

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 22019477
J. MUNOZ AND)
T. MUNOZ)
_____)

OPINION

Representing the Parties:

For Appellants: Michael P. Mears, Attorney

For Respondent: Joel Smith, Tax Counsel III

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, J. Munoz (appellant-husband) and T. Munoz (collectively appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$5,127.00, a late-filing penalty of \$1,281.75, a demand-to-file (demand) penalty of \$1,281.75, a filing enforcement cost recovery fee of \$97.00, and applicable interest, for the 2018 taxable year.

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

ISSUES

1. Have appellants established error in FTB’s proposed assessment for 2018?
2. Have appellants established a basis to abate the late-filing penalty?
3. Have appellants established a basis to abate the demand penalty?
4. Have appellants established a basis to waive the filing enforcement cost recovery fee?

FACTUAL FINDINGS

1. Appellants were residents of California in 2018 but did not file a 2018 California tax return.
2. FTB obtained information that appellant-husband received \$91,642 from New York Life Insurance Company in 2018. FTB issued to appellant-husband a Demand for Tax Return

- to which appellants did not reply. FTB issued to appellant-husband a Notice of Proposed Assessment (NPA) proposing additional tax of \$5,127.00, a late-filing penalty of \$1,281.75, a demand penalty of \$1,281.75, a filing enforcement cost recovery fee of \$97.00, and applicable interest, for the 2018 taxable year.
3. FTB previously issued to appellant-husband a Request for Tax Return on May 10, 2018, for the 2016 taxable year. When appellants did not respond, FTB issued an NPA for the 2016 taxable year on July 9, 2018.
 4. Appellants protested the NPA for the 2018 taxable year but did not submit any evidence that would change the NPA. FTB issued a Notice of Action affirming its NPA.¹
 5. This timely appeal followed.

DISCUSSION

Issue 1: Have appellants established error in FTB's proposed assessment for 2018?

FTB's determination is presumed correct, and a taxpayer has the burden of proving error. (*Appeal of Morosky*, 2019-OTA-312P.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing that FTB's determination is incorrect, it must be upheld. (*Ibid.*) The burden of proof requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) To meet this evidentiary standard, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Appeal of Belcher*, 2021-OTA-284P.)

Appellants' only assertion at protest with FTB and on appeal with OTA is that when appellants file their 2018 tax return, the proper assessment will be made. Appellants claimed at protest that they were "diligently" trying to file their return but were unable to finish. On appeal, appellants generally make the same argument; that they "expect to have their 2018 income tax return prepared and filed in the near future and expect that the filing of that return will resolve all issues"

The deadline to file the 2018 tax return was April 15, 2019. Appellants did not timely file a return, nor did they file a return following a demand to file issued by FTB more than a year

¹ The NOA incorrectly reflects the additional tax amount as \$5,245 instead of \$5,127 in the NPA. FTB concedes that the correct amount is \$5,127.

after the filing due date, on July 28, 2020. Moreover, appellants did not file a return prior to their protest five months later, on December 16, 2020. Appellants still had not filed their return by the date of this appeal, on January 12, 2022, and they have not filed the 2018 return even today, which is more than three years after the original due date.

Appellants have provided no evidence to show that the amount of the proposed tax, based on amounts reported to the IRS by third-party payors is incorrect. Therefore, appellants have not met their burden of proof, and FTB's determination must be sustained.

Issue 2: Have appellants established a basis to abate the late-filing penalty?

California imposes a penalty for failing to file a return on or before the due date, unless the taxpayer shows that the failure is due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) When FTB imposes a penalty, it is presumed to have been imposed correctly. (*Appeal of Xie*, 2018-OTA-076P.) A taxpayer may rebut this presumption by providing credible and competent evidence supporting abatement of the penalty for reasonable cause. (*Ibid.*)

Appellants have offered no explanation for their failure, for more than three years, to file a 2018 tax return. Thus, OTA concludes that appellants have not established reasonable cause to abate the late-filing penalty.

Issue 3: Have appellants established a basis to abate 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 the failure is due to reasonable cause and not willful neglect. FTB will only impose a demand penalty if an individual taxpayer fails to respond to a current Demand for Tax Return, and at any time during the preceding four tax 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).) A demand penalty may be abated where a taxpayer shows that the failure to respond was due to reasonable cause and not to willful neglect. (R&TC, § 19133.)

Here, the demand penalty was properly imposed because appellant-husband failed to respond to a Request for Tax Return for taxable year 2016, and FTB subsequently issued an NPA to appellant-husband for that year. (See *Appeal of Jones*, 2021-OTA-144P.) Appellants have offered no explanation for appellant-husband's failure to respond to FTB's Demand for Tax

Return for the 2018 taxable year within the allotted time. Thus, OTA concludes that appellants have not established reasonable cause to abate the demand penalty.

Issue 4: Have appellants established a basis to waive the filing enforcement cost recovery fee?

R&TC section 19254(a)(2) provides that if a person fails or refuses to make and file a tax return within 25 days after a formal legal demand to file the tax return is mailed to that person, FTB shall impose a filing enforcement cost recovery fee (set at \$97 for 2018), which pursuant to R&TC section 19254(b) is adjusted annually to reflect actual costs as reflected in the annual Budget Act. Once the fee is properly imposed, the statute provides no grounds upon which the fee may be abated or waived. (R&TC, § 19254; *Appeal of Jones, supra.*)


FTB sent appellant-husband a Demand for Tax Return for appellants' 2018 return, to which appellants did not respond within 25 days. Therefore, FTB properly imposed the filing enforcement cost recovery fee, and there is no basis to waive it.

HOLDINGS


1. Appellants have not established error in FTB’s proposed assessment for 2018.
2. Appellants have not established a basis to abate the late-filing penalty.
3. Appellants have not established a basis to abate the demand penalty.
4. Appellants have not established a basis to waive the filing enforcement cost recovery fee.


DISPOSITION

FTB’s action is sustained.

DocuSigned by:

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 Teresa A. Stanley
 Administrative Law Judge

We concur:

DocuSigned by:

DC88A60D8C3E442...
 Keith T. Long
 Administrative Law Judge

DocuSigned by:

3CADA62FB4884CB...
 Andrew J. Kwee
 Administrative Law Judge

Date Issued: 9/7/2022