

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
F. KISS

) OTA Case No. 21108899
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OPINION

Representing the Parties:

For Appellant: F. Kiss

For Respondent: Christopher T. Tuttle, Tax Counsel III

A. KLETTER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, F. Kiss (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$24,026.48¹ for the 1991 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 shown error in FTB’s assessment of additional tax for the 1991 tax year.
2. Whether FTB properly imposed the post-amnesty penalty, and whether OTA has jurisdiction to consider abatement of the penalty.
3. Whether appellant has established grounds to abate the collection cost recovery fee (collection cost fee) and the lien fee (collectively, collection fees).
4. Whether appellant is entitled to interest abatement.

¹ Of the \$24,026.48, it appears \$3,898.00 is tax, \$116.00 is collection fees, \$3,239.68 is the amnesty penalty, and the remainder is interest.

FACTUAL FINDINGS

1. Appellant timely filed his 1991 California personal income tax return, reporting an overpayment.
2. FTB subsequently received information that appellant had been deposed in connection with a lawsuit and gave sworn testimony that he had unreported income of \$50,501.² On August 24, 1995, FTB issued to appellant a Notice of Proposed Assessment (NPA) proposing to assess additional tax of \$3,858, plus interest. Appellant did not protest the NPA and it went final.
3. FTB sent collection notices to appellant for the amount due. Appellant did not respond.
4. FTB conducted an amnesty program from February 1, 2005, through March 31, 2005. Appellant did not participate in the amnesty program. On February 22, 2006, FTB imposed a post-amnesty penalty because of appellant's outstanding liability for the 1991 tax year.
5. On June 30, 2008, appellant filed an amended tax return revising his taxable income to exclude the unreported income added by FTB. It appears FTB did not act on the amended tax return which reported the same taxable income as on appellant's original return.
6. Appellant contacted FTB to resolve his tax dispute on several occasions, and untimely protested the NPA. FTB notified appellant that the protest was untimely.
7. On December 15, 2020, and on April 15, 2021, appellant paid the balance due for the 1991 tax year. On June 4, 2021, appellant filed a claim for refund.³
8. FTB denied the claim for refund on September 29, 2021.
9. Appellant timely appeals.

² The deposition statement is not in the record.

³ There is an unresolved discrepancy between appellant's claim for refund of \$24,026.48, and appellant's payments totaling \$24,106.90 (\$1,275.44 payment on December 15, 2020, plus \$22,831.46 payment on April 15, 2021). The difference is \$80.42.

DISCUSSION

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

Where FTB makes a proposed assessment based on an estimate of income, FTB's initial burden is to show that the proposed 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 the unreported income. (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*.) In the present case, FTB obtained information from a deposition statement in which appellant claimed he had unreported income of \$50,501. FTB estimated appellant's income by adding the unreported income to appellant's reported income. OTA finds that use of the sworn court statement to arrive at the assessment is reasonable and rational.

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*.) FTB's determinations cannot be successfully rebutted when a taxpayer fails to provide credible, competent, and relevant evidence as to the issues in dispute. (*Todd v. McColgan, supra; Bindley, supra*.)

Appellant's sole contention on appeal is that FTB erred in its determination that he earned unreported income. Specifically, appellant provides court documentation as proof that "no money was exchanged." It appears that appellant relies on a Los Angeles superior court document dated November 19, 1992, which indicates that pursuant to arbitration, no party was entitled to recovery from the lawsuit. However, that document does not address (let alone contradict) appellant's sworn deposition statement that he earned unreported income. Thus, the November 19, 1992 document is not credible or competent evidence that appellant did not make the deposition statement or did not earn the unreported income which is the basis for FTB's assessment. Although OTA provided an opportunity for the parties to provide additional evidence, appellant did not respond. As appellant failed to provide any other evidence in support of his contention that FTB's determination for the 1991 tax year is in error, OTA sustains FTB's determination.

Issue 2: Whether FTB properly imposed the post-amnesty penalty, and whether OTA has jurisdiction to consider abatement of the penalty.

In 2004, the Legislature enacted Senate Bill 1100 which authorized FTB to institute an income tax amnesty program. (R&TC, §§ 19730-19738.) A taxpayer who participated in the program could satisfy unpaid California income and franchise tax liabilities for tax years beginning before January 1, 2003. (R&TC, §§ 19731, 19733.) However, a taxpayer with outstanding balances for eligible tax years who did not participate in the program was subject to penalty under R&TC section 19777.5. R&TC section 19777.5(a)(1) provides that, for amounts due and payable on the last day of the amnesty period, a penalty will be imposed equal to 50 percent of the accrued interest payable under R&TC section 19101, calculated from the last date prescribed by law for payment of that tax to the last day of the amnesty period.

OTA's jurisdiction to review the post-amnesty penalty is extremely limited. As relevant here, a taxpayer may not file a claim for refund for any amounts paid in connection with the penalty, except on the grounds that the amount of the penalty was not properly computed by FTB. (R&TC, § 19777.5(e).) There is no reasonable cause or good faith exceptions for failing to participate in the program. (*Ibid.*) Appellant does not contend, and the evidence does not show that FTB failed to properly compute the amounts of the post-amnesty penalty. Since our jurisdiction is limited to the computation of the penalty, OTA has no jurisdiction to consider abatement of the penalty.

Issue 3: Whether appellant has established grounds to abate the collection fees.

R&TC section 19254(a)(1) requires FTB to impose a collection cost fee when FTB notifies a taxpayer that the continued failure to pay an amount due may result in the imposition of the fee, and the taxpayer fails to timely pay the amount due in response to the notice. The amount of the collection cost fee is adjusted annually to reflect annual enforcement costs.⁴ There is no reasonable cause defense to the imposition of the collection cost fee; thus, our inquiry is limited to determining whether FTB complied with the statutory notice requirements for imposing the cost collection recovery fee. (*Auburn Old Town Gallery, LLC*, 2019-OTA-319P.)

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

In addition, if a taxpayer fails to pay any liability at the time that it becomes due and payable, FTB is authorized by R&TC section 19221 and Government Code sections 7174, 27361, 27361.3 and 27361.4 to secure and release liens and to charge the taxpayer a lien fee. Once properly imposed, there is no provision in the R&TC which would excuse the imposition of the lien fee for any circumstances, including reasonable cause.

Here, FTB issued several collection notices which informed appellant that failure to pay the liability may result in collection action and imposition of a collection cost fee. The collection cost fee was required to be imposed by R&TC section 19254(a)(1) because appellant failed to pay the liability after receiving notice that the continued failure to pay the liability may result in imposition of the collection cost fee. Appellant did not make payment until years later in 2020. As a result, the collection cost recovery fee was properly imposed. Furthermore, as appellant failed to pay the additional tax and interest at the time it became due and payable, FTB properly imposed the lien fee. Therefore, OTA sustains FTB's imposition of the collection fees.

Issue 4: Whether appellant is entitled to interest abatement.

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, 19112, or 21012.⁵ (*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.


⁵ 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 FTB employee. Under R&TC section 19112, FTB may waive interest for any period for which FTB determines that an individual has extreme financial hardship. OTA does not have authority to review extreme financial hardship determinations. (See *Appeal of Moy*, 2019-OTA-057P.) Under R&TC section 21012, a person may be relieved from interest if that person reasonably relies on written advice from FTB in response to a written request.

HOLDINGS

1. Appellant has not shown error in FTB’s assessment of additional tax for the 1991 tax year.
2. FTB properly imposed the post-amnesty penalty, and OTA does not have jurisdiction to consider abatement of the penalty.
3. Appellant has not established grounds to abate the collection fees.
4. Appellant is not entitled to interest abatement.


DISPOSITION

FTB’s action in denying appellant’s claim for refund is sustained.

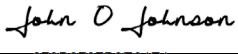
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 Administrative Law Judge

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 John O. Johnson
 Administrative Law Judge

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