

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
A. CUEVA

) OTA Case No. 22039827
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OPINION

Representing the Parties:

For Appellant: A. Cueva

For Respondent: Brian Werking, Tax Counsel III

E. LAM, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, A. Cueva (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing tax of \$5,664, a late filing penalty of \$1,416, a notice and demand penalty (demand penalty) of \$1,416, a filing enforcement cost recovery fee of \$97, and applicable interest, for the 2018 tax year.

Appellant waived the right to an oral hearing; therefore, the Office of Tax Appeals (OTA) decides the matter based on the written record.

ISSUES¹

1. Whether appellant has demonstrated error in FTB’s determination that appellant has a filing requirement for the 2018 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.

¹ Here, FTB sent appellant a Frivolous Submission Notice, notifying him that his protest of the Notice of Proposed Assessment is considered a frivolous submission and he may be subject to a \$5,000 frivolous submission penalty under R&TC section 19179 if he does not withdraw the protest. Appellant did not timely withdraw his protest. As such, FTB imposed a \$5,000 frivolous submission penalty. However, OTA does not have jurisdiction to review FTB’s imposition of the frivolous submission penalty imposed under R&TC section 19179. (R&TC, § 19179(e)(3).) As such, the frivolous submission penalty is not at issue in this appeal.

FACTUAL FINDINGS

1. FTB received third-party payor information indicating that appellant received wage income of \$96,124 from Able Air Corporation, and determined that appellant earned sufficient income for the 2018 tax year to prompt a filing requirement.
2. Since FTB did not receive appellant's 2018 California tax return, FTB issued appellant a Demand for Tax Return (Demand) for the 2018 tax year with a response deadline of January 6, 2021. The Demand informed appellant that the filing enforcement cost recovery fee would be imposed if appellant did not respond or file a tax return.
3. FTB did not receive a response by the deadline set forth in the Demand; therefore, FTB issued a Notice of Proposed Assessment (NPA) proposing tax, a late filing penalty, a demand penalty, a filing enforcement cost recovery fee, and applicable interest, for the 2018 tax year.
4. Appellant protested the NPA by letter dated May 10, 2021.
5. Subsequently, FTB issued a Notice of Action (NOA) affirming the NPA.
6. This timely appeal followed.
7. On appeal, FTB provides copies of Demands and NPAs issued for the 2014 through 2017 tax years.

DISCUSSION

Issue 1: Whether appellant has demonstrated error in FTB's determination that appellant has a filing requirement for the 2018 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).) For the 2018 tax year, the filing threshold for a single individual under 65 years of age with no dependents was gross income of more than \$17,693 or adjusted gross income of more than \$14,154.²

² FTB annually adjusts the filing thresholds for tax years beginning on or after January 1, 1996. (See R&TC, § 18501(d).)

Here, the third-party payor information in the record shows that appellant received wage income of \$96,124 from Able Air Corporation which exceeded the 2018 filing threshold of \$17,693. (See R&TC, § 17041(a).) Thus, appellant had a 2018 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.” 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, after FTB issued the 2018 Demand, appellant failed to file a 2018 California tax return. As such, FTB estimated appellant’s 2018 income based on third-party payor information. FTB’s use of the third-party payor information to estimate appellant’s taxable income is both reasonable and rational. (See *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.*)

Here, appellant has not provided any supporting documentation to demonstrate that appellant does not have a 2018 California filing requirement or that FTB’s determination is erroneous. Instead, appellant’s sole argument on appeal is that his due process rights were violated because he did not receive an oral hearing during his protest of the NPA with FTB.³ However, OTA’s jurisdiction is generally limited to hearing appeals from an FTB determination denying a protest of a proposed tax deficiency, and from FTB’s denial (or deemed denial) of a taxpayer’s tax refund claim. (See R&TC, §§ 19045-19048, 19324, 19331; Cal. Code Regs., tit. 18, § 30103(a); see also *Appeal of Eric H. Liljestrand Irrevocable Trust*, 2019-OTA-012P.) OTA’s function in the appeals process is to determine the correct amount of the taxpayer’s California income tax liability. (*Appeal of Robinson*, 2018-OTA-059P.) OTA does not have

³ It is noted that appellant specifically waived the right to an oral hearing before OTA.

jurisdiction to determine whether an appellant is entitled to a remedy for an agency's actual or alleged violation of any substantive or procedural right to due process under the law, unless the violation affects the adequacy of a notice, the validity of an action from which a timely appeal was made, or the amount at issue in the appeal. (Cal. Code Regs., tit. 18, § 30104(d).) For example, FTB expressly does not have jurisdiction to determine whether an appellant is entitled to a remedy on the basis that there was no FTB protest hearing. (Cal. Code Regs., tit. 18, § 30104(d)(1).) 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.)

Here, appellant provides no evidence, and the record contains no indication, that appellant's failure to timely file the 2018 tax return was due to reasonable cause. On appeal, appellant does not contest that the late filing penalty was properly imposed or computed. Accordingly, there is no basis to abate the late filing penalty for the 2018 tax year.

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

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 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 Demand for the 2018 tax year. In addition, FTB issued NPAs for the 2014 through 2017 tax years after appellant failed to respond to the Demand for each of those tax years, all of which are within the four-taxable-year period preceding the 2018 tax year at issue. Therefore, FTB properly imposed the demand penalty. Appellant provided no evidence, and the record contains no indication that appellant had reasonable cause for failure to respond to the 2018 Demand. Thus, OTA finds no error in FTB's imposition of 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.)

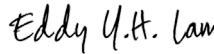
Here, appellant did not file the tax return within the time period prescribed by the 2018 Demand, which informed appellant that the filing enforcement cost recovery fee would be imposed if appellant did not file a tax return. Therefore, FTB properly imposed the filing enforcement cost recovery fee and OTA has no basis to abate it.

HOLDINGS

1. Appellant has not demonstrated error in FTB’s determination that appellant has a filing requirement for the 2018 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.

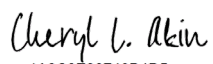
DISPOSITION

FTB’s action is sustained.


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Eddy Y.H. Lam
 Administrative Law Judge

We concur:

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Cheryl L. Akin
 Administrative Law Judge

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Asaf Kletter
 Administrative Law Judge

Date Issued: 6/21/2023