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2023 – OTA – 361
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **E. SAUER**	OTA Case No. 220310055

OPINION

Representing the Parties:

For Appellant: E. Sauer and K. Sauer[1]

For Respondent: Eric R. Brown, Tax Counsel III

A. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, E. Sauer (appellant) appeals actions by the Franchise Tax Board (respondent) proposing additional tax of $9,249.00, a late filing penalty of $2,312.25, a demand penalty of $2,455.25, a filing enforcement fee of $97.00, and applicable interest for the 2016 tax year; and additional tax of $1,992.00, a late filing penalty of $498.00, a demand penalty of $597.50, a filing enforcement fee of $97.00, and applicable interest for the 2018 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 shown error in respondent's proposed assessment of tax for the 2016 or 2018 tax year.
2. Whether appellant has established reasonable cause to abate the late filing penalty for the 2016 or 2018 tax year.
3. Whether appellant has established reasonable cause to abate the demand penalty for the 2016 or 2018 tax year.

[1] Although the assessments at issue were only issued to appellant, appellant's spouse joined the appeal. For simplicity, the Opinion will only refer to E. Sauer as "appellant" in the singular.

4. Whether appellant has shown that the filing enforcement fee for the 2016 or 2018 tax year should be abated.
5. Whether the frivolous appeal penalty should be imposed.

FACTUAL FINDINGS

2016 Tax Year

1. Respondent determined that appellant received income from LPL Financial, Southern California Edison Co, and SCE Federal Credit Union but did not file a 2016 tax return. On July 26, 2019, respondent issued appellant a Demand for Tax Return (Demand) because appellant had received sufficient income to trigger a filing obligation. The Demand required appellant to respond by August 28, 2019, by either filing a 2016 tax return, providing a copy of the return as evidence that it had already been filed, or providing information on why she was not required to file a return. The Demand included a questionnaire.
2. On August 15, 2019, appellant submitted respondent's questionnaire and reported gross income of $38,103. Additionally, appellant reported that her filing status was married/RDP filing jointly, she had two or more dependents, and her spouse was age 65 or older. Appellant noted that she did not understand the filing chart that would determine whether she had a filing requirement. Additionally, appellant stated the following: "FTB signed for our 540's first and subsequent dates due to identify theft – certified mail!"
3. On September 23, 2019, appellant sent another response to respondent, stating that respondent continued to fail to locate her and her spouse's joint tax return even though they were signed by certified mail. Appellant also notes that the "tax payer [sic] advocate has not been able to resolve this Identity Theft issue."[2]
4. In response to the questionnaire, respondent sent appellant a Determination of Filing Requirement – Tax Return Demand (Tax Return Demand), which required appellant to file a tax return by December 2, 2019. This notice stated that if appellant did not file and pay by the due date, respondent would, among other things, impose the demand penalty

[2] In a Notice of Determination, respondent stated that respondent's Identity Theft unit reviewed appellant's account and based on the information appellant provided, it was unable to substantiate appellant's identity theft claim.

and collection cost recovery fee. In addition, respondent replied that it searched its records and could not locate her return. Respondent required appellant to mail an original 2016 return for processing.

5. Appellant responded by letter reiterating problems with respondent's failure to locate her and her spouse's returns. Appellant provided a copy of a certified mail receipt addressed to respondent but did not include a 2016 tax return.

6. Subsequently, respondent issued a Notice of Proposed Assessment (NPA) for the 2016 tax year on July 9, 2018, and estimated appellant's income to be $138,625 based on information reported by appellant's employer, financial institution, and other sources. The NPA proposed additional tax and imposed a demand penalty, late filing penalty, and filing enforcement fee, plus applicable interest. As relevant to this appeal, prior to the 2016 Demand and Tax Return Demand, respondent had also issued appellant a Demand for the 2015 tax year and a corresponding NPA for the 2015 tax year that imposed the demand penalty.

7. The federal account transcript for the 2016 tax year indicates that appellant did not file a federal 2016 tax return.

2018 Tax Year

8. Respondent determined that appellant received income from BNY Mellon Disbursement Agent and West Covina Unified School District but did not file a 2018 tax return. On August 18, 2020, respondent issued appellant a Demand because appellant had received sufficient income to trigger a filing obligation. The Demand required appellant to respond by September 23, 2020, by either filing a 2018 tax return, providing a copy of the return as evidence that it had already been filed, or providing information on why she was not required to file a return. The Demand included a questionnaire.

9. On September 15, 2020, appellant submitted respondent's questionnaire, stating the following: "Requests for transcripts in the past still remain unansered [sic] in order to resolve our Identity theft issues. We do not understand the charts."

10. In response to the questionnaire, respondent sent appellant a Tax Return Demand, which required appellant to file a tax return by December 3, 2020. This notice stated that if appellant did not file and pay by the due date, respondent would, among other things, impose the demand penalty and collection cost recovery fee.

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11. In a letter dated November 13, 2020, appellant stated that appellant and her spouse sent their joint income tax return on April 8, 2019, and provided a USPS certified number. Appellant noted that past identity theft issues with prior returns were resolved with respondent even when respondent could not locate appellant's original returns. Due to COVID-19, appellant requested additional time to locate a copy of the 2018 return which appellant asserts was in an out-of-state storage facility.
12. On December 30, 2020, respondent issued an NPA and estimated appellant's income to be $60,942 based on information reported by appellant's employer and financial institution. The NPA proposed additional tax and imposed a demand penalty, late filing penalty, and filing enforcement fee, plus applicable interest.
13. The federal account transcript for the 2018 tax year indicates that appellant did not file a federal 2018 tax return.

Administrative Protest

14. Appellant protested the NPAs and requested a protest hearing. Respondent scheduled an oral hearing for each tax year. After multiple postponement requests by appellant (and once by respondent for each tax year), respondent sent Notices of Oral Hearing on Protest for each tax year to appellant to reschedule the hearing to November 9, 2021. This Notice indicated in boldfaced language the following: "**Failure to appear or requesting another postponement will be considered a waiver of the hearing and the assessment will become final.**" Appellant responded by requesting the hearings be rescheduled for an additional 90 days.
15. By a letter dated February 14, 2022, respondent denied appellant's request to postpone the scheduled hearings. Thereafter, respondent issued appellant separate Notices of Action (NOAs) for each tax year at issue, affirming the NPAs. The NOAs informed appellant that the Office of Tax Appeals (OTA) may impose up to $5,000 a penalty for maintaining frivolous appeals under R&TC section 19714.
16. These timely appeals followed.

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DISCUSSION

Issue 1: Whether appellant has shown error in respondent's proposed assessment of tax for the 2016 or 2018 tax year.

Every individual subject to the Personal Income Tax Law must make and file a return with respondent "stating specifically the items of the individual's gross income from all sources and the deductions and credits allowable," in excess of certain filing thresholds. (R&TC, § 18501(a)(1)-(4).) If any taxpayer fails to file a return, 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).)

When respondent makes a proposed assessment of additional tax based on an estimate of income, respondent's initial burden is to show why 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 respondent has met its initial burden, the proposed assessment of additional tax is presumed correct, and the taxpayer has the burden of proving it to be wrong. (*Ibid.*) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing error in respondent's determination, the determination must be upheld. (*Ibid.*) A taxpayer's failure to produce evidence that is within its control gives rise to a presumption that such evidence is unfavorable to its case. (*Ibid.*)

Here, respondent has no record that appellant filed a 2016 or 2018 tax return. Respondent received information reported by appellant's employer, financial institution, and other sources stating that appellant received income of $138,625 in 2016 and $60,942 in 2018. Respondent, therefore, has met its initial burden to show that the assessments are reasonable and rational.

Appellant argues that she already filed her 2016 and 2018 tax returns. However, this does not address whether respondent's assessments that appellant received income of $138,625 in 2016 and $60,942 in 2018, and accordingly owes taxes of $9,249 and $1,992 for the corresponding tax years, are incorrect. Appellant does not provide argument or evidence that the proposed assessments for the 2016 and 2018 tax years are incorrect and has not provided copies of her purportedly filed returns. Instead, appellant alleges that she is a victim of identity theft

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and has been since 1997. However, there is no evidence in the record to support appellant's assertion. As such, the proposed assessments are upheld.

Issue 2: Whether appellant has established reasonable cause to abate the late filing penalty for the 2016 or 2018 tax year.

A late filing penalty will be imposed when a taxpayer fails to file a tax return on or before its due date, unless the taxpayer establishes that the late filing was due to reasonable cause and was not due to willful neglect. (R&TC, § 19131(a).) Respondent's imposition of the late filing penalty is presumed correct, and the burden of proof is on the taxpayer to establish otherwise. (*Appeal of Xie*, 2018-OTA-076P.)

Here, appellant argues that she timely filed her 2016 and 2018 returns. The appeal record includes a copy of a return receipt form addressed to respondent dated April 11, 2017, for the 2016 tax return, and information purporting to be contained on a certified mail form with the date April 18, 2019, for the 2018 tax return.[3]

If a taxpayer places a tax return in the United States mail before the statutory filing deadline, properly addressed to respondent and postage prepaid, the return is deemed filed on the date shown on the cancellation mark stamped on the envelope containing the return. (Gov. Code, § 11003.) Similar to the Internal Revenue Code (IRC), California Government Code section 11003 contemplates that respondent actually *received* the return. (See IRC, § 7502(a); *Taha on behalf of his deceased brother v. U.S.* (Fed.Cl. 2020) 148 Fed.Cl. 37, 43 ["Under Paragraph 7502(a)(1), a claim is considered filed on its date of postmark, even if it is received by the IRS after the applicable deadline. This exception, however, expressly contemplates the document's eventual receipt by the IRS."].) The IRC also considers situations where the IRS claims to not have received the taxpayer's return. In those circumstances, IRC section 7502(c) provides that for returns sent by registered mail, "such registration shall be prima facie evidence that the … document was delivered to the agency." California, however, has no such counterpart.

Although appellant provides a copy of a return receipt form dated April 11, 2017, addressed and signed by respondent, without more, it cannot be determined what was submitted to respondent. Specifically, nothing on the return receipt form indicates that appellant filed a

[3] A copy of a certified mail receipt was not provided to OTA for the 2018 tax year.

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2016 return on April 11, 2017. For 2018, appellant only provides information of what she purports is on the certified mail receipt for the 2018 return without providing an actual copy of the receipt. Furthermore, appellant has not provided copies of the 2018 and 2016 returns she purports to have filed.

In addition, appellant's federal account transcripts for the 2016 and 2018 tax years indicate that appellant never filed federal tax returns for those tax years, which is a strong indication that the California returns were also never filed. (*Appeal of La Salle Hotel Company* (66-SBE-071) 1966 WL 1412.) Respondent also provides a record of appellant's filing history that shows appellant has not timely filed a California income tax return since 1987, which is another indicator that the 2016 and 2018 California returns were not timely (or ever) filed with respondent. Accordingly, respondent correctly imposed the late filing penalty.

Issue 3: Whether appellant has established reasonable cause to abate the demand penalty for the 2016 or 2018 tax year.

Respondent may impose a penalty on a taxpayer for 25 percent of the amount of tax determined or assessed if the taxpayer fails to file a return or provide information upon a notice and demand from respondent. (R&TC, § 19133.) Respondent may only impose a demand penalty if two criteria are met: (1) the taxpayer fails to timely respond to a current demand letter, and (2) at any time during the preceding four tax years, respondent issued an NPA following the taxpayer's failure to timely respond to a Request for Tax Return or a Demand for Tax Return. (Cal. Code Regs., tit. 18, § 19133(b)(1)-(2).) A "timely response" is a response within the time period specified in the Request for Tax Return or Demand for Tax Return.[4] (Cal. Code Regs., tit. 18, § 19133(c)(3).) The demand penalty was designed to penalize the taxpayer's failure to respond to the Demand for Tax Return, not the taxpayer's failure to pay the proper tax. (*Appeal of Scott* (83-SBE-094) 1983 WL 15480.)

Here, appellant failed to file 2016 and 2018 tax returns as required by the 2016 and 2018 Tax Return Demands. Appellant also failed to timely respond to the 2015 Demand, which

[4] A "Demand for Tax Return" is defined as a written notice and demand for a return from respondent, which advises the taxpayer that failure to respond in the manner provided and within the time prescribed will make the taxpayer liable for a penalty under R&TC section 19133 for failure to file upon notice and demand. (Cal. Code Regs., tit. 18, § 19133(c)(1).) The 2016 and 2018 Demands and the 2016 and 2018 Tax Return Demands meet the definition of a Demand for Tax Return.

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resulted in the issuance of the 2015 NPA. Because both criteria are met for each of the tax years at issue, respondent properly imposed the demand penalty for the 2016 and 2018 tax years.

Appellant asserts the same contentions stated previously but they do not establish reasonable cause for the demand penalty either. Appellant provides no explanation as to why she could not respond to the 2016 Tax Return Demand by December 2, 2019, and the 2018 Tax Return Demand by December 3, 2020. Accordingly, the demand penalty cannot be abated.

Issue 4: Whether appellant has shown that the filing enforcement fee for the 2016 or 2018 tax year should be abated.

R&TC section 19254(a)(2) provides that if a taxpayer fails to make and file a tax return within 25 days after respondent mails a formal legal demand to file the tax return, respondent will impose a filing enforcement cost recovery fee. Once properly imposed, the fee cannot be abated under any circumstances, including reasonable cause. (*Appeal of Wright Capital Holdings LLC*, 2019-OTA-219P.)

Here, respondent informed appellant in the 2016 and 2018 Tax Return Demands that appellant would be subject to the filing enforcement cost recovery fee if appellant did not file a 2016 and 2018 return, respectively, by the stated due date. Respondent did not receive the 2016 and 2018 returns from appellant by the date prescribed on the Tax Return Demands. Therefore, respondent properly imposed the filing enforcement cost recovery fee, and there is no basis to abate it.

Issue 4: Whether the frivolous appeal penalty should be imposed.

R&TC section 19714 provides that a penalty of up to $5,000 will be imposed whenever it appears to OTA that proceedings before it have been instituted or maintained primarily for delay, or that the taxpayer's position is frivolous or groundless. California Code of Regulations, title 18, (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 appellant is making arguments that OTA, in a precedential opinion, or the Board of Equalization (BOE), in a formal opinion, or the courts have rejected; (2) whether appellant is making the same arguments

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that the same appellant made in prior appeals; (3) whether appellant filed the appeal with the intent of delaying legitimate tax proceedings or the legitimate collection of tax owed; (4) whether appellant has a history of filing frivolous appeals or failing to comply with California's tax laws; and (5) whether appellant has been notified, in a current or prior appeal that a frivolous appeal penalty may apply.

The R&TC and existing regulations promulgated thereunder do not specifically define what is meant by "frivolous or groundless" or "instituted or maintained by the taxpayer primarily for delay." Nevertheless, R&TC section 19714 applies the same standard and uses substantially identical language as IRC section 6673(a)(1)(A)-(B), which is the comparable federal statute authorizing a frivolous appeal penalty. Therefore, it is appropriate to look to federal authority for guidance. (*Douglas v. State* (1948) 48 Cal.App.2d 835, 838.)

Existing federal authorities explain that the purpose of the frivolous appeal penalty is not to compensate the government for time spent handling frivolous appeals; instead, the purpose is to penalize a taxpayer who raises frivolous claims. (*Sauers v. Commissioner* (3d Cir. 1985) 771 F.2d 64, 67.) A position maintained by the taxpayer is frivolous if it is contrary to established law and unsupported by a reasoned, colorable argument for change in the law. (*Coleman v. Commissioner* (7th Cir. 1986) 791 F.2d 68, 71.)

Appellant had previously brought appeals before BOE. (*Appeal of K. and E. Sauer* (Mar. 24, 1995) 1995 WL 502724; *Appellants: E. Sauer* (May 1, 1998) 1998 WL 289343;[5] *Appeal of Sauer* (Feb. 1, 2007) 2007 WL 444523.)[6] For the 1990 and 1991 tax years, appellant contended that she filed timely returns. (*Appeal of K. and E. Sauer*, *supra*; *Appellants: E. Sauer*, *supra*.) Respondent disagreed and issued NOAs based on non-filing of returns. (*Appellants: E. Sauer*, *supra*.) On appeal before BOE for the 1990 and 1991 tax years, respondent's NOAs were affirmed, and a $5,000 frivolous appeal penalty was imposed. (*Appeal of K. and E. Sauer*, *supra.*) BOE imposed another frivolous appeal penalty of $5,000 for the 1999 tax year. (*Appeal of Sauer*, *supra*.)

[5] In the 1998 case, appellant repeated the contentions that she and her spouse filed their returns and did not receive respondent's notices and demands that they file 1992 and 1993 returns. But BOE did not impose a frivolous appeal penalty. The decision states, "Respondent has also requested that this Board impose another frivolous appeal penalty, as occurred in the prior appeal. In this case, appellants have submitted evidence resulting in a decrease in the amount of their assessments from in excess of $10,000 to less than $1,000. These appeals cannot be regarded as frivolous." (*Appellants: E. Sauer*, *supra*, 1998 WL 289343.)

[6] These citations to appellant's appeals before BOE are not precedential opinions.

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Based on appellant's appeal history with BOE and the instant appeal before OTA, appellant's conduct meets the following factors enumerated under Regulation section 30217(b) that conclude this appeal is frivolous: (1) in the instant appeal before OTA, appellant makes the same baseless claim that she had already filed the tax returns, which is the same argument that the same she made before BOE for the 1990 and 1991 tax years; (2) BOE imposed the frivolous appeal penalties in two instances totaling $10,000; and (3) appellant was notified in the 2016 and 2018 NOAs that a frivolous appeal penalty may apply. Based on the forgoing, the frivolous appeal penalty of $5,000 is imposed.[7]

[7] In determining the amount of the frivolous appeal penalty to impose in this appeal, OTA considers fairness to appellant, as well as to the public, which is impacted by the cost of adjudicating frivolous and groundless appeals. Appellant has previously pursued two frivolous appeals, and frivolous appeal penalties were imposed in the total amount of $5,000 for each tax year. In addition, this current appeal involves two tax years that appellant has pursued on frivolous grounds. As such, OTA has determined that a $5,000 penalty is fair and appropriate as a deterrent for future frivolous appeals.

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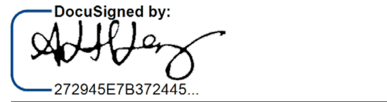
HOLDINGS

1. Appellant has not shown error in respondent's proposed assessment of tax for the 2016 or 2018 tax year.
2. Appellant has not established reasonable cause to abate the late filing penalty for the 2016 or 2018 tax year.
3. Appellant has not established reasonable cause to abate the demand penalty for the 2016 or 2018 tax year.
4. Appellant has not shown that the filing enforcement fee for the 2016 or 2018 tax year should be abated.
5. The frivolous appeal penalty of $5,000 is imposed.

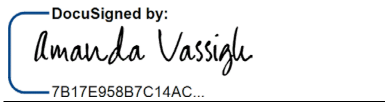
DISPOSITION

Respondent's actions are sustained, and a frivolous appeal penalty of $5,000 is imposed.

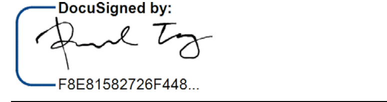


Andrea L.H. Long
Administrative Law Judge

We concur:



Amanda Vassigh
Administrative Law Judge



Richard Tay
Administrative Law Judge

Date Issued: 5/31/2023