

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

In the Matter of the Appeal of:  
**M. KYLES**

) OTA Case No. 20035933  
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**OPINION**

Representing the Parties:

For Appellant: M. Kyles

For Respondent: Christopher M. Cook, Tax Counsel III

For Office of Tax Appeals: Amber Poon, Graduate Student Assistant

T. LEUNG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, M. Kyles (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$2,744.00, a late filing penalty of \$686.00, a demand penalty of \$894.00, a filing enforcement fee of \$93.00, plus applicable interest, for the 2017 taxable year.

Appellant waived his right to an oral hearing. Therefore, we decide this appeal based on the written record.

**ISSUES**

1. Whether appellant has shown that FTB erred in its proposed assessment of additional tax for the 2017 taxable year.
2. Whether appellant has shown reasonable cause for failing to file a timely 2017 tax return.
3. Whether appellant has shown reasonable cause for not filing a 2017 tax return upon demand.
4. Whether appellant has established a basis for a waiver of the filing enforcement fee.
5. Whether appellant has established a basis for a waiver of interest.

### FACTUAL FINDINGS

1. FTB sent appellant a Notice of Proposed Assessment (NPA) dated February 16, 2016, for failing to file a 2014 California personal income tax return (Form 540), imposing additional tax and interest, including a demand penalty.
2. At the time of this appeal, appellant had not filed his 2017 Form 540.
3. After receiving information from third parties indicating that appellant may have had enough income to require filing a 2017 Form 540, FTB sent appellant a Demand for Tax Return (Demand) in September 2019.
4. When appellant failed to respond to the Demand, FTB sent appellant an NPA in November 2019 with tax calculated based on the information received from the third parties.
5. Appellant submitted a Quick Resolution Worksheet in protest of the NPA.
6. Based on the information appellant provided on the Quick Resolution Worksheet, FTB sent him a Notice of Action (NOA), indicating that he had a 2017 filing requirement and affirming the NPA.

### DISCUSSION

Issue 1: Whether appellant has shown that FTB erred in its proposed assessment of additional tax for the 2017 taxable year.

California residents are taxed upon their entire taxable income, regardless of source. (R&TC, § 17041(a)(1).) Every individual subject to the Personal Income Tax Law is required 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, § 18501(a).) If a 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.” (R&TC, § 19087(a).)

When FTB makes a proposed assessment based on an estimate of income, FTB’s initial burden is to show that its determination is reasonable and rational. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514.) If 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];

*Appeals of Tonsberg* (85-SBE-034) 1985 WL 15812 [use of third-party information reporting].) Federal courts have held that the taxing agency needs only to introduce some evidence linking the taxpayer with the unreported income. (*Appeals of Dauberger, et al.* (82-SBE-082) 1982 WL 11759.) “[A] taxpayer is not in a good position to criticize [FTB’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.” (*Ibid.*)

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 proposed assessment is arbitrary or erroneous by a preponderance of the evidence. (*Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932, 935; *Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514.) Unsupported assertions are not sufficient to satisfy the taxpayer’s burden of proof. (*Appeal of Talavera*, 2020-OTA-022P.)

Here, FTB has met its initial burden by linking appellant with an income-producing activity. Based on information received from third party sources, FTB determined that appellant had a filing requirement. Since appellant did not respond to FTB’s Demand and has not yet filed a return for the 2017 taxable year, FTB sent appellant its NPA, imposing additional tax, late filing and demand penalties, a filing enforcement fee, and applicable interest. We find that FTB’s estimate was both reasonable and rational. Therefore, the burden of proof is on appellant to show that FTB’s action was arbitrary or erroneous.

Appellant does not claim that FTB erred in its calculation. Instead, appellant indicates that he is unable to pay the tax due to his low income. However, OTA’s function in the appeals process is to determine appellant’s correct amount of California income tax liability. (*Appeal of Robinson*, 2018-OTA-059P.) In other words, we lack authority to make discretionary adjustments to a valid imposition of tax based on a taxpayer’s inability to pay. (*Ibid.*) Further, we note that FTB offers taxpayers payment options.<sup>1</sup> Taxpayers may apply to enter into an installment payment agreement with FTB<sup>2</sup> or apply to an offer in compromise program, which considers a taxpayer’s ability to pay.<sup>3</sup>

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<sup>1</sup> OTA has no jurisdiction over FTB’s payment plans and programs.

<sup>2</sup> See: <https://www.ftb.ca.gov/online/eIA/index.asp>.

<sup>3</sup> See: <https://www.ftb.ca.gov/pay/if-you-cant-pay/offer-in-compromise.html>.

Because appellant has not asserted or provided documentary evidence to demonstrate that FTB's proposed assessment is arbitrary or erroneous, he has not met his burden of proof. We therefore reject appellant's position.

Issue 2: Whether appellant has shown reasonable cause for failing to file a timely 2017 Form 540.

A late filing penalty is imposed when a taxpayer fails to file a tax return on or before the due date, unless the taxpayer establishes that the late filing was due to reasonable cause and not willful neglect. (R&TC, § 19131.) For every month (or fraction thereof) that the return is late, the penalty is 5 percent of the tax due, up to a maximum of 25 percent. (R&TC, § 19131(a).)

Generally, to establish reasonable cause, the taxpayer must show that the failure to file a timely return occurred despite the exercise of ordinary business care and prudence, or that such cause existed as would prompt an "ordinary intelligent and prudent businessman" to have so acted under similar circumstances. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P; *Appeal of Tons* (79-SBE-027) 1979 WL 4068.) Each taxpayer has a personal, non-delegable obligation to file a tax return by the due date. (*United States v. Boyle* (1985) 469 U.S. 241, 247.)

On appeal, appellant does not argue that the penalty amount was incorrectly calculated; therefore, the only issue is whether he has shown reasonable cause for abatement of the late filing penalty given that he has not yet filed his 2017 Form 540. Appellant contends that he cannot afford to pay the tax liability due to his low income and "would like to sit and discuss this."

In its Demand, FTB established that appellant was required to file a tax return for the 2017 taxable year, which is separate from his obligation to actually pay the tax owed. Appellant has yet to file his 2017 Form 540, and ignoring this filing obligation does not reflect the exercise of ordinary business care and prudence. Consequently, we find no basis to abate the late filing penalty.

Issue 3: Whether appellant has shown reasonable cause for not filing a 2017 Form 540 upon demand.

A penalty for the failure or refusal to file a return or provide information upon FTB's written demand to do so is imposed unless reasonable cause prevented the taxpayer from responding to the request. (R&TC, § 19133.) The demand penalty is 25 percent of the

taxpayer's total tax liability. (R&TC, § 19133.) For individual taxpayers, FTB will only impose the demand penalty if: (1) the taxpayer fails to respond to a current Demand and (2) at any time during the preceding four taxable years, FTB issued an NPA following the taxpayer's failure to timely respond to a Request or a Demand. (Cal. Code Regs., tit. 18, § 19133(b); *Appeal of Jones*, 2021-OTA-144P.) The demand penalty is designed to penalize a taxpayer for failing to respond to a notice and demand, not for failing to pay the proper tax. (*Appeal of Bryant* (83-SBE-180) 1983 WL 961596.)

The taxpayer has the burden of proving that reasonable cause prevented him from complying with the demand. (See *Appeal of Jones, supra*; *Appeal of James* (83-SBE-009) 1983 WL 15396.) Illness or other personal difficulties that prevent a taxpayer from responding to a demand notice or request for information may be considered reasonable cause. (*Appeal of Halaburka* (86-SBE-025) 1985 WL 15809.)

Here, the demand penalty was properly imposed. First, FTB issued its Demand for the 2017 taxable year in September 2019 and the subsequent NPA in November 2019. Second, during the four years preceding the 2017 taxable year (i.e., 2013 through 2016), FTB issued an NPA on February 16, 2016, following appellant's failure to timely respond to a demand for a 2014 Form 540. Appellant has provided no explanation for his failure to respond to the Demand issued for the 2017 taxable year. Therefore, we find no reasonable cause for waiving the penalty.

Issue 4: Whether appellant has established a basis for a waiver of the filing enforcement fee.

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 within 25 days, then FTB must impose a filing enforcement fee. (R&TC, § 19254(a)(2).) Once properly imposed, there is no statutory provision that would allow a waiver of the filing enforcement fee under any circumstances. (*Appeal of Myers, supra*.)

Here, the fee was properly imposed because appellant failed to file a 2017 Form 540 within 25 days of the mailing of the Demand in September 2019. To date, appellant has not yet filed his 2017 Form 540. Accordingly, he is not entitled to a waiver of the filing enforcement fee.

Issue 5: Whether appellant has established a basis for a waiver of interest.

The imposition of interest on a tax payment is mandatory. (R&TC, § 19101(a).) Interest is charged from the due date of the tax payment to the date the tax is paid. (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 Moy*, 2019-OTA-057P.) There is no reasonable cause exception to the imposition of interest and interest can only be waived in certain limited situations when authorized by law. (*Ibid.*)


To obtain an interest waiver, appellant must qualify under one of the following statutes: R&TC sections 19104, 21012, or 19112. First, R&TC section 19104 does not apply here because appellant does not allege, and the evidence does not show, that the interest at issue is attributable, in whole or in part, to any unreasonable error or delay by an officer or employee of FTB when performing a ministerial or managerial act. Second, R&TC section 21012 does not apply as FTB did not provide appellant with any requested written advice. Lastly, appellant does not allege, and the evidence does not show, that appellant is unable to pay interest due to “extreme financial hardship caused by significant disability or other catastrophic circumstance.” (R&TC, § 19112.) In any event, OTA does not have jurisdiction to review FTB’s denial of a request to waive interest under R&TC section 19112. (*Appeal of Moy, supra.*) Accordingly, appellant is not entitled to an interest waiver.

HOLDINGS

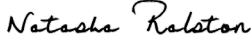
1. Appellant has not shown that FTB erred in its proposed assessment of additional tax for the 2017 taxable year.
2. Appellant has not shown reasonable cause for failing to timely file his 2017 Form 540.
3. Appellant has not shown reasonable cause for failing to file his 2017 Form 540 upon demand.
4. Appellant has not established a basis for a waiver of the filing enforcement fee.
5. Appellant has not established a basis for a waiver of interest.


DISPOSITION

FTB’s action is sustained.

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 Tommy Leung  
 Administrative Law Judge

We concur:

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 Natasha Ralston  
 Administrative Law Judge

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 Nguyen Dang  
 Administrative Law Judge

Date Issued: 6/30/2021