

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
F. CROW

) OTA Case No. 20086429
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OPINION

Representing the Parties:

For Appellant:	Rickey Crow, Appellant’s Representative
For Respondent:	Topher Tuttle, Tax Counsel
For Office of Tax Appeals:	Matthew McDermott, Graduate Student Assistant

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, appellant R. Crow appeals an action by respondent Franchise Tax Board (FTB) proposing an additional tax of \$1,773.00, a late-filing penalty of \$443.25, a demand penalty of \$443.25, a filing enforcement cost recovery fee of \$93.00, and applicable interest, for the 2016 taxable year.

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

ISSUES¹

1. Is appellant liable for tax of \$1,733 for the 2016 taxable year?
2. Has appellant established reasonable cause to abate the demand penalty?
3. Was the filing enforcement cost recovery fee properly imposed?
4. Has appellant established a basis for waiver of interest?

¹ FTB states in its opening brief that it will abate the late-filing penalty because appellant’s medical condition made him incapable of filing a timely tax return. (See R&TC, § 19131.)

FACTUAL FINDINGS

1. Appellant did not file a California tax return for 2016. FTB received information that indicated appellant has a 2016 filing requirement: income from the U.S. Office of Personnel Management, Defense Finance and Accounting Service Cleveland Center, Genworth Life and Annuity Insurance Co., and Pershing LLC.
2. On July 26, 2019, FTB issued to appellant a Demand for Tax Return (Demand), requiring that appellant file a 2016 California tax return, send a copy of his California tax return, or explain why he was not required to file a California tax return, by August 28, 2019.
3. On August 27, 2019, appellant responded to the Demand by faxing a letter stating that appellant was not able to file his 2016 California tax return because he suffered from elder abuse and neglect from his caregiver and had dementia since October 2015. Appellant also indicated that he was single, over the age of 65, and had no dependents.
4. With his letter to FTB dated August 18, 2018,² appellant provided two letters from doctors who both confirmed, under penalty of perjury, that appellant suffered from dementia and other medical conditions that made him unable to pay his bills or make decisions of any kind, at least as of late 2015.
5. On October 14, 2019, FTB issued to appellant a Notice of Proposed Assessment (NPA) for the 2016 taxable year when it did not receive appellant's 2016 California tax return or information establishing that appellant did not have a filing requirement.
6. FTB estimated appellant's income to be \$52,760.00, and proposed an additional tax of \$1,773.00,³ a late-filing penalty of \$443.25, a demand penalty of \$443.25, a filing enforcement cost recovery fee of \$93.00, plus interest.
7. On July 10, 2020, FTB issued to appellant a Notice of Action, affirming the 2016 NPA because appellant did not substantiate that he was not required to file a 2016 tax return, or that he was a victim of fraud.

² The letter purports to respond to a letter from FTB dated August 6, 2018. That letter is not included with either party's briefing.

³ For 2016, an individual age 65 or older with a filing status of single with no dependents was required to file a tax return if California gross income exceeded \$22,147. (California 2016 Personal Income Tax Booklet, https://www.ftb.ca.gov/forms/2016/16_540bk.pdf at 3.)

8. Previously, appellant did not file a tax return for the 2014 taxable year. FTB sent appellant a Demand on January 13, 2016. Because appellant did not respond to FTB's notice, FTB issued an NPA on March 14, 2016, for taxable year 2014.
9. On July 27, 2020, appellant filed this timely appeal.

DISCUSSION

Issue 1: Is appellant liable for tax of \$1,733 for the 2016 taxable year?

A tax is imposed upon the entire taxable income of every California resident. (R&TC, § 17041(a).) Gross income includes “all income from whatever source derived,” including—but not limited to—interest, pensions, compensation for services, and income from life insurance and endowment contracts. (Int.Rev. Code (IRC), § 61(a).)⁴ Every individual subject to California Personal Income Tax Law must make and file a return stating specifically the items of the individual's gross income from all sources and the deductions and credits allowable if the individual's income exceeds the applicable filing threshold. (R&TC, § 18501(a).) If any taxpayer fails to file a return, FTB may estimate the taxpayer's net income, from any available information, and may propose to assess the amount of tax, interest, and penalties due. (R&TC, § 19087(a).) In such cases, FTB is given great latitude to determine the amount of a taxpayer's tax liability and may use reasonable estimates to establish the taxpayer's income. (*Appeals of Tonsberg* (85-SBE-024) 1985 WL 15812.)

When FTB proposes additional tax based on an estimate of income, FTB's initial burden is to show why its proposed assessment is reasonable and rational. (*Appeal of Bindley*, 2019-OTA-179P, citing to *Appeal of Myers* (2001-SBE-001) 2001WL 37126924.) An assessment based on unreported income is presumed correct when the taxing agency introduces a minimal factual foundation to support the assessment. (*Appeal of Bindley, supra.*) Once FTB has met its initial burden, the proposed assessment of additional tax is presumed correct, and the taxpayer has the burden of proving it to be wrong. (*Ibid.*)

Here, FTB obtained information from third-party reports that appellant received income in the amount of \$52,760 in the 2016 taxable year but FTB's records showed that appellant failed to file a tax return. The filing threshold in 2016 for a single individual, over 65 years of age with no dependents was \$22,147 in gross income. (California 2016 Personal Income Tax Booklet at

⁴ California conforms to IRC section 61. (R&TC, § 17071.)

p. 3.) Appellant's income exceeded the 2016 filing threshold, which means appellant, as a California resident, was required to file a California income tax return. Appellant has not provided evidence or documentation to contradict FTB's estimate, nor has appellant established that the income totaling \$52,760 is not taxable. Therefore, we conclude that appellant was required to file a California tax return and is liable for the proposed tax of \$1,773.

Issue 2: Has appellant established reasonable cause to abate the demand penalty?

California imposes a penalty on taxpayers for failing to file a return or to provide information upon FTB's demand to do so, unless reasonable cause prevented the taxpayer from complying with the demand. (R&TC, § 19133.) For individuals, a demand penalty will only be imposed if FTB had already proposed an assessment of tax after the individual failed to timely respond to a request for a tax return or demand for a tax return at any time during the prior four taxable year period for which the current Demand is issued. (Cal. Code Regs., tit. 18, § 19133(b).) The burden of proving reasonable cause for the failure to file a return upon demand is on the taxpayer. (Appeal of *GEF Operating, Inc.*, 2020-OTA-057P.) To establish reasonable cause, a taxpayer must show that the failure to respond to a demand occurred despite the exercise of ordinary business care or that the reason for failing to respond would prompt an ordinarily intelligent and prudent businessperson to act similarly under the circumstances. (*Ibid.*)

Illness or other personal difficulties that prevent a taxpayer from responding to a Demand or a request for information may be considered reasonable cause if the taxpayer presents credible and competent proof that the taxpayer was continuously prevented from responding to the demand. (*Appeal of Head and Feliciano*, 2020-OTA-127P.)⁵ When a taxpayer alleges reasonable cause based on an incapacity attributable to illness, the duration of the incapacity must be approximate to the tax obligation deadline.⁶ (*Ibid.*)

⁵ The cited appeal relates to reasonable cause in the context of a late-filing penalty. We see no reason to treat the standards for reasonable cause differently for a late-filing penalty or a demand penalty.

⁶ With respect to the demand penalty, there is no "tax filing deadline" since the penalty would not have been imposed if a return had been filed. The tax obligation deadline at issue here is the date appellant was directed to respond to FTB's Demand, August 28, 2019.

Here, appellant received an NPA for the 2014 taxable year and then received an NPA for the 2016 taxable year.⁷ Appellant argues that he failed to respond to the NPA because he suffers from dementia, which rendered him incapable of either filing a timely return or personally responding to FTB's letters. Appellant provided doctors' letters signed under penalty of perjury that confirm his medical conditions and inability to make decisions of any kind. FTB accepts appellant's diagnosis but proposed to abate the demand penalty only if appellant files his 2016 tax return.

We disagree with FTB's proposal to abate the penalty only after appellant files his return. Abatement of penalties is unrelated to whether a taxpayer must still file his or her tax return for a particular year. To establish reasonable cause to abate the demand penalty, appellant must show that illness or other personal difficulties continuously prevented him from responding to FTB's Demand. (See *Appeal of Head and Feliciano, supra.*) Additionally, appellant must show that the duration of the illness or personal difficulty rendering him incapacitated approximates the tax obligation deadlines (here, the deadline to respond to the Demand). (*Ibid.*) Appellant has presented credible and competent proof that he was continuously prevented from filing a tax return or responding to FTB's Demand. Appellant provided letters from two separate doctors, which were signed under penalty of perjury, that diagnose appellant with dementia. The letters confirm that appellant is unable to make decisions of any kind. Moreover, appellant's diagnoses date back to at least October 2015, and continue in the present. Appellant's incapacity was approximate to the tax obligation deadline for responding to FTB's Demand. Furthermore, FTB accepts appellant's diagnoses and proof as credible and competent and has agreed to abate the late-filing penalty on that basis. Accordingly, appellant has established reasonable cause to abate the demand penalty.

Issue 3: Was the filing enforcement cost recovery fee properly imposed?

If a taxpayer fails to file a tax return required by California Personal Income Tax Law within 25 days after FTB mails a formal legal demand to file the tax return, FTB shall impose a filing enforcement cost recovery fee. (R&TC, § 19254(a)(2).) Once properly imposed, there is

⁷ The majority of this panel does not agree that an NPA issued in 2016 for taxable year 2014 meets the requirements of California Code of Regulations, title 18, section 19133(b), which states that the Demand must have been issued *during* the four years preceding 2016 (2012, 2013, 2014, or 2015); however, because there is controlling law on this issue set forth in the Opinion in *Appeal of Jones, 2021-OTA-144P*, we must find that the penalty was properly imposed.

no statutory provision that relieves the imposition of the filing enforcement cost recovery fee under any circumstance, including reasonable cause. (*Appeal of GEF Operating, supra.*)

Here, the filing enforcement cost recovery fee was properly imposed because appellant did not respond to FTB's Demand by filing a tax return or establishing that he did not have a filing requirement. There are no exceptions allowing for abatement of the fee. Accordingly, FTB properly imposed the filing enforcement cost recovery fee, and there is no basis to abate it.

Issue 4: Has appellant established a basis for waiver of interest?

Taxes are due and payable as of the original due date of a taxpayer's return. (R&TC, § 19101.) If tax is not paid by the original due date or if FTB assesses additional tax and that assessment becomes due and payable, the taxpayer is charged interest on the resulting balance due, compounded daily. (*Appeal of GEF Operating, supra.*) Imposition of interest is mandatory; it is not a penalty, but rather compensation for appellant's use of money after it should have been remitted to FTB. (*Appeal of Moy, 2019-OTA-057P.*) There is no reasonable cause exception to the imposition of interest. (*Appeal of Gorin, 2020-OTA-018P.*)

To obtain relief from interest, appellant must qualify under one of the following statutory exceptions: (1) unreasonable error or delay caused by a managerial or ministerial act by FTB under R&TC section 19104; (2) written advice provision under R&TC section 21012; or (3) evidence of extreme financial hardship under R&TC section 19112. (*Appeal of Balch, 2018-OTA-159P.*) Moreover, interest abatement provisions are not intended to be routinely used to avoid the payment of interest, thus abatement should be ordered only where failure to abate interest would be widely perceived as grossly unfair. (*Appeal of Gorin, supra.*)

Here, appellant has alleged only that he is facing financial hardship. Interest on this basis may only be waived when FTB determines a waiver of interest is warranted upon a showing of extreme financial hardship. (R&TC, § 19112.) The Office of Tax Appeals (OTA) does not have the authority to decide whether interest abatement is warranted due to extreme financial hardship, nor does OTA have the authority to review FTB's decision in that respect. (*Appeal of Moy, supra.*) Therefore, there are no grounds to waive interest.⁸


⁸ Appellant may seek appropriate relief from FTB; e.g., installment payments or an Offer in Compromise, after this appeal is final. OTA has no authority to settle or compromise a tax liability.

HOLDINGS

1. Appellant is required to file a 2016 tax return and to pay the proposed liability of \$1,773.
2. Appellant has established reasonable cause to abate the demand penalty.
3. Appellant has failed to show that the filing enforcement cost recovery fee should be abated.
4. Appellant is not entitled to a waiver of interest.

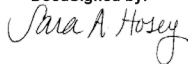
DISPOSITION

FTB’s action in imposing the late-filing penalty in the amount of \$443.25, plus applicable interest, is reversed, as conceded by FTB on appeal. FTB’s action in imposing the demand penalty in the amount of \$443.25, plus applicable interest, is also reversed. Otherwise, FTB’s action is sustained.

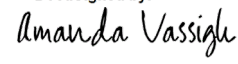
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 Teresa A. Stanley
 Administrative Law Judge

We concur:

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 Sara A. Hosey
 Administrative Law Judge

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 Amanda Vassigh
 Administrative Law Judge

Date Issued: 6/30/2021