

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:  
**E. AUFDERMAUR**

) OTA Case No. 220510296  
)  
)  
)  
)

**OPINION**

Representing the Parties:

For Appellant: E. Aufdermaur

For Respondent: Christopher T. Tuttle, Tax Counsel III

A. KLETTER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, E. Aufdermaur (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing to assess tax of \$519.00, a late-filing penalty of \$135.00, a notice and demand penalty (demand penalty) of \$129.75, a filing enforcement cost recovery fee (filing enforcement fee) of \$97.00, and applicable interest, for the 2018 tax year.

Appellant elected to have this appeal determined pursuant to the procedures of the Small Case Program. Those procedures require the assignment of a single administrative law judge. (Cal. Code Regs., tit. 18, § 30209.1.) 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 determination that she has a filing requirement for the 2018 tax year and owes tax.
2. Whether appellant has shown reasonable cause for the late filing of her 2018 California tax return.
3. Whether the demand penalty was properly imposed.
4. Whether appellant has established grounds to abate the filing enforcement fee.
5. Whether appellant has established grounds to abate interest.

### FACTUAL FINDINGS

1. As of the date briefing closed, appellant has not filed a timely 2018 California resident income tax return.
2. FTB received information based on a 2018 Form 1098 issued by Wells Fargo Bank, N.A. (Wells Fargo) indicating that appellant paid mortgage interest of \$5,649 on a property located in Turlock, California. The mortgage interest information indicated to FTB that appellant may have a 2018 California filing requirement, but she 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 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. Appellant timely responded to the Demand, explaining that she did not earn income in 2018, and that she borrowed money and family helped her pay the mortgage interest amount and living expenses. Appellant attached a signed questionnaire reporting that she earned no gross income and had no 2018 filing requirement. Although the questionnaire requests that appellant provide supporting documentation, she did not attach any.
5. Following its review of appellant's response, FTB issued appellant a Notice of Proposed Assessment (NPA). The NPA stated that FTB had not received appellant's 2018 California tax return or information establishing that appellant did not have a 2018 filing requirement.<sup>1</sup> Based on statistical information obtained from an analysis of tax returns filed by California residents, FTB estimated appellant's gross income for the 2018 tax year to be six times the mortgage interest she paid for the year, or \$33,894 (\$5,649 x 6). FTB determined that appellant had a 2018 filing requirement as her gross income exceeded the filing threshold for the year. The NPA proposed to assess tax, a late-filing penalty, a demand penalty, a filing enforcement fee, and applicable interest.
6. Appellant timely responded that she disagreed with the proposed assessment of tax for the same reasons as those contained in her response to the Demand and attached a copy

---

<sup>1</sup> However, as noted above, FTB had received appellant's signed questionnaire.

of the 2018 Form 1098. The last four numbers of appellant's TIN match those of the "Payer/Borrower" on Form 1098.

7. FTB affirmed the NPA in a position letter dated January 29, 2022, explaining that it was unable to determine whether appellant had a filing requirement based on the information provided, and requested that appellant either file a tax return or provide the following information: copies of credit card statements or bank account statements for January, June, and December 2018; copy of wire transfer verification for applicable periods and/or three cancelled check copies; names and social security numbers of the person(s) making the mortgage payments and/or the first two pages of their Federal 1040 tax return.
8. Following appellant's failure to provide the additional documentation, on April 1, 2022, FTB issued a Notice of Action affirming the NPA.
9. This timely appeal followed. On appeal, appellant again states that she had no income and had family assistance in paying the mortgage interest expense.
10. As relevant to this appeal, FTB previously issued appellant an NPA for the 2017 tax year following appellant's failure to respond to a Request for Tax Return (Request).

### DISCUSSION

Issue 1: Whether appellant has demonstrated error in FTB's determination that she 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).) 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."

FTB's initial burden is to show that its imposed assessment is reasonable and rational. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Bindley*, 2019-OTA-179P (*Bindley*)). Federal courts have held that the taxing agency need only introduce some evidence linking the taxpayer with income-producing activity. (See *Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932, 935.) An assessment based on unreported income is presumed correct when the

taxing agency introduces a minimal factual foundation to support the assessment. (*Bindley, supra*, see also *Andrews v. Commissioner*, T.C. Memo. 1998-316 [information including interest payments by the taxpayer and statistics can provide the “minimal factual predicate” for an assessment].)

Here, FTB reconstructed appellant’s income for the 2018 tax year based on the mortgage interest that appellant paid, which was reported on the 2018 Form 1098. FTB estimated appellant’s California income based on a six-to-one ratio of income to mortgage interest paid based on FTB’s study of tax returns filed by California residents. FTB has conducted at least two studies establishing a statistical relationship between the income shown on taxpayer’s tax return and the mortgage interest paid by taxpayers. The premise of the studies is that a non-filer who can pay mortgage interest payments may have sufficient income to generate a filing requirement. The mortgage interest paid by appellant and reported on the 2018 Form 1098 qualifies as “some evidence linking [appellant] with income-producing activity” and as a minimal factual foundation to support the proposed assessment. OTA finds that FTB’s use of third-party information to estimate appellant’s income using the six-to-one ratio of income to mortgage interest paid is reasonable and rational. OTA finds that FTB correctly determined that appellant received income in excess of the 2018 California filing threshold.

Once FTB has met its initial burden, the proposed assessment of tax is presumed correct and the taxpayer has the burden of providing 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*.) 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 explained how she was making the Wells Fargo mortgage interest payments, or paying for her living expenses during the 2018 tax year, despite several opportunities to provide this information. While appellant contends that she had no income in 2018, asserting that she did not work that year because of health and mental issues, she provides no support for these claims. Appellant also asserts that her family helped pay the mortgage interest expense but provides no evidence supporting her claim. FTB requested additional information to verify whether appellant had a filing requirement, such as FTB’s January 29, 2022

position letter, which requested that appellant provide selected credit card statements, bank statements, wire transfer information, and names, social security numbers, and federal tax returns of persons making mortgage payments, to which appellant did not respond. Such documentation is within appellant's control, not FTB's. 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 her 2018 California tax return.

Absent an extension, 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 their 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.*) Appellant has still not filed a 2018 California tax return as of the date briefing closed. 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 late-filing penalty.

Issue 3: Whether the demand penalty was properly imposed.

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 timely respond to a current Demand in the manner prescribed; and (2) FTB proposed an assessment of tax under the authority of R&TC section 19087(a), after the taxpayer failed to timely respond to a Request or a Demand in the manner prescribed, for any taxable year within the four-taxable-year period immediately preceding the taxable year for which the current Demand is issued. (Cal. Code Regs, tit. 18, § 19133(b)(1)-(2).)

Here, the first requirement is not met. Although FTB issued a Demand for the 2018 tax year, appellant timely responded with a signed questionnaire. On the questionnaire, appellant determined that she did not earn gross income and did not have a filing requirement, and provided further explanations that her family helped her with the mortgage payments. However, the NPA proposed a demand penalty. In support of the demand penalty, FTB asserts that appellant failed to file her 2018 tax return after FTB's Demand. However, the Demand gave appellant the option of responding with a questionnaire form showing that she had no filing requirement for the 2018 tax year, which appellant did.<sup>2</sup> In other words, appellant responded in the prescribed manner to FTB's Demand. Appellant did not fail to respond to FTB.<sup>3</sup> Therefore, OTA finds that FTB did not properly impose the demand penalty and it should be withdrawn.

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).<sup>4</sup> Once properly imposed, the statute provides no grounds upon which the fee may be abated. (R&TC, § 19254; see *Appeal of Jones*, 2021-OTA-144P.)

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

---

<sup>2</sup> Following FTB's issuance of the NPA, appellant also timely protested in writing, enclosing the quick resolution and her 2018 Form 1098.

<sup>3</sup> FTB's January 29, 2022 position letter does not constitute a second Demand. The position letter does not state that a demand penalty would be imposed if no response to the letter was received.

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

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,<sup>5</sup> 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.

---


<sup>5</sup> Under R&TC section 19104, FTB is authorized to abate or refund interest if there has been an unreasonable error or delay in the performance of a ministerial or managerial act by an employee of FTB.

HOLDINGS

1. Appellant has not demonstrated error in FTB’s determination that she has a filing requirement for the 2018 tax year and owes tax.
2. Appellant has not shown reasonable cause for the late filing of her 2018 California tax return.
3. The demand penalty was not properly imposed and should be withdrawn.
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 modified to abate the demand penalty. FTB’s action is otherwise sustained.

DocuSigned by:  
  
D17AEEDCAAB045B...  
Asaf Kletter  
Administrative Law Judge

Date Issued: 11/8/2022