OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **S. WINSTON**	) OTA Case No. 22019388)))))

OPINION

Representing the Parties:

For Appellant: S. Winston

For Respondent: Topher Tuttle, Tax Counsel

N. RALSTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, S. Winston (appellant) appeals an action by the Franchise Tax Board (respondent) proposing additional tax of $6,352, a late filing penalty of $1,588, a notice and demand penalty (demand penalty) of $1,588, a filing enforcement cost recovery fee (filing enforcement fee) of $97, 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 that respondent's proposed assessment of tax is in error.
2. Whether appellant has established reasonable cause to abate the late filing penalty.
3. Whether appellant has established reasonable cause to abate the demand penalty.
4. Whether the filing enforcement fee should be abated.
5. Whether interest may be abated.

FACTUAL FINDINGS

1. Respondent received information that appellant paid mortgage interest of $19,812 during the 2018 tax year.
2. Respondent determined that appellant did not file a tax return for 2018. Thus, respondent issued a Demand for Tax Return (Demand) to appellant, based on mortgage interest paid by appellant.
3. Appellant did not respond to the Demand for 2018 and respondent issued a Notice of Proposed Assessment (NPA) for 2018, assessing tax of $6,352, a delinquent filing penalty of $1,588, a demand penalty of $1,588, and a filing enforcement fee of $97, plus interest.
4. Appellant protested the NPA, arguing that she did not earn income in 2018.
5. Respondent requested substantiating information. When none was provided, respondent issued a Notice of Action (NOA) affirming its proposed assessment.
6. This timely appeal followed.[1]

DISCUSSION

Issue 1: Whether appellant has demonstrated that respondent's proposed assessment of tax for the 2018 tax year is in error.

If a taxpayer fails to file a return, then respondent, 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." (R&TC, § 19087(a), *Appeal of Bindley*, 2019-OTA-179P.) Respondent may estimate income when a taxpayer fails to file a return or provide the information necessary to ascertain their tax liability. (*Appeal of Bindley*, *supra*.) If respondent proposes a tax assessment based on an estimate of income, then respondent's initial burden is to show that its proposed assessment is reasonable and rational. (*Ibid*.) An assessment based on unreported income is presumed correct when the taxing agency introduces a minimal factual

[1] Appellant argues that she did not receive respondent's NOA until January 2, 2022, and she was required to respond by January 3, 2022. Appellant asserts that her neighborhood had a problem with mailboxes being broken into and states that she also did not receive respondent's Request for Additional Information dated September 26, 2021. Respondent asks OTA to, "Verify the mail situation and lost mail concerns if relevant." However, neither party disputes the timeliness of this appeal so OTA will not address the issue any further. Additionally, appellant was provided a copy of the September 26, 2021 letter from respondent with respondent's opening brief and was given an opportunity to provide additional information, including the additional information requested in this letter.

foundation to support the assessment. (*Ibid*.) Once respondent has met its initial burden, respondent's proposed assessment is presumed correct, and the taxpayer has the burden of proving that the assessment is incorrect. (*Ibid*.) Respondent's determination must be upheld in the absence of credible, competent, and relevant evidence showing error in its determination. (*Ibid*.)

Respondent estimated appellant's income to be $118,872 based on third-party information showing that appellant paid mortgage interest of $19,812 during the 2018 tax year.[2] OTA finds that it was reasonable and rational for respondent to infer that appellant earned sufficient income to make mortgage interest payments in 2018 based on this information. Furthermore, OTA finds that respondent's estimate is reasonable and rational as it is based on an analysis of millions of tax returns which showed a statistical relationship between the mortgage interest paid by taxpayers and the income shown on taxpayers' returns. Thus, respondent's assessment is presumed correct and the burden shifts to appellant to show that respondent's assessment is incorrect.

Appellant argues that respondent's assessment is incorrect because appellant did not earn income in 2018 as she did not work in 2018. Appellant notes that she received a Form W-2 for $966 in 2018, but states that this is inconsequential because her gross income was still below the federal filing threshold and that had she filed, she would have received a refund. Appellant states that she consulted with a tax preparer who agreed with her.

Appellant has failed to meet her burden to show that respondent's assessment is in error. Respondent has provided evidence that appellant paid mortgage interest in 2018 in an amount, which indicates that she earned income sufficient to trigger a filing requirement. Respondent estimated that appellant earned income of approximately $118,872. While appellant asserts that she did not earn income in 2018, appellant has failed to provide any evidence to refute respondent's assessment, or to explain how she was able to make her mortgage payments without income, despite being given the opportunity to do so.[3] A taxpayer's failure to produce evidence that is within the taxpayer's control gives rise to a presumption that such evidence is

[2] Respondent multiplied appellant's mortgage interest paid of $19,812 by six to compute total estimated income of $118,872.

[3] OTA wrote to appellant and requested this information, but appellant declined to provide it.

unfavorable to the taxpayer's case. (*Appeal of Bindley*, *supra*.) Thus, OTA finds that appellant has failed to meet her burden to show that respondent's assessment is in error.

Issue 2: Whether appellant has established reasonable cause to abate the late filing penalty.

When respondent imposes a penalty, the law presumes that the penalty was imposed correctly. (*Appeal of Xie*, 2018-OTA-076P). The burden of proof is on the taxpayer to show that reasonable cause exists to support an abatement of the penalty. (*Ibid*.) To overcome the presumption of correctness attached to the penalty, appellant must provide credible and competent evidence supporting a claim of reasonable cause; otherwise, the penalty cannot be abated. (*Ibid*.)

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 5 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. Here, appellant's 2018 return was due on April 15, 2019, but appellant has not filed a return. While appellant argues that she did not have a filing requirement, respondent has provided evidence showing that appellant did in fact have a filing requirement and appellant has not provided any evidence to rebut the presumption that the late filing penalty was properly imposed.

The late filing penalty may be abated if the taxpayer establishes that the failure to file a return was due to reasonable cause and not willful neglect. (R&TC, § 19131(a).) For a taxpayer to establish that a failure to act was due to reasonable cause, the taxpayer must show that the failure occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Belcher*, 2021-OTA-284P.) Reliance on a tax professional's advice for questions of substantive tax law, such as whether a liability exists, may constitute reasonable cause, where certain conditions are met, including where the tax professional has competency in the subject tax law and the tax professional's advice is based on the taxpayer's full disclosure of the relevant facts and documents. (*U.S. v. Boyle, (1985), 469 U.S. 241 (Boyle)*; *Appeal of Summit Hosting LLC*, 2021-OTA-216P.) By contrast, reliance on an expert cannot function as a substitute for compliance with an unambiguous statute. (*Boyle, supra.*)

As noted above, the law presumes that the penalty was properly imposed, and the burden is on appellant to show that reasonable cause exists to abate the penalty. (*Appeal of Xie, supra*). In addition, appellant must show that reasonable cause existed until the return was filed. (*Appeal of Head and Feliciano,* 2020-OTA-127P.) Here, appellant has yet to file her 2018 return.

With regard to appellant's reliance on a licensed tax professional, appellant states that she spoke with the tax preparer prior to filing her appeal. As previously stated, reliance on a tax professional's advice for questions of substantive tax law, such as whether a liability exists, may constitute reasonable cause, where certain conditions are met, including where the tax professional has competency in the subject tax law and the tax professional's advice is based on the taxpayer's full disclosure of the relevant facts and documents. OTA requested additional information regarding whether appellant's reliance on this tax preparer was reasonable, but appellant declined to respond. As appellant has failed to show that the required conditions established in *Boyle, supra* and *Appeal of Summit Hosting, LLC, supra* were met, OTA has no basis abate the late filing penalty.

Issue 3: Whether appellant has established reasonable cause to abate the demand penalty.

If any taxpayer fails or refuses to furnish any information requested in writing by respondent or fails or refuses to make and file a return upon notice and demand by respondent, then, unless the failure is due to reasonable cause, respondent may add a penalty of 25 percent of the amount of any tax assessed by respondent pertaining to the assessment for which the information or return was required. (R&TC, § 19133.) To establish reasonable cause, a taxpayer's failure to respond to a Demand must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Patient Comfort Services, LLC,* 2021-OTA-300P.)

Appellant does not dispute that the demand penalty was properly computed or imposed, but rather argues that she did not have a filing requirement for 2018. Appellant has not explained nor submitted evidence to establish reasonable cause for failure to respond to the Demand. Thus, OTA has no basis to abate the demand penalty.

Issue 4: Whether appellant has established that the filing enforcement fee should be abated.

R&TC section 19254(a)(2) provides that, if respondent mails a formal legal demand for a tax return to a taxpayer, a filing enforcement fee is required to be imposed when the taxpayer fails or refuses to file the return within the prescribed time period. Once properly imposed, there is no provision in the R&TC which would excuse respondent from imposing the filing enforcement fee for any circumstances, including reasonable cause. (R&TC, § 19254; *Appeal of GEF Operating, Inc.,* 2020-OTA-057P.) Here, respondent informed appellant in the Demand that appellant may be subject to the filing enforcement fee if appellant did not file a tax return for the 2018 tax year. Respondent did not receive a return from appellant within the prescribed period in the Demand. Therefore, respondent properly imposed the filing enforcement fee of $97 and OTA has no basis to abate this fee.

Issue 5: Whether appellant has established that interest may be abated.

Interest must be assessed from the date a tax payment is due through the date that it is paid. (R&TC, § 19101.) Imposition of interest is mandatory; it is not a penalty, but is compensation for appellant's use of money after it should have been paid to the state. (*Appeal of Moy*, 2019-OTA-057P.) Interest can only be abated in certain limited situations when authorized by law. (*Appeal of Balch*, 2018-OTA-159P.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Summit Hosting, LLC, supra.*) To obtain relief from interest, appellant must qualify under R&TC section 19104, 19112, or 21012; however, based on the evidence and arguments provided in this matter, none of these statutory provisions apply.[4] Thus, OTA finds that appellant has not established any basis for abatement of interest.

[4] Pursuant to R&TC section 19104, respondent 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 respondent. Here, appellant does not assert any such errors or delays occurred. Further, relief pursuant to R&TC section 21012 is not relevant here because respondent did not provide appellant with any written advice. Relief pursuant to R&TC section 19112 is not relevant here because appellant does not allege extreme financial hardship caused by significant disability or other catastrophic circumstance, which OTA does not have authority to review. (See *Appeal of Moy*, *supra*.)

HOLDINGS

1. Appellant has not established error in respondent's proposed assessment of tax for the 2018 tax year.
2. Appellant has not established reasonable cause to abate the late filing penalty.
3. Appellant has not established reasonable cause to abate the demand penalty.
4. Appellant has not established that the filing enforcement fee should be abated.
5. Appellant has not established that interest may be abated.

DISPOSITION

Respondent's determination is sustained in full.

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Natasha Ralston
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Natasha Ralston
Administrative Law Judge

We concur:

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Keith T. Long
Administrative Law Judge

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Asaf Kletter
Administrative Law Judge

Date Issued: 11/30/2022