for individuals, the demand penalty will only be imposed if the following two conditions are satisfied:

1. the taxpayer fails to timely respond to a current Demand for Tax Return in the manner prescribed, and

¹ We note that FTB previously issued an NPA dated March 26, 2012, for the 2010 tax year after appellant did not respond to a Demand for Tax Return issued by FTB on January 26, 2012.

² Appellant's objection to FTB's opening brief on grounds of timeliness is overruled because we find FTB timely filed its opening brief.

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.

(Cal. Code. Regs., tit. 18, § 19133(b)(1)-(2).)

Here, both conditions are present. First, appellant failed to timely respond to FTB's Demand for Tax Return dated January 13, 2016. And, second, FTB issued a prior NPA "during the four-taxable-year period preceding" the tax year at issue.³

This dispute centers on the amount of the penalty. Appellant argues that FTB erred in its computation of the penalty because FTB did not account for appellant's timely payments. Appellant contends that the penalty should be calculated at 25 percent of the balance due after payments, which would eliminate FTB's proposed assessment of the demand penalty. However, appellant's position is not supported by the plain language of the statute or case law.

R&TC section 19133 allows FTB to "add a penalty of 25 percent of the amount of tax determined pursuant to Section 19087." The rules of statutory interpretation require us to look at the plain language of the statute, and "where the language is clear, its plain meaning should be followed." (*Great Lakes Properties, Inc. v. City of El Segundo* (1977) 19 Cal.3d 152, 155.) "If the words of a statute are clear, we do not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*Ramos v. Superior Court* (2007) 146 Cal.App.4th 719, 727; see also *People v. Knowles* (1950) 35 Cal.2d 175, 183.)

A careful reading of the statute leads to the clear interpretation that, as relevant here, the demand penalty is calculated on the "amount of tax" or any deficiency tax FTB assesses after a taxpayer does not file a return in response to FTB's notice and request to do so. Indeed, the statute does not modify the phrase "amount of tax" or provide for any reductions based on payments. Consequently, contrary to appellant's contentions, there is no language in the statute that would allow us to interpret the statute another way and find that the demand penalty should

³ The four taxable years preceding 2014 are 2010, 2011, 2012, and 2013. It is noteworthy that FTB's prior NPA satisfies two competing interpretations of Regulation 19133. FTB issued the prior NPA on March 26, 2012, for the 2010 tax year, which is *during* the four-taxable-year-period prior to the 2014 tax year, and *for* one of the four taxable years preceding the 2014 tax year.

be calculated based on a taxpayer's amount of tax reduced by taxpayer's tax payments. (See, e.g., R&TC, § 17041 [defining tax, which does not include payments].)

Appellant makes much of the word “due” in R&TC section 19087. However, we are not persuaded by appellant's argument. R&TC section 19087 allows FTB to make an assessment of tax at any time after a taxpayer fails to file an income tax return despite FTB's request to do so. That tax assessment is made without regard to payments. Moreover, it is well established that the demand penalty is based on FTB's tax assessment without regard to payments, such as withholding. (*Appeal of Malakoff* (83-SBE-274) 1983 WL 15525; see also *Appeal of Findley* (86-SBE-091) 1986 WL 22761.) Thus, FTB properly calculated the amount of the demand penalty.

Issue 2: Whether appellant is entitled to abatement of the filing enforcement fee for the 2014 tax year.

R&TC section 19254(a)(2) states that if FTB mails a formal legal demand to file a tax return and the taxpayer fails or refuses to make and file a tax return, then FTB will also impose a filing enforcement fee. Once properly imposed, there is no provision in the Revenue and Taxation Code that would allow abatement of the filing enforcement fee. (*Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.)

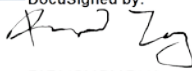
Here, it is uncontroverted that FTB properly imposed the filing enforcement fee in the amount of \$79. As such, this panel upholds FTB's imposition.

HOLDINGS

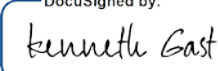
1. Appellant has not shown FTB erred in its proposed assessment of the demand penalty for the 2014 tax year.
2. Appellant is not entitled to abatement of the filing enforcement fee for the 2014 tax year.

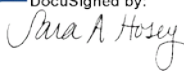
DISPOSITION

FTB's action is sustained in full.

DocuSigned by:

F8E81552726F448...
Richard Tay
Administrative Law Judge

We concur:

DocuSigned by:

FD75A3136CB34C2...
Kenneth Gast
Administrative Law Judge

DocuSigned by:

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Sara A. Hosey
Administrative Law Judge

Date Issued: 6/30/2020