

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
S. ITLIONG

) OTA Case No. 220610650
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OPINION

Representing the Parties:

For Appellant: Michael P. Mears, Attorney

For Respondent: Christopher M. Cook, Tax Counsel

E. LAM, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, S. Itliong (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$12,216, a late filing penalty of \$3,054, a notice and demand (demand penalty) of \$3,054, a filing enforcement cost recovery fee of \$97, and applicable interest, for the 2019 tax 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 demonstrated error in FTB’s determination that appellant has a filing requirement for the 2019 tax year and owes tax.
2. Whether appellant has demonstrated reasonable cause to abate the late filing penalty.
3. Whether appellant has shown that FTB incorrectly imposed the demand penalty.
4. Whether there is a basis to abate the filing enforcement cost recovery fee.
5. Whether appellant has established that interest should be abated.

FACTUAL FINDINGS

1. Appellant did not file a 2019 California Resident Income Tax Return (Form 540) as of the date briefing was closed.

2. FTB received third party payor information indicating that appellant received sufficient income to have a California tax filing requirement. As such, FTB issued a Demand for Tax Return (Demand) for the 2019 tax year, but appellant did not timely file a tax return or respond to the Demand.
3. Following appellant's nonresponse to the Demand, FTB issued a Notice of Proposed Assessment (NPA) for the 2019 tax year proposing tax, a late filing penalty, a demand penalty, a filing enforcement cost recovery fee, and applicable interest, for the 2019 tax year. Thereafter, appellant protested the NPA, stating that a tax return will be prepared to determine the true amount of liability.
4. Appellant did not provide a 2019 tax return; therefore, FTB issued a Notice of Action affirming the NPA.
5. This timely appeal followed.
6. On appeal, FTB provides copies of NPAs issued for the 2015 through 2017 tax years that impose a demand penalty.

DISCUSSION

Issue 1: Whether appellant has demonstrated error in FTB's determination that appellant has a filing requirement for the 2019 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).)¹ For the 2019 tax year, the filing threshold for a single individual under 65 years of age with no dependents is gross income of more than \$18,241 or adjusted gross income of more than \$14,593; and the filing threshold for a single individual 65 years of age or older with no dependents is gross income of more than \$24,341 or adjusted gross income of more than \$20,693.

Here, FTB received third party payor information indicating that appellant received interest income, dividend income, and sale of stock income that exceeded both gross income

¹ FTB annually adjusts the filing thresholds for tax years beginning on or after January 1, 1996. (See R&TC, § 18501(d).)

thresholds, as mentioned above, for the 2019 tax year. Thus, appellant, as a California resident subject to tax on appellant's worldwide income under R&TC section 17041(a)(1), had a 2019 California filing requirement.

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." As noted above, California imposes a tax on the entire taxable income of a resident, such as appellant. (R&TC, § 17041(a)(1).) When FTB makes a proposed assessment based on an estimate of income, FTB's initial burden is to show why its proposed assessment is reasonable and rational. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514 (*Todd*); *Appeal of Bindley*, 2019-OTA-179P (*Bindley*).

Here, appellant failed to file a 2019 California resident tax return, even after FTB issued appellant the 2019 Demand. FTB estimated appellant's 2019 income based on third party payor information. Appellant does not dispute that appellant received interest income, dividend income, and sale of stock income. FTB's use of third party payor information to estimate appellant's taxable income is both reasonable and rational. (*Bindley, supra*.)

Once FTB has met its initial burden, the proposed assessment of tax is presumed correct and the taxpayer has the burden of proving it to be wrong. (*Todd, supra; Bindley, supra*.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Bindley, supra*.) In the absence of credible, competent, and relevant evidence showing error in FTB's determination, the determination must be upheld. (*Ibid.*) 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 failed to provide any supporting documentation to demonstrate that appellant does not have a 2019 California filing requirement. On appeal, it appears that appellant argues that the proposed assessment of tax is incorrect, and that appellant will file a 2019 tax return to determine the correct tax liability. As of the date briefing was closed, appellant has not provided a filed copy of the 2019 tax return or documentation that the proposed assessment of tax is incorrect. Therefore, appellant has not met the burden of proof to demonstrate error in FTB's proposed assessment of tax.

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

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. Generally, to establish reasonable cause, the taxpayer must show that the failure to file a timely return occurred despite the exercise of ordinary business care and prudence, or that such cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Each taxpayer has a personal, non-delegable obligation to file a tax return by the due date. (*U.S. v. Boyle* (1985) 469 U.S. 241, 247.)

As of the date briefing was closed, appellant had not filed a 2019 California tax return. Further, appellant provided no evidence, and the record contains no indication, that appellant had reasonable cause for failing to timely file appellant's tax return. Therefore, the Office of Tax Appeals finds no error in FTB's imposition of the late filing penalty.

Issue 3: Whether appellant has shown that FTB incorrectly imposed the demand penalty.

R&TC section 19133 imposes a penalty when a taxpayer fails, upon FTB's notice and demand to do so, to file a return or provide information, unless it is shown that the failure was due to reasonable cause and not willful neglect. For individuals, a demand penalty is properly imposed if two criteria are met: (1) the taxpayer fails to respond to a current Demand in the manner prescribed; and (2) FTB has 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 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, appellant failed to respond to the current Demand for the 2019 tax year. In addition, FTB issued NPAs for the 2015 through 2017 tax years after appellant failed to respond to the Demand for those tax years, all of which are within the four-taxable-years preceding the 2019 tax year at issue. Appellant provided no evidence, and the record contains no indication, that appellant had reasonable cause for failing to respond to the 2019 Demand. Therefore, FTB properly imposed the demand penalty.

Issue 4: Whether there is a basis to abate the filing enforcement cost recovery 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 a formal legal demand to file the tax return is mailed to that person, FTB must impose a filing enforcement cost recovery fee. Once properly imposed, the statute provides no grounds upon which the fee may be abated. (R&TC, § 19254.)

Here, appellant did not file the tax return within the time period prescribed by the 2019 Demand, which informed appellant that the filing enforcement cost recovery fee would be imposed if appellant did not file a tax return. Therefore, FTB properly imposed the filing enforcement cost recovery fee and there is no basis to abate it.

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

R&TC section 19101 provides that taxes are due and payable as of the original due date of the taxpayer's return (without regard to extension). If tax is not paid by the original due date or if FTB assesses additional tax and that assessment becomes due and payable, the taxpayer is charged interest on the resulting balance due, compounded daily. (R&TC, § 19101.) Interest is not a penalty, but is compensation for a taxpayer's use of money after it should have been paid to the state. (*Appeal of GEF Operating, Inc., supra.*) There is no reasonable cause exception to the imposition of interest, and interest is mandatory except where abatement is authorized under the law. (*Appeal of Moy, 2019-OTA-057P.*) Generally, to obtain relief from interest, taxpayers must qualify under one of the following three R&TC sections: 19104, 19112, or 21012. (*Ibid.*) OTA has no authority to review FTB's action under R&TC section 19112. (*Ibid.*) Here, appellant does not allege, and nothing in the record suggests, that there is any basis for interest abatement under R&TC sections 19104 and 21012. Therefore, appellant has not established that interest should be abated.

HOLDINGS

1. Appellant has not demonstrated error in FTB’s determination that appellant has a filing requirement for the 2019 tax year and owes tax.
2. Appellant has not demonstrated reasonable cause to abate the late filing penalty.
3. Appellant has not shown that FTB incorrectly imposed the demand penalty.
4. There is no basis to abate the filing enforcement cost recovery fee.
5. Appellant has not established that interest should be abated.

DISPOSITION

FTB’s action is sustained.

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 Eddy Y.H. Lam
 Administrative Law Judge

We concur:
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 Tommy Leung
 Administrative Law Judge

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 Josh Lambert
 Administrative Law Judge

Date Issued: 2/28/2023