

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:)
R. VAN DIGGELE) OTA Case No. 220310057
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OPINION

Representing the Parties:

For Appellant: R. Van Diggele
For Respondent: Topher Tuttle, Tax Counsel III

V. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, R. Van Diggele (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$3,333.00, a late filing penalty of \$833.25, and applicable interest for the 2019 taxable year.

Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUES

1. Whether appellant has shown error in FTB’s proposed assessment of tax.
2. Whether appellant has shown the late filing penalty should be abated.
3. Whether appellant has shown interest should be abated.

FACTUAL FINDINGS

1. Appellant did not file a California income tax return for the 2019 taxable year.
2. Through its Integrated Non-Filer Compliance Program, FTB obtained information from California Department of Tax and Fee Administration (CDTFA) indicating that appellant engaged in sales activity during the 2019 taxable year and from the IRS indicating that appellant received miscellaneous income, reported on federal Forms 1099-MISC, of \$8,718.00 for the 2019 taxable year.

3. Then, FTB issued appellant a notice requesting that appellant file a return or explain why no return was required.¹
4. Based on the information received through its Integrated Non-filer Compliance Program, FTB estimated appellant's gross income for the 2019 taxable year to be \$72,099.03 (i.e., \$63,381.03² plus \$8,718.00). FTB reduced this amount by the standard deduction of \$4,537.00, resulting in taxable income of \$67,562.03. When appellant did not file a return, FTB issued a Notice of Proposed Assessment (NPA) for the 2019 taxable year proposing tax of \$3,333.00 and a late filing penalty of \$833.25, plus applicable interest.
5. Appellant filed a timely protest asserting the miscellaneous income reported on federal Forms 1099-MISC was included in his reported gross sales to CDTFA and asserting that the standard deduction of \$4,537.00 was too low.
6. Subsequently, FTB issued a Notice of Action, affirming its NPA.
7. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has shown error in FTB's proposed assessment of tax.

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, [FTB], 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 based on an estimate of income, FTB's initial burden is to show why its proposed tax assessment is reasonable and rational. (*Appeal of*

¹ For the 2019 taxable year, the minimum California adjusted gross income filing threshold for a single filer under 65 years of age with no dependents was \$18,241.00. (See <https://www.ftb.ca.gov/forms/2019/2019-540-booklet.html#Do-I-Have-to-File>.)

² To arrive at \$63,381.03, FTB used gross sales from appellant's sales tax return and multiplied it by the average gross profit percentage for appellant's type of business.

Bindley, 2019-OTA-179P.) Federal courts have held that the taxing agency need only introduce some evidence linking the taxpayer with the unreported income. (See *Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932.) When a taxpayer fails to file a valid return, FTB's use of income information from third party sources to estimate a taxpayer's taxable income is a reasonable and rational method of estimating taxable income. (*Appeal of Bindley, supra.*) Once FTB has met its initial burden, the proposed assessment is presumed correct and the taxpayer has the burden of proving it wrong. (*Todd v. McColgan* (1949) 89 Cal.App 2d 509, 514; *Appeal of Bindley, supra.*)

Appellant's gross sales reported to CDTFA and the federal Forms 1099-MISC reporting miscellaneous income constitute substantive evidence linking appellant to unreported California income. FTB reasonably and rationally estimated appellant's income based on this information. Therefore, FTB met its initial burden, and the proposed assessment is presumed correct and appellant has the burden of proving it wrong. (*Todd v. McColgan, supra.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of 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's protest letter states that the estimated income is incorrect because the income reported on Forms 1099-MISC was included by him in his sales tax return to CDTFA. Appellant provided copies of his quarterly sales tax reporting, reflecting total gross sales of \$68,855. However, no evidence has been provided to show that the amounts reported on Forms 1099-MISC, totaling \$8,718.00, were included by appellant in his sales tax return to CDTFA. Appellant also asserts the amount of the standard deduction was too low. However, appellant has not provided any evidence to substantiate entitlement to a greater deduction. Accordingly, appellant has not met his burden of demonstrating error in FTB's determination.

Issue 2: Whether appellant has shown the late filing penalty should be abated.

California imposes a penalty for the failure to file a return by the due date, unless the failure to file was due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) The late filing penalty is computed at 5 percent of the tax due, after allowing for timely payments, for every month elapsing from the due date of the return (without regard to any extension) to the filing date, up to a maximum of 25 percent. (*Ibid.*) To establish reasonable cause, a taxpayer must show that the failure to file timely returns 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.)

Appellant’s return was due on July 15, 2020.³ As of the filing date of this appeal, appellant has not filed a tax return with FTB for the 2019 taxable year. Appellant asserts he has not filed a return because of hardship caused by the coronavirus pandemic, that he is too busy running a business, and that his tax preparer does not have time to prepare appellant’s tax return for the 2019 taxable year. It is well established that taxpayers have a personal, non-delegable obligation to ensure timely filing of a tax return. (*Appeal of Fisher*, 2022-OTA-337P.) Mere reliance upon an agent, such as a return preparer, to timely file a tax return does not constitute reasonable cause. (*Ibid.*) A taxpayer’s selective inability to perform tax obligations, while participating in regular business activities, does not establish reasonable cause. (*Appeal of Head and Feliciano*, 2020-OTA-127P.) Appellant’s decision to not file a timely tax return because he was busy running a business does not negate his obligation to file a timely tax return. When a taxpayer sacrifices the timeliness of one aspect of their affairs to pursue other aspects, the taxpayer must bear the consequences of that choice. (*Ibid.*) Similarly, the workload of appellant’s return preparer does not constitute reasonable cause because appellant has a personal, non-delegable obligation to ensure that his tax return is timely filed. Appellant has not asserted any specific hardships due to the coronavirus pandemic and the due date for the return was already extended to permit additional time for filing the return due to the coronavirus pandemic. Accordingly, there is no basis for abatement of the penalty.

Issue 3: Whether appellant has shown interest should be abated.

If any amount of the tax is not paid by the due date, interest is required to be imposed from the due date until the date the taxes are paid. (R&TC, § 19101(a).) Interest is not a penalty but is compensation for the taxpayer’s use of money which should have been paid to the state. (*Appeal of Balch*, 2018-OTA-159P.) Imposition of interest is mandatory, and it can only be abated in certain limited situations when authorized by law. (R&TC, § 19101(a); *Appeal of Balch*, *supra*.) There is no reasonable cause exception to the imposition of interest. (*Appeal of*

³ For the 2019 taxable year, the deadline to file California tax returns and pay tax was postponed to July 15, 2020, because of the coronavirus pandemic, in line with the IRS’s postponement of the deadline for federal tax returns for taxable year 2019. (See: <https://www.ftb.ca.gov/about-ftb/newsroom/news-releases/2020-3-state-postpones-tax-deadlines-until-july-15-due-to-the-covid-19-pandemic.html>.)

Moy, 2019-OTA-057P.) Office of Tax Appeals has jurisdiction to determine whether appellant is entitled to the abatement of interest under R&TC sections 19104 and 21012. (*Ibid.*) R&TC section 19104 does not apply here because appellant does not allege, and the evidence does not show, that the interest at issue is attributable, in whole or in part, to any unreasonable error or delay by an officer or employee of FTB when performing a ministerial or managerial act. R&TC section 21012 does not apply as FTB did not provide appellant with any requested written advice. Thus, appellant has not established a basis for interest abatement for the 2019 taxable year.

HOLDINGS

1. Appellant has not shown error in FTB’s proposed assessment of tax.
2. Appellant has not shown the late filing penalty should be abated.
3. Appellant has not shown interest should be abated.

DISPOSITION

FTB’s action is sustained.

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Veronica I. Long
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Veronica I. Long
Administrative Law Judge

We concur:

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Huy “Mike” Le
Administrative Law Judge

DocuSigned by:

Kenneth Gast
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Kenneth Gast
Administrative Law Judge

Date Issued: 12/8/2022