

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 220410280
R. BURNINGHAM)
)
)
)
)
)
)

OPINION

Representing the Parties:

For Appellant: R. Burningham
For Respondent: Joel M. Smith, Tax Counsel III

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, R. Burningham (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$8,325.00, a late filing penalty of \$2,081.25, a notice and demand (demand) penalty of \$2,081.25, and a filing enforcement cost recovery fee (filing enforcement fee) of \$97.00, plus applicable interest, for the 2018 tax year.

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

ISSUES

1. Whether appellant established error in FTB’s proposed additional tax assessment.
2. Whether the late filing penalty should be abated.
3. Whether the demand penalty should be abated.
4. Whether the filing enforcement fee should be abated.
5. Whether a frivolous appeal penalty should be imposed.

FACTUAL FINDINGS

1. Appellant did not file a California income tax return for 2018. FTB received wage information from the California Employment Development Department (EDD) showing

that appellant earned sufficient income to prompt a return-filing requirement. FTB then initiated a filing enforcement action by issuing a Demand for Tax Return (Demand) to appellant, requiring appellant to respond by September 9, 2020, either by filing a 2018 return, providing a copy of a previously filed return, or explaining why he did not need to file a return.

2. Appellant responded to the Demand on September 1, 2020, contending that he was not subject to California income tax. Subsequently, FTB issued a Determination of Filing Requirement – Tax Return Demand (Second Demand), which required appellant to file a return by January 4, 2021. Appellant did not respond to the Second Demand.
3. FTB issued a Notice of Proposed Assessment (NPA) on July 9, 2021, which estimated that in 2018 appellant received income of \$124,718.00,¹ and proposed to assess tax of \$8,325.00, a late filing penalty of \$2,081.25, a demand penalty of \$2,081.25, and a filing enforcement fee of \$97.00, plus interest.²
4. Appellant timely protested the NPA, and FTB affirmed the NPA in a Notice of Action.
5. This timely appeal followed.³

DISCUSSION

Issue 1: Whether appellant established error in FTB’s proposed additional tax assessment.

California residents are taxed upon their entire taxable income regardless of the source of that income. (R&TC, § 17041(a).) 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 the 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

¹ FTB’s estimate of appellant’s income is based his wages as reported by his employers. FTB provides appellant’s federal Wage and Income Transcript which confirms the reported wages on Forms W-2.

² FTB issued separate Demands to appellant for the 2014, 2015, and 2016 tax years, and issued NPAs to appellant for each tax year after appellant did not timely respond to the Demands.

³ In a prior appeal before OTA for the 2013 tax year, OTA issued an Opinion which did not impose a frivolous appeal penalty but notified appellant that appellant’s “positions and conduct in this [prior] appeal suggest that such a penalty may be warranted in the future should he file another appeal with OTA raising the same or similar issues.” (See *Appeal of Burningham*, 2020-OTA-054.) In a letter from OTA to appellant on May 10, 2022, accepting appellant’s current appeal, appellant was notified that a frivolous appeal penalty may apply.

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. (*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 this initial burden, the burden then shifts to the taxpayer to prove the proposed assessment is wrong. (*Ibid.*)

R&TC sections 17071 and 17072 define “gross income” and “adjusted gross income” by referring to and incorporating into California law Internal Revenue Code (IRC) sections 61 and 62, respectively. IRC section 61 states that, unless otherwise provided, “gross income means all income from whatever source derived,” including compensation for services. Income generally includes any “accessions to wealth.” (*Commissioner v. Glenshaw Glass Co.* (1955) 348 U.S. 426, 431.) Wages and compensation for services are gross income within the meaning of IRC section 61. (*U. S. v. Romero* (1981) 640 F.2d 1014, 1016; *Appeal of Balch*, 2018-OTA-159P.)

Appellant did not file a 2018 return. FTB received wage information from EDD, which it used to estimate appellant’s income. The wages were also reported on Forms W-2 issued by appellant’s employer. Therefore, appellant must include his wages in his gross income, pursuant to IRC section 61. (See also *Appeal of Balch*, *supra*.) Based on this income, FTB determined that appellant had a return filing requirement. FTB’s use of wage information from EDD to estimate appellant’s income is reasonable and rational. (See *Appeal of Bindley*, *supra*.) Therefore, the burden shifts to appellant to establish error in FTB’s determination.

Appellant provides frivolous arguments, such as there is “no law making working Americans liable for the income tax,” there is “no lawful basis for treating personal earnings as 100% profit,” and the “right to earn a living is as exempt from taxation as freedom of speech.” Frivolous arguments such as these do not establish that appellant was not required to report his wages as income. (See *Appeal of Balch*, *supra*.) Appellant does not provide any argument or evidence establishing error in FTB’s determination. Therefore, appellant has not met his burden of showing error in FTB’s determination.

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

California imposes a penalty for failing to file a return on or before the due date, unless the taxpayer shows that the failure is due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) When FTB imposes a penalty, it is presumed to have been imposed correctly. (*Appeal of Xie*, 2018-OTA-076P.) A taxpayer may rebut this presumption by providing credible and competent evidence supporting abatement of the penalty for reasonable cause. (*Ibid.*)

Appellant did not file a 2018 return. Appellant argues that he has no filing requirement and does not owe tax on the income received. However, OTA has determined that appellant had sufficient income to require him to file a return for the 2018 tax year and appellant provides no argument or evidence establishing the penalty was improperly imposed or that he had reasonable cause for the failure to timely file a return. Therefore, the late filing penalty should not be abated.

Issue 3: Whether the demand penalty should be abated.

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 for Tax Return 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.⁴ (Cal. Code Regs, tit. 18, § 19133(b)(1)-(2).)

Appellant failed to respond to the Second Demand for 2018. In addition, FTB issued Demands for the 2014, 2015, and 2016 tax years, and issued NPAs for each tax year after appellant did not timely respond to the Demands. Therefore, the conditions under California Code of Regulations, title 18, section (Regulation) section 19133 are met, and FTB properly imposed the demand penalty. Appellant provides the same or similar arguments as to the

⁴ Operative October 19, 2021, amendments to Regulation section 19133(b) and (d) are applicable for demand penalties imposed on a proposed assessment of tax under the authority of R&TC section 19087, on or after January 1, 2020. (Cal. Code Regs, tit. 18, § 19133(e).) In this case, the NPA imposing the demand penalty was issued on July 9, 2021. Therefore, the amendments to the regulation are applicable to the demand penalties in this case.

demand penalty as he did for the late filing penalty. However, appellant provides no argument or evidence establishing reasonable cause for the failure to timely respond to the Second Demand. Therefore, the demand should not be abated.

Issue 4: Whether the filing enforcement fee should be abated.

R&TC section 19254(a)(2) provides that if a taxpayer fails or refuses to make and file a tax return within 25 days after FTB mails to that person a formal legal demand to file the tax return, FTB will impose a filing enforcement cost recovery fee. Once properly imposed, there is no provision in the R&TC which would excuse FTB from imposing the filing enforcement cost recovery fee under any circumstances, including reasonable cause. (*Appeal of Wright Capital Holdings LLC*, 2019-OTA-219P.)

Here, FTB informed appellant in its Second Demand that appellant would be subject to the filing enforcement cost recovery fee if appellant did not file a 2018 return by the due date provided. Appellant did not file such a return. Therefore, FTB properly imposed the filing enforcement cost recovery fee, and there is no basis to abate it.

Issue 5: Whether a frivolous appeal penalty should be imposed.

R&TC section 19714 provides that a penalty of up to \$5,000 shall be imposed whenever it appears to OTA that proceedings before it have been instituted or maintained primarily for delay, or that the appellant's position is frivolous or groundless. Regulation section 30217(a) provides that OTA may impose a frivolous appeal penalty pursuant to R&TC section 19714 "[i]f a Panel determines that a franchise or income tax appeal is frivolous or has been filed or maintained primarily for the purpose of delay." Regulation section 30217(b) lists the following nonexclusive factors to be considered in determining whether, and in what amount, to impose a frivolous appeal penalty: (1) whether the appellant is making arguments that OTA, in a precedential Opinion, or the State Board of Equalization (BOE), in a precedential Opinion, or courts have rejected; (2) whether the appellant is making the same arguments that the same appellant made in prior appeals; (3) whether the appellant submitted the appeal with the intent of delaying legitimate tax proceedings or the legitimate collection of tax owed; (4) whether the appellant has a history of submitting frivolous appeals or failing to comply with California's tax laws; or (5) whether the appellant has been notified, in a current or prior appeal, that a frivolous appeal penalty may apply.

Appellant’s arguments, such as that his wages are not taxable income, are arguments that have been consistently rejected by the IRS, the courts, FTB, BOE, and OTA. (See *Appeal of Balch, supra.*) In a letter from OTA to appellant on May 10, 2022, accepting appellant’s current appeal, appellant was notified that a frivolous appeal penalty may apply. In a prior appeal before OTA for the 2013 tax year, OTA issued an Opinion which did not impose a frivolous appeal penalty but notified appellant that appellant’s “positions and conduct in this [prior] appeal suggest that such a penalty may be warranted in the future should he file another appeal with OTA raising the same or similar issues.” (See *Appeal of Burningham, 2020-OTA-054.*) Appellant provides the same or similar arguments in this appeal as done in the prior appeal, which demonstrates a history of submitting frivolous appeals and failing to comply with California’s tax laws.


Based on the foregoing, OTA imposes a frivolous appeal penalty of \$500. If appellant files additional appeals that raise similar frivolous arguments, OTA may impose additional frivolous appeal penalties pursuant to R&TC section 19714, up to the maximum of \$5,000 per appeal.

HOLDINGS


1. Appellant has not established error in FTB’s proposed additional tax assessment.
2. The late filing penalty should not be abated.
3. The demand penalty should not be abated.
4. The filing enforcement fee should not be abated.
5. A frivolous appeal penalty of \$500 should be imposed.

DISPOSITION


FTB’s action is sustained. In addition, a frivolous appeal penalty in the amount of \$500 is imposed, pursuant to R&TC section 19714.

DocuSigned by:

 CB1F7DA37831416...

 Josh Lambert
 Administrative Law Judge

We concur:
 DocuSigned by:

 48745BB806914B4...

 Josh Aldrich
 Administrative Law Judge

DocuSigned by:

 0CC6C6ACCC6A44D...

 Teresa A. Stanley
 Administrative Law Judge

Date Issued: 12/19/2022