OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Consolidated Appeals of: **C. GOTTSTEIN**	) OTA Case Nos. 18011448, 18011450, 18011452)))))

OPINION

Representing the Parties:

For Appellant: C. Gottstein

For Respondent: David Muradyan, Tax Counsel III
Nancy Parker, Tax Counsel V

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, C. Gottstein (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing: (1) an assessment of tax of $173 and a late filing penalty of $135, plus interest, for the 2012 tax year; (2) an assessment of tax of $399, a late filing penalty of $135, a notice and demand penalty (demand penalty) of $99.75, and a filing enforcement cost recovery fee (filing enforcement fee) of $76, plus interest for the 2013 tax year; and (3) an assessment of tax of $811, a late filing penalty of $202.75, and a demand penalty of $202.75, and a filing enforcement fee of $79, plus interest, for the 2014 tax year.

Office of Tax Appeals (OTA) Administrative Law Judges Josh Lambert, Elliott Scott Ewing, and Teresa A. Stanley held an oral hearing via videoconference for this matter on January 26, 2022. At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

ISSUES

1. Whether appellant demonstrated error in the proposed assessments for the 2012, 2013, and 2014 tax years
2. Whether the demand penalties should be abated for the 2013 and 2014 tax years.
3. Whether the late filing penalties should be abated for the 2012 through 2014 tax years.

4. Whether the filing enforcement fees should be abated for the 2013 and 2014 tax years.
5. Whether interest should be waived.
6. Whether OTA has jurisdiction to consider appellant's request for reimbursement of charges or fees pursuant to R&TC section 21018 and, if so, whether any remedy should be provided.

FACTUAL FINDINGS

2012 Tax Year

1. Appellant did not file a 2012 California income tax return.
2. FTB received Form 1099 information that appellant received income totaling $21,416.42, which is sufficient to prompt a return-filing requirement. This included income from Charles Schwab & Co. (Schwab) reported by the payor on Forms 1099-B - Proceeds from Broker and Barter Exchange Transactions. After making a reduction for basis estimated to be 79 percent of the income on the Forms 1099-B, FTB estimated appellant's income from Schwab to be $773.08 and $10.34.
3. On July 30, 2014, FTB sent appellant a Request for Tax Return (Request) requesting that appellant file a 2012 tax return, send a copy of the return if already filed, or explain why appellant was not required to file a return.
4. After appellant failed to respond to the Request, FTB issued a Notice of Proposed Assessment (NPA), which proposed total tax of $173 and a late filing penalty of $135, plus applicable interest.
5. Appellant protested the NPA. FTB issued a Notice of Action (NOA), affirming the NPA.
6. Appellant timely filed an appeal with OTA.

2013 Tax Year

7. Appellant did not file a 2013 California income tax return.
8. FTB received Form 1099 information that appellant received income totaling $27,449.20, which is sufficient to prompt a return-filing requirement. This included income from Schwab reported on Forms 1099-B. After making a reduction for basis estimated to be 79 percent of the income on the Forms 1099-B, FTB estimated appellant's income from Schwab to be $1,522.50 and $707.70.

9. On February 24, 2015, FTB sent appellant a Demand for Tax Return (Demand) stating that appellant should file a 2013 tax return, send a copy of the return if already filed, or explain why appellant was is not required to file a return.
10. After appellant failed to respond to the Demand by the due date of April 1, 2015, FTB issued an NPA, which proposed tax of $399, a late filing penalty of $135, a demand penalty of $99.75, a filing enforcement fee of $76, and applicable interest.
11. Appellant protested the NPA. FTB issued an NOA, affirming the NPA.
12. Appellant timely filed an appeal with OTA.

2014 Tax Year

13. Appellant did not file a 2014 California income tax return.
14. FTB received Form 1099 information that appellant received income totaling $36,395, which is sufficient to prompt a return-filing requirement. This included income from Schwab reported on a Form 1099-B. After making a reduction for basis estimated to be 80 percent of the income on the Form 1099-B, FTB estimated appellant's income from Schwab to be $504.
15. On January 22, 2016, FTB sent appellant a Demand stating that appellant should file a 2014 tax return, send a copy of the return to FTB if already filed, or explain why appellant was not required to file a return.
16. After appellant failed to file a tax return by an extended due date of April 24, 2016, FTB issued an NPA that proposed tax of $811, a late filing penalty of $202.75, a demand penalty of $202.75, a filing enforcement fee of $79, and applicable interest.
17. Appellant protested the NPA. FTB issued an NOA, affirming the NPA.
18. Appellant timely filed an appeal with OTA.

Claim for Reimbursement of Bank Charges for the 2015 Tax Year

19. Appellant filed a claim for reimbursement of bank charges with FTB, pursuant to R&TC section 21018. Appellant asserted that a bank fee of $63.45 was charged to her as a result of an erroneous bank levy by FTB.
20. FTB determined that appellant's claim was untimely and, therefore, denied the claim. FTB also found that the bank levy was not erroneous.

DISCUSSION

Issue 1: Whether appellant demonstrated error in the proposed assessments for the 2012, 2013, and 2014 tax years.

R&TC section 17041 imposes a tax upon the entire taxable income of every resident of this state. 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 deduction and credits allowable ..... " R&TC section 19087(a) provides in relevant part:

> If any taxpayer fails to file a return, or files a false or fraudulent return with intent to evade the tax, for any taxable year, the Franchise Tax Board, at any time, may require a return or an amended return under penalties of perjury or 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.

When FTB makes a proposed assessment of 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.) An assessment based on unreported income is presumed correct when the taxing agency introduces a minimal factual foundation to support the assessment. (*Ibid*.) 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*.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Ibid*.) In the absence of credible, competent, and relevant evidence showing error in FTB's determination, the determination must be upheld. (*Ibid*.)

Based on the Form 1099 information, FTB estimated appellant's California income for 2012, 2013, and 2014, and determined that appellant had a California filing requirement for those years. We find that FTB met its initial burden to support the proposed assessments of tax and that its determinations are reasonable and rational. Therefore, the proposed assessments are presumed correct, and the burden of proof shifts to appellant to show error in FTB's determinations.

Appellant argues that itemized deductions, such as for medical expenses, should offset the proposed assessments of tax and provides documentation in support. However, appellant has not filed a tax return for any of the years at issue. A taxpayer must file a return to itemize

deductions. (R&TC, § 17073(a); IRC, § 63(e)(1)-(2); see also *Jahn v. Commissioner*, T.C. Memo. 2008-141, affd. (3d Cir. 2010) 392 Fed.Appx. 949.) Therefore, because appellant has not filed returns for the years at issue, itemized deductions cannot be allowed.

Appellant provides evidence of her basis in stock that was sold, which she argues should reduce the income from the stock sales. While a taxpayer must file a return to itemize deductions, as discussed above, we are unaware of any provision in the Personal Income Tax Law that prevents taxpayers from showing error in FTB's calculation of basis in situations where a taxpayer has not filed a tax return. Therefore, we will examine whether there is error as to FTB's calculation of the basis in stock that was sold.

In this case, FTB's estimate of gain from the stock sales for each year included a reduction to income using an estimated basis of approximately 79-80 percent of the income received. Appellant provides a 2019 letter from Schwab stating that, with regard to the 2012 stock sales, Schwab was able to update the basis of 48 shares to a total of $211.64 (approximately $4.41 per share). The Schwab letter states that the basis for the other 74 shares is unknown since the original purchase was prior to 1993. It appears that FTB calculated that the basis for that stock was $2,775.27, which is approximately 79 percent of $3,513. Given that Schwab was unable to verify the basis for the remaining 74 shares, we cannot determine that the basis should be further modified. However, we note that using the Schwab basis for the 48 shares ($4.41 per share) as the basis for the remaining 74 shares, results in a basis of $326.34 (74 x $4.41) and a total basis for the 122 shares of $537.98 (i.e., $211.64 + $326.34), which is a lower basis than used by FTB.

Also provided is a Schwab statement from 2015 which states that appellant's gain from the 2012 sale of stock, after a reduction of basis, is $35.39 (proceeds of $46.67 less basis of $11.28) and $3,513.60 (proceeds of $5,292.94 less basis of $1,779.34). In addition, there is a sale with zero gain, as the proceeds and basis are both $1,960. Appellant's federal Wage and Income Transcript indicates gross proceeds from stock sales of $3,513, $46, and $1,960. The Demand for 2012 states that stock sale income included $773.08 and $10.34, after estimating a basis of 79 percent, which corresponds with the amounts on the Schwab statement from 2015. FTB's estimate of gain did not include any gain from the proceeds of $1,960, which Schwab reported as having a basis of $1,960. As a result, the Schwab statement appears to approximate the amounts used by FTB to estimate gain, although, as discussed below, it appears that the

amounts that FTB reduced to account for basis were already adjusted for basis before FTB estimated the income.

The 2012 Demand indicated a gain of $773.08 after estimating basis, which corresponds to the amount on the Schwab statement of $3,513.60 after multiplying by 21 percent to account for estimated basis of 79 percent, and then by adding $35.39 for the gain reported the Schwab statement, resulting in $773.25. Therefore, it appears that FTB increased the stock basis when the amount reported by Schwab on the Forms 1099-B already included appellant's basis in the stock. This decreased the gain below the amount that is reported on the statements, which is to appellant's benefit.

For the 2013 tax year, FTB estimated appellant's income from Schwab to be $2,230.20 and states that it made a reduction for basis estimated to be 79 percent of the income reported on the Forms 1099-B. The income amounts on the Forms 1099-B are $7,250 and $3,370, totaling $10,980.[1] According to a Schwab statement provided by appellant, after accounting for basis, the gain on those stock sales is $153.13 and $2,501.20, totaling $2,654.33. Therefore, FTB estimated the income on the 2013 sale of stocks to be lower than what was reported by Schwab, which is to appellant's benefit.

For the 2014 tax year, FTB estimated appellant's income from Schwab to be $504, and states that it made a reduction for basis estimated to be 80 percent of the income on the Form 1099-B. The income on the Form 1099-B is $2,250. According to a Schwab statement provided by appellant, after accounting for basis, the gain on that stock sale was $1,302.23. Therefore, FTB estimated the income on the 2014 sale of stock to be lower than what was reported by Schwab, which is to appellant's benefit.

The evidence in the record does not indicate that FTB's determination of income, including income from the stock sales, is in error for the years at issue. Therefore, we find that appellant has not shown error in FTB's determination of the proposed assessments of tax.

Issue 2: Whether the demand penalties should be abated for the 2013 and 2014 tax years.

California imposes a demand 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, FTB will only impose a

[1] We note that 21 percent of $10,980 is $2,305.80, whereas FTB estimated the income to be a lesser amount, $2,230.20.

demand penalty if: (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).)

FTB issued a 2013 and 2014 Demand to appellant, but appellant did not file returns for these tax years in response. Therefore, we examine whether the prerequisites of California Code of Regulations, title 18, section 19133(b) are satisfied. For the 2012 tax year, FTB issued a Request and an NPA. For the 2013 tax year, FTB issued a Demand and an NPA. Both the 2012 and 2013 NPAs were for tax years within the four tax years preceding the 2013 and 2014 tax years. (Cal. Code Regs., tit. 18, § 19133(b); *Appeal of Jones*, 2021-OTA-144P.) As a result, the prerequisites of California Code of Regulations, title 18, section 19133 are satisfied.

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. (*Appeal of GEF Operating, Inc*., 2020-OTA-057P.)

Appellant testified that she has reasonable cause for failing to respond to the Demands due to personal hardships, such as physical disabilities, as well as difficulties in finding a tax preparer for reasons including financial hardship. Appellant provides voluminous documentation in support. However, the documentation includes evidence that appellant was able to participate in numerous activities during the same period in which she was requested to file a tax return in response to the Demands, and also was able to retain an attorney. For instance, appellant participated in a court action and retained an attorney during 2015 and 2016. In addition, the record includes evidence that appellant attended an in-person hearing at an FTB office in 2015 and participated in other activities, including corresponding with numerous entities, serving on a board, applying to serve on a commission, all during the time periods in question.

Illness or other personal difficulties may be considered reasonable cause if taxpayers present credible and competent proof that they were continuously prevented from filing a tax return. (*Appeal of Head and Feliciano*, 2020-OTA-127P.)[2] However, if the difficulties simply

[2] Since the issue of whether a taxpayer has demonstrated reasonable cause for failure to timely respond to a Demand asks the same questions and weighs the same evidence as the inquiry of whether reasonable cause exists for failure to timely file a tax return, opinions analyzing whether reasonable cause existed for failure to timely file a tax return are persuasive authority for determining whether reasonable cause existed for the failure to timely respond to a Demand. (See *Appeal of Triple Crown Baseball LLC*, 2019-OTA-025P.)

caused the taxpayers to sacrifice the timeliness of one aspect of their affairs to pursue other aspects, the taxpayers must bear the consequences of that choice. (*Ibid*.) The taxpayer's selective inability to perform tax obligations, while participating in regular business activities, does not establish reasonable cause. (*Ibid*.) Appellant admitted in her testimony that she prioritized tasks ahead of her tax filing obligation. Therefore, appellant has not shown that she was incapacitated such that she was unable to timely reply to the Demands by filing returns because she he was able to conduct other business affairs during the same period.

Appellant also provides a Department of the Treasury Final Agency Decision involving appellant's attempts to have her federal tax returns prepared during the period of September 14, 2016, through October 20, 2016. However, that time period is after the April 1, 2015 due date for the 2013 Demand, and the April 24, 2016 extended date for the 2014 Demand. Otherwise, appellant has not provided evidence of steps taken to file California returns in response to the Demands during the time periods in question, such as contacting tax preparation services or other attempts to complete her returns, or to show that she was prevented from filing the returns despite the exercise of ordinary business care and prudence. Therefore, appellant has not shown that the demand penalties should be abated.

Issue 3: Whether the late filing penalties should be abated for the 2012 through 2014 tax years.

California imposes a penalty for failing to file a valid return on or before the due date, unless the taxpayers show that the failure is due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) To establish reasonable cause, taxpayers must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that such cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Head and Feliciano, supra*.)

Appellant did not file returns for the 2012, 2013, or 2014 tax years. Appellant testified that she has reasonable cause due to personal hardships, such as physical disabilities, as well as difficulties in finding a tax preparer for reasons including financial hardship. As discussed above, the record includes evidence that appellant was able to participate in a court action and was able to retain an attorney. In addition, appellant was able to participate in numerous activities during the time periods when she had filing obligations. Appellant participated in a 2012 administrative action, was a member of a government advisory board in 2012 and 2013,

applied for appointment to a city commission in 2015, and corresponded with numerous entities, including two of which performed tax preparation services without cost to appellant, during the time periods in question.

As stated above, a taxpayer's selective inability to perform tax obligations, while participating in regular business activities, does not establish reasonable cause. (See *Appeal of Head and Feliciano*, *supra*.) While appellant sought assistance in filing her federal tax returns in 2016, appellant has not provided evidence of steps taken during 2013 to 2015 when her California tax returns were due, or during the following years, such as contacting tax preparation services or other attempts to complete the returns at issue. Therefore, appellant has not shown that the late filing penalties should be abated.

Issue 4: Whether the filing enforcement cost recovery fees should be abated for the 2013 and 2014 tax years.

R&TC section 19254(a)(2) requires FTB to impose a filing enforcement cost recovery fee in the event a taxpayer fails to file a return within 25 days after FTB mails a Demand to the taxpayer. Here, the fees were properly imposed after appellant failed to timely file a 2013 and 2014 tax return in response to the Demands. There is no reasonable cause exception or other exception that permits the abatement of the fees. (See *Appeal of Wright Capital Holdings*, LLC, 2019-OTA-219P.) Accordingly, the filing enforcement fees cannot be abated.

Issue 5: Whether interest should be waived.

The imposition of interest 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 relief from interest, a taxpayer must qualify under R&TC sections 19104, 19112, or 21012. (*Appeal of Moy*, *supra*.) The OTA has no jurisdiction to determine whether appellant is entitled to the abatement of interest under R&TC section 19112. (*Ibid*.) The relief of interest under R&TC section 21012 is not relevant here, because FTB did not provide appellant with any written advice. Under R&TC section 19104(a)(1), FTB may abate all or a

part of any interest on a deficiency to the extent that interest is attributable in whole or in part to any unreasonable error or delay committed by FTB in the performance of a ministerial or managerial act. (R&TC, § 19104(a)(1).) The OTA has jurisdiction to determine whether FTB's denial of interest abatement under R&TC section 19104 was an abuse of discretion. (R&TC, § 19104(b)(2)(B); *Appeal of Moy*, *supra*.)

FTB asserts that appellant raised a new issue at the prehearing conference with OTA, namely that interest should be abated based on a $753.36 payment made on October 15, 2016, that was initially credited to the 2013 tax year, but later applied to the 2015 tax year. FTB argues that OTA does not have jurisdiction over the issue because appellant did not make a claim in writing to FTB and FTB has not denied such claim. A request for abatement of interest related to a proposed deficiency may be made with an appeal to OTA under R&TC section 19045 in the form and manner required by FTB. (R&TC, § 19104(b)(4).) Here, FTB provided a denial of interest abatement in its opening brief in response to appellant's contentions in her briefs disputing the interest. Therefore, we find we have jurisdiction over appellant's claim for interest abatement.

In this case, FTB's records show that the $753.36 payment was applied to the 2013 tax year, but appellant requested that the balance be moved to 2015. Appellant testified that she requested the balance transfer. An error or delay can only be considered when no significant aspect of the error or delay is attributable to the taxpayer. (R&TC, § 19104(b)(1).) Therefore, any interest charged to the 2013 tax year as a result of the transfer of the payment is the result of appellant's request to move the payment to another year. In addition, $285.15 was used to make a payment for federal tax due, after an offset request by the IRS. However, FTB may enter into an agreement to collect any delinquent tax debt due to the IRS. (See R&TC, § 19291.) The evidence does not indicate that FTB committed any unreasonable error or delay in the performance of a ministerial or managerial act. Therefore, we find that interest should not be abated.

Issue 6: Whether OTA has jurisdiction to consider appellant's request for reimbursement of charges or fees pursuant to R&TC section 21018 and, if so, whether any remedy should be provided.

Appellant filed a claim for reimbursement of bank charges with FTB pursuant to R&TC section 21018. Appellant asserted that a bank fee of $63.45 was charged to her as a result of an

erroneous bank levy by FTB. FTB determined that appellant's claim was untimely and, therefore, denied the claim. FTB also states that the bank levy was not erroneous. Appellant contends that FTB was incorrect in denying her claim and provides numerous arguments and documentation in support of her contentions.

R&TC section 21018 provides that a person may file a claim with FTB for reimbursement of charges or fees imposed on the person by an unrelated business entity as the direct result of an erroneous levy, erroneous processing action, or erroneous collection action by FTB. R&TC section 21018 is a provision of the Taxpayer Bill of Rights under Part 10.7 of the R&TC. There is no language in R&TC section 21018 or elsewhere in the R&TC that provides OTA with jurisdiction to review FTB's determination with regard to such reimbursement claims. Except for reimbursement claims under R&TC section 21013, OTA does not have jurisdiction to hear matters based on alleged violations of the Taxpayer Bill of Rights. (*Appeal of Jacqueline Mairghread Patterson Trust*, 2021-OTA-187P.) Therefore, we find that we have no jurisdiction to review FTB's determination regarding appellant's reimbursement claim made pursuant to R&TC section 21018.

HOLDINGS

1. Appellant has not demonstrated error in the proposed assessments for the 2012, 2013, and 2014 tax years.
2. The demand penalties should not be abated for the 2013 and 2014 tax years.
3. The late filing penalties should not be abated for the 2012 through 2014 tax years.
4. The filing enforcement fees may not be abated for the 2013 and 2014 tax years.
5. Interest may not be waived.
6. OTA does not have jurisdiction to consider appellant's request for reimbursement of charges or fees pursuant to R&TC section 21018.

DISPOSITION

FTB's actions are sustained.

DocuSigned by:
Josh Lambert
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Josh Lambert
Administrative Law Judge

We concur:

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E S Ewing
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Elliott Scott Ewing
Administrative Law Judge

DocuSigned by:
Teresa A. Stanley
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Teresa A. Stanley
Administrative Law Judge

Date Issued: 3/24/2022

This Opinion was revised pursuant to California Code of Regulations, title 18, section 30506 on October 6, 2022.