

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
S. ITLIONG

) OTA Case No. 22029727
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OPINION

Representing the Parties:

For Appellant: Michael P. Mears, Attorney

For Respondent: Christopher M. Cook, Tax Counsel

A. KLETTER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, S. Itliong (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing to assess tax of \$10,062.00, a \$2,515.50 late-filing penalty, a \$2,515.50 notice and demand penalty (demand penalty), a \$97 filing enforcement cost recovery fee (filing enforcement fee), and applicable interest, for the 2018 tax year.

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

ISSUES

1. Whether appellant has demonstrated error in FTB’s proposed assessment of tax.
2. Whether appellant has shown reasonable cause for the late filing of her 2018 California tax return.
3. Whether appellant has established grounds to abate the demand penalty.
4. Whether appellant has established grounds to abate the filing enforcement fee.
5. Whether appellant has established grounds to abate interest.

FACTUAL FINDINGS

1. Appellant did not file (and based on the record, still has not filed) a California tax return for the 2018 year.

2. FTB received information that appellant earned income from interest, dividends, and the sale of stock.¹ FTB determined that appellant earned sufficient income for the 2018 tax year to prompt a filing requirement, but had not filed a return.
3. FTB issued appellant a Demand for Tax Return (Demand), which required that, within 30 days, she file or provide evidence that she already filed her 2018 California tax return, or respond with a completed questionnaire form (FTB Form 4602 ENS) showing that she had no filing requirement for the 2018 tax year. The Demand notified appellant that if she did not timely respond to the Demand in the manner prescribed, FTB would assess a demand penalty, a late-filing penalty, a filing enforcement fee, and interest.
4. When FTB did not receive a response to the Demand, FTB issued appellant a Notice of Proposed Assessment (NPA) for the 2018 tax year. The NPA estimated appellant's income to exceed the 2018 filing threshold based on third-party information, and proposed to assess tax, a late-filing penalty, a demand penalty, and a filing enforcement fee, plus applicable interest.
5. Appellant protested the NPA, contesting the proposed assessment in its entirety.
6. On January 19, 2022, FTB issued a Notice of Action affirming the NPA.
7. This timely appeal followed. On appeal, appellant states that she diligently attempted to have her income tax return prepared but was unable to finish that process.²
8. As relevant to this appeal, FTB previously issued appellant an NPA for the 2014 through 2017 tax years following appellant's failures to respond to a Demand for each respective tax year.³

DISCUSSION

Issue 1: Whether appellant has demonstrated error in FTB's proposed assessment of 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

¹ The third-party information contained on the IRS Wage and Income Transcript is not in the record, although FTB's Notice of Proposed Assessment for the 2018 tax year purports to provide a summary. Appellant does not contest this information.

² Appellant, although reserving the right to supplement, provides no further factual or legal information.

³ Copies of the NPA and Demand for the 2016 and 2017 tax years are not in the record, although the record contains the dates that they were issued.

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).) 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 available information, and may propose to assess the amount of tax, interest, and penalties due.” FTB’s initial burden is to show that its proposed assessment is reasonable and rational. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *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, FTB determined that third-party information on an IRS Wage and Income Transcript reported gross income which exceeded the filing threshold for the 2018 tax year. Appellant raises no argument that the income was not received or properly estimated based on the third-party information. OTA finds that FTB’s use of the third-party information to estimate appellant’s income is reasonable and rational. Further, OTA finds, based on a review of the record, that FTB correctly determined that appellant received income in excess of the 2018 California filing thresholds, and has a 2018 California filing requirement.

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 v. McColgan, supra; Bindley, supra.*) Unsupported assertions are insufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Gorin*, 2020-OTA-018P.) In the absence of credible, competent, and relevant evidence showing error in FTB’s determination, the determination must be upheld. (*Bindley, supra.*)

Appellant provides no evidence to support that she did not receive the income at issue, that she does not have a 2018 California filing requirement, or that FTB’s calculations of the tax liability were incorrect. Accordingly, 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 her 2018 California tax return.

Absent an extension, individual taxpayers who file on a calendar year basis are generally required to file their income tax returns by April 15 of the following year. (R&TC, § 18566.) R&TC section 19131 requires FTB to impose a late-filing penalty when a taxpayer does not file a return on or before its due date, unless the taxpayer shows that the late filing was due to

reasonable cause and not due to willful neglect. When FTB imposes a late-filing penalty, the law presumes that it is correct, and the burden of proof is on the taxpayer to show that reasonable cause exists to abate the penalty. (*Appeal of Cremel and Koepfel*, 2021-OTA-222P.)

Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Appeal of Gorin, supra.*) Appellant raises no argument that the late-filing penalty was imposed in error, and OTA finds that FTB correctly imposed the penalty after appellant untimely filed her return.

The standard of reasonable cause requires the taxpayer to establish that the failure to timely file occurred despite the exercise of ordinary business care and prudence. (*U.S. v. Boyle* (1985) 469 U.S. 241, 246; see also *Appeal Cremel and Koepfel, supra.*) Even if the taxpayer is unaware of a filing requirement, ignorance of the law is not an excuse for failing to file a timely return. (*Appeal of Cremel and Koepfel, supra.*) The record indicates that appellant has still not filed a 2018 California tax return. Appellant provides no evidence demonstrating reasonable cause; appellant merely asserts a diligent effort to complete her return, and unsupported assertions are insufficient to carry a taxpayer's burden of proof. A review of the record does not show any facts and circumstances that warrant a finding of reasonable cause. Therefore, OTA has no basis to abate the late-filing penalty.

Issue 3: Whether appellant has established grounds 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 it is shown that the failure was due to reasonable cause and not willful neglect. A demand penalty is properly imposed if two criteria are met: (1) the taxpayer fails to respond to a current Demand; and (2) 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)(1)-(2); see *Appeal of Jones*, 2021-OTA-144P.)

The first requirement is met because FTB issued a Demand for the 2018 tax year but did not receive a timely response. The second requirement is also met because FTB previously issued appellant NPAs for the 2014 and 2015 tax years after appellant failed to respond to prior Demands for those years. As with the late-filing penalty, appellant provides no evidence demonstrating reasonable cause, and a review of the record does not show any facts and circumstances that warrant a finding of reasonable cause. Therefore, OTA has no basis to abate the demand penalty.

Issue 4: Whether appellant has established grounds to abate the filing enforcement 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 formal legal demand to file the tax return is mailed to that person, FTB must impose a filing enforcement 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 she may be subject to the filing enforcement fee if she did not file a tax return. However, appellant did not file her return within the time period prescribed by the 2018 Demand. Therefore, FTB properly imposed the filing enforcement fee and OTA has no basis to abate it.

Issue 5: Whether appellant has established grounds to abate interest.

Imposing interest is mandatory, and FTB cannot abate interest except where authorized by law. (R&TC, § 19101; *Appeal of Balch*, 2018-OTA-159P.) Interest is not a penalty; it is compensation for the use of money. (*Appeal of Balch, supra.*) Interest accrues on a deficiency assessment regardless of the reason for the assessment. (*Ibid.*) Generally, to obtain relief from interest, taxpayers must qualify under R&TC section 19104, 19112, or 21012. (*Ibid.*) Appellant does not allege that any of the three statutory provisions for interest abatement apply to the facts of this case, and OTA concludes based on the evidence in the record that none of these statutory provisions apply. Therefore, FTB properly imposed interest and OTA has no basis to abate it.

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

HOLDINGS

1. Appellant has not demonstrated error in FTB’s proposed assessment of tax.
2. Appellant has not shown reasonable cause for the late filing of her 2018 California tax return.
3. Appellant has not established grounds to abate the demand penalty.
4. Appellant has not established grounds to abate the filing enforcement fee.
5. Appellant has not established grounds to abate interest.

DISPOSITION

FTB’s action is sustained.

DocuSigned by:

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 Asaf Kletter
 Administrative Law Judge

We concur:

DocuSigned by:

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 Amanda Vassigh
 Administrative Law Judge

DocuSigned by:

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 Kenneth Gast
 Administrative Law Judge

Date Issued: 8/30/2022