

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 21078189
M. PERRY)
)
)
)
)

OPINION

Representing the Parties:

For Appellant: M. Perry
For Respondent: Brian Werking, Tax Counsel III

A. KLETTER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, M. Perry (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing tax of \$182.00, a late-filing penalty of \$135.00, a demand penalty of \$133.75, a filing enforcement cost recovery fee of \$97.00, and applicable interest, for the 2018 tax year.¹

Appellant waived the right to an oral hearing; therefore, Office of Tax Appeals (OTA) decides the matter based on the written record.

ISSUES

1. Whether appellant has demonstrated error in FTB’s determination that appellant has a filing requirement for the 2018 tax year and owes tax.
2. Whether appellant has shown reasonable cause for the late filing of his 2018 California tax return.
3. Whether appellant has shown that FTB incorrectly imposed the demand penalty.

¹ Appellant’s correspondence dated July 15, 2021, listed the 2019 tax year as the year at issue. However, attached to appellant’s appeal letter is FTB’s June 21, 2021 Notice of Action, which was issued for the 2018 tax year. FTB informed Office of Tax Appeals (OTA) that no Notice of Action or Claim for Refund Denial was issued for the 2019 tax year; consequently, OTA determined that it has no jurisdiction over the 2019 tax year and solely accepted the appeal for the 2018 tax year.

4. Whether appellant has shown that FTB incorrectly imposed the filing enforcement cost recovery fee.

FACTUAL FINDINGS

1. FTB received a 2018 federal Form 1099-MISC (2018 Form 1099) from appellant's employer reporting \$33,026 in California wages paid to appellant. FTB determined that appellant earned sufficient income for the 2018 tax year to prompt a filing requirement.
2. FTB issued appellant a Demand for Tax Return (Demand) for the 2018 tax year (2018 Demand) asking that he file or provide evidence that he already filed his 2018 California tax return, or explain why he had no filing requirement for the 2018 tax year.
3. When appellant did not respond, FTB issued a Notice of Proposed Assessment (NPA) proposing tax, a late-filing penalty, a demand penalty, a filing enforcement cost recovery fee, and applicable interest, for the 2018 tax year. Appellant protested the NPA.
4. FTB issued a Notice of Action affirming the NPA.
5. This timely appeal followed.
6. To date, Appellant has not filed a 2018 California tax return.

DISCUSSION

Issue 1: Whether appellant has demonstrated error in FTB's determination that appellant has a filing requirement for the 2018 tax year and owes tax.

R&TC section 18501 requires every individual subject to the Personal Income Tax Law 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," if an individual has gross income or adjusted gross income exceeding certain filing thresholds. (R&TC, § 18501(a)(1)-(4).) For the 2018 tax year, the filing threshold for a single individual under 65 years of age with no dependents is gross income of more than \$17,693 or adjusted gross income of more than \$14,154.²

Here, appellant received California wages in 2018. FTB determined that appellant's filing status was single, appellant's age was under 65, and appellant had no dependents. As reported on the 2018 Form 1099, appellant's employer paid appellant \$33,026, which exceeds

² FTB annually adjusts the filing thresholds for tax years beginning on or after January 1, 1996. (See R&TC, § 18501(d).)

the gross income threshold for the 2018 tax year based on appellant's filing status. Thus, appellant had a 2018 California filing requirement.³

R&TC section 19087(a) provides that if any 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.” California imposes a tax on the entire taxable income of a resident, such as appellant. (R&TC, § 17041(a)(1).) When FTB makes a proposed assessment based on an estimate of income, FTB's initial burden is to show why its proposed assessment is reasonable and rational. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514 (*Todd*); *Appeal of Bindley*, 2019-OTA-179P (*Bindley*).) An assessment based on unreported income is presumed correct when the taxing agency introduces a minimal factual foundation to support the assessment. (*Bindley, supra.*)

Here, appellant failed to file a 2018 California tax return, even after FTB issued him the 2018 Demand. FTB estimated appellant's 2018 income based on the 2018 Form 1099. Appellant does not dispute that he received income from his employer. FTB's use of the 2018 Form 1099 to estimate appellant's taxable income is both reasonable and rational. (*Bindley, supra.*)

Once FTB has met its initial burden, the proposed assessment of tax is presumed correct and the taxpayer has the burden of proving it to be wrong. (*Todd, supra; Bindley, supra.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Bindley, supra.*) In the absence of credible, competent, and relevant evidence showing error in FTB's determination, the determination must be upheld. (*Ibid.*) 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. (*Ibid.*)

Appellant has not provided any supporting documentation to demonstrate that he does not have a 2018 California filing requirement. Indeed, the 2018 Form 1099 itself shows that appellant had gross income exceeding the 2018 California filing thresholds. Rather, appellant argues on appeal that he has already paid the assessed tax as of October 2019. However, appellant provided no proof of payment for the 2018 tax year. FTB provided a copy of appellant's payment history showing that no amounts were paid after June 11, 2019. Further,

³ See 2018 FTB Publication 1031, p.3, available at: https://ftb.ca.gov/forms/2018/18_1031.pdf. If either the gross income or adjusted gross income threshold is exceeded, an individual has a filing requirement.

FTB's records show that any payments made on or before June 2019 were applied to liabilities for prior tax years. Appellant has not provided any evidence indicating that these payments were specifically designated for the 2018 tax year. Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Bindley, supra.*) Thus, appellant has not shown error in FTB's proposed assessment of tax.

Issue 2: Whether appellant has shown reasonable cause for the late filing of his 2018 California tax return.

R&TC section 19131 imposes a late-filing penalty on a taxpayer who fails to file a return by either the due date or the extended due date unless it is shown that the failure was due to reasonable cause and not willful neglect. The late-filing penalty is calculated at five percent of the tax for each month or fraction thereof that the return is late, with a maximum penalty of 25 percent of the tax. (R&TC, § 19131(a).) When FTB imposes this penalty, the law presumes that it is correct. (*Appeal of Xie, 2018-OTA-076P.*) The minimum late-filing penalty is the lesser of \$135 or 100 percent of the tax due after applying timely payments and credits. (R&TC, § 19131(b).)

To date, appellant has not filed a 2018 California tax return. FTB proposed a minimum \$135 late-filing penalty. Further, appellant provided no evidence, and the record contains no indication, that appellant had reasonable cause for failure to timely file his tax return. Thus, OTA finds no error in FTB's imposition of the late-filing penalty.

Issue 3: Whether appellant has shown that FTB incorrectly imposed the demand penalty.

R&TC section 19133 imposes a penalty when a taxpayer fails to file a return or provide information upon FTB's notice and demand to do so, unless it is shown that the failure was due to reasonable cause and not willful neglect. FTB imposes a demand penalty if two criteria are met: (1) the taxpayer fails to respond to a current Demand; and (2) at any time for the preceding four tax years, FTB issued an NPA following the taxpayer's failure to timely respond to a Request for Tax Return or Demand. (Cal. Code Regs., tit. 18, § 19133(b); *Appeal of Jones, 2021-OTA-144P.*)

Here, the record contains no evidence that appellant responded to the 2018 Demand. FTB provided records showing that an NPA was issued for the 2016 tax year after appellant did not respond to a 2016 Demand. Therefore, both conditions for imposition of the demand penalty

are present. Appellant provided no evidence, and the record contains no indication, that appellant had reasonable cause for failure to respond to the 2018 Demand. Thus, OTA finds no error in FTB's imposition of the demand penalty.

Issue 4: Whether appellant has shown that FTB incorrectly imposed the filing enforcement cost recovery fee.

R&TC section 19254 provides that if a person fails or refuses to make and file a tax return within 25 days after formal legal demand to file the tax return is mailed to that person, FTB must impose a filing enforcement cost recovery fee (currently set at \$97 for individuals).⁴ Once properly imposed, the statute provides no grounds upon which the fee may be abated. (R&TC, § 19254; see *Appeal of Jones, supra.*)

Here, FTB informed appellant in the 2018 Demand that he may be subject to the filing enforcement cost recovery fee if he did not file a tax return. However, appellant did not file his return within the time period prescribed by the 2018 Demand. Therefore, FTB properly imposed the filing enforcement cost recovery fee and OTA has no basis to abate it.


⁴ FTB annually adjusts the filing enforcement cost recovery fee to reflect actual costs as reflected in the annual Budget Act.

HOLDINGS


1. Appellant has not demonstrated error in FTB’s determination that appellant has a filing requirement for the 2018 tax year and owes tax.
2. Appellant has not shown reasonable cause for the late filing of his 2018 California tax return.
3. Appellant has not shown that FTB incorrectly imposed the demand penalty.
4. Appellant has not shown that FTB incorrectly imposed the filing enforcement cost recovery fee.


DISPOSITION

FTB’s action is sustained.

DocuSigned by:

 D17AEDDCAAB045B...
 Asaf Kletter
 Administrative Law Judge

We concur:

DocuSigned by:

 67F043D83EF547C...
 Sheriene Anne Ridenour
 Administrative Law Judge

DocuSigned by:

 88F35E2A935348D...
 Ovsep Akopchikyan
 Administrative Law Judge

Date Issued: 6/10/2022