

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:  
**M. FUSSELL**

) OTA Case No. 220410132  
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**OPINION**

Representing the Parties:

For Appellant: M. Fussell

For Respondent: Christopher T. Tuttle, Tax Counsel III

For Office of Tax Appeals: Lisa Burke, Business Taxes Specialist III

T. LEUNG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, M. Fussell (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$2,062.00, a late-filing penalty of \$515.50, a penalty of \$515.50 for failure to file upon demand (demand penalty), a filing enforcement cost recovery fee (filing enforcement fee) of \$97.00, and applicable interest, for the 2019 taxable year.

Appellant waived his right to an oral hearing; therefore, this matter is being decided based on the written record.

**ISSUES**

1. Whether appellant has established error in FTB’s proposed assessment.
2. Whether appellant has established reasonable cause to waive the late-filing penalty.
3. Whether appellant has established reasonable cause to waive the demand penalty.
4. Whether the filing enforcement fee was properly imposed.
5. Whether relief of interest is warranted.

FACTUAL FINDINGS

1. FTB issued a Notice of Proposed Assessment (NPA) to appellant in 2017 for failing to timely respond to a demand for his 2015 California tax return.
2. Appellant had not filed his 2019 California income tax return at the time this appeal was filed.
3. Based on information reported on various Forms 1099, FTB found that appellant received California source income sufficient to require him to file a California tax return for the 2019 taxable year.
4. On July 20, 2021, FTB sent appellant a Demand for Tax Return (Demand) stating it had no record of having received his 2019 tax return. The Demand required appellant to respond by August 25, 2021, by: (1) filing his 2019 tax return; (2) providing evidence that he already had filed his return; or (3) explaining why he did not have a filing requirement.
5. Appellant did not respond by the due date and FTB issued an NPA on September 24, 2021. The NPA showed estimated gross income of \$57,876.00, total tax of \$2,062.00, a late-filing penalty of \$515.50, a demand penalty of \$515.50, and a filing enforcement fee of \$97.00, plus applicable interest.
6. In a letter dated November 20, 2021, appellant protested the NPA explaining that ongoing disputes with the IRS prevented him from filing his 2019 return at that time, but that once the disputes with the IRS were resolved, the return he would file likely would show business expenses that were nearly the same as the associated income such that his taxable income and tax would be nearly zero.
7. On January 5, 2022, FTB sent appellant a letter in which it explained that appellant still was required to file a tax return, notwithstanding the information in his protest, and required that the tax return be filed within 30 days.
8. Appellant did not file his 2019 tax return and on March 28, 2022, FTB issued a Notice of Action in which it affirmed the NPA.

## DISCUSSION

### Issue 1: Whether appellant has established error in FTB's proposed assessment.

FTB is authorized to require a return be filed under penalty of perjury and to make an estimate of income from any available information to propose an assessment when the taxpayer fails to file a return. (R&TC, § 19087.) An assessment based on unreported income is presumed correct when the taxing agency introduces a minimal factual foundation to support the assessment. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509.) If FTB satisfies this burden, the taxpayer has the burden of proving error. (*Appeal of Morosky*, 2019-OTA-312P.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing that FTB's determination is incorrect, it must be upheld. (*Ibid.*) The burden of proof requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) To meet this evidentiary standard, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Appeal of Belcher*, 2021-OTA-284P.)

Here, appellant has not disputed that he received the income stated in the NPA. Instead, appellant claims that the business expenses associated with the income stated in the NPA were nearly the same amount as the income, and may even have exceeded the income, such that his 2019 taxable income was nearly zero. However, appellant has not specified the types and amounts of expenses he allegedly incurred, and has not substantiated any disputes he might have had with the IRS over this issue.

To claim deductions for qualified business expenses, appellant was required to file Schedule C together with his tax return for tax year 2019. The deadline to file the 2019 tax return was July 15, 2020. Appellant did not timely file a return, nor did he file a return following a demand to file issued by FTB a year after the filing due date, on July 20, 2021. Moreover, appellant did not file a return prior to his protest four months later, on November 20, 2021. Appellant still had not filed his return by the date of this appeal, on April 1, 2022, and he has not filed the 2019 return even today, which is more than two years after the original due date. Given that appellant has failed to file a Schedule C to claim any qualified business expenses as deductions from the income stated in the NPA, appellant has not met his burden of proving error in the proposed assessment, and thus, FTB's determination must be upheld.

Issue 2: Whether appellant has established reasonable cause to waive the late-filing penalty.

Absent an extension, taxpayers who file on a calendar year basis are generally required to file their income tax returns by April 15 of the following year. (R&TC, § 18566.) However, due to COVID-19, the original filing deadline and tax payment due date for tax year 2019 was postponed from April 15, 2020, to July 15, 2020. R&TC section 19131 requires FTB to impose a late-filing penalty when a taxpayer does not file their return on or before its due date, unless the taxpayer shows that the late filing was due to reasonable cause and not due to willful neglect. The penalty is computed at 5 percent of the amount of tax required to be shown on the return for every month that the return is late, up to a maximum of 25 percent. (R&TC, § 19131(a).) The taxpayer carries the burden of establishing that reasonable cause exists to waive the penalty. (*Appeal of Xie*, 2018-OTA-076P.) Unsupported assertions are not enough to satisfy a taxpayer's burden of proof. (*Appeal of Gorin*, 2020-OTA-018P.)

Here, the record contains no evidence showing that appellant has filed his 2019 tax return, which was due on July 15, 2020. Because appellant's return is more than five months late, the penalty of \$515.50 was calculated based on the maximum of 25 percent of the total unpaid tax of \$2,062.00. Thus, the late-filing penalty was properly computed and was properly imposed.

When a late-filing penalty is properly imposed, the burden is on the taxpayer to prove that reasonable cause prevented the taxpayer from timely filing its return. (*Appeal of Head and Feliciano*, 2020-OTA-127P.) 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 prudent businessperson to have so acted under similar circumstances. (*Ibid.*) Illness or other personal difficulties may be considered reasonable cause if a taxpayer presents credible and competent proof that the taxpayer was continuously prevented from filing a tax return. (*Ibid.*)

Appellant attributes the delay in filing his 2019 California income tax return to delays by the IRS in reviewing tax filing information extending back to tax years since 2014. According to appellant, any return he might file prior to resolution of disputed issues with the IRS would be inaccurate given that the disputed issues relate to 1040X filings and subsequent year expenses. Appellant claims that he intends to file a return as soon as he and the IRS have worked out the correct business expenses for tax years since 2014, which he estimates will result in reported net

income and tax of nearly zero for the 2019 taxable year. Based on his argument that the IRS caused the delay in filing his return, appellant contends that he should owe no penalties.

If information is lacking when a tax return is due, the appropriate action to take is to file a timely return with the information available at the time, and then to file an amended return later, if necessary. (*Appeal of Xie, supra.*) Difficulty in obtaining information does not constitute reasonable cause for the late filing of a return. (*Ibid.*) However, based on appellant's argument that his work expenses likely approach or even exceeded his work income, it appears that appellant should have had a substantial amount of information available regarding his income and expenses for the 2019 taxable year. Appellant's decision to not file timely with the information available as of the filing due date, and instead to wait to file until resolution of purported disputes with the IRS, does not constitute reasonable cause for the failure to timely file.

Issue 3: Whether appellant has established reasonable cause to waive the demand penalty.

California imposes a penalty on taxpayers, upon FTB's demand to do so, for failing to file a return or to provide information unless reasonable cause prevented the taxpayer from complying with the demand. (R&TC, § 19133.) A demand penalty is properly imposed if two criteria are met: (1) the taxpayer fails to timely respond to a current Demand; and (2) at any time during the preceding four tax years, FTB issued an NPA following the taxpayer's failure to timely respond to a Request or a Demand. (Cal. Code Regs., tit. 18, § 19133(b)(1)-(2).) The demand penalty is computed at 25 percent of the amount of a taxpayer's total tax liability (as proposed on his NPA), which is determined without regard to payments. (R&TC, § 19133.)

The first requirement for imposing the demand penalty is met because appellant failed to respond to a Demand for the 2019 taxable year issued to appellant on July 20, 2021. The second requirement is met because FTB issued an NPA to appellant on August 21, 2017, following appellant's failure to timely respond to a Request for Tax Return for the 2015 taxable year. The demand penalty of \$515.50 was computed at 25 percent of appellant's total tax liability of \$2,062.00, and thus, it was properly computed. Based on a finding that both criteria for imposing the demand penalty were met and the penalty was properly computed, the demand penalty for the 2019 taxable year was properly imposed.

When a demand penalty is properly imposed, the burden is on the taxpayer to prove that reasonable cause prevented the taxpayer from timely responding to the Demand. (*Appeal of*

*GEF Operating, Inc.*, 2020-OTA-057P.) To establish reasonable cause, a taxpayer must show that the failure to respond to the Demand occurred despite the exercise of ordinary business care or that the reason for failing to respond would prompt an ordinarily intelligent and prudent businessperson to act similarly under the circumstances. (*Ibid.*)

Appellant's arguments regarding the demand penalty are the same as his arguments regarding the late-filing penalty discussed above in that appellant attributes the delay in filing his California return to an alleged delay by the IRS in resolving his disputed issues regarding business expenses. As with appellant's failure to timely file his return for the 2019 taxable year, his unspecified dispute with the IRS does not constitute reasonable cause for failing to file his return in response to FTB's demands. Accordingly, appellant has failed to establish reasonable cause to waive the demand penalty.

Issue 4: Whether the filing enforcement fee was properly imposed.

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 by FTB, then FTB shall impose a filing enforcement fee, which is adjusted annually to reflect actual costs as reflected in the annual Budget Act. Once properly imposed, the statute provides no grounds upon which the fee may be waived. (R&TC, § 19254.)

Here, FTB informed appellant in the Demand issued on July 20, 2021, that the fee may be assessed if he did not respond by August 25, 2021. After FTB did not receive a response within the prescribed period set forth in the Demand, it imposed the fee. Furthermore, appellant does not specifically dispute the filing enforcement fee. Thus, the fee was properly imposed and may not be waived.

Issue 5: Whether relief of interest is warranted.

The imposition of interest is mandatory. (R&TC, § 19101(a).) Interest is not a penalty, but is compensation for a taxpayer's use of money which should have been paid to the state. (*Appeal of Moy*, 2019-OTA-057P.) There is no reasonable cause exception to the imposition of interest. To obtain relief from interest a taxpayer must qualify under one of the waiver provisions of R&TC sections 19104 (pertaining to unreasonable error or delay by FTB in the performance of a ministerial or managerial act), 19112 (pertaining to extreme financial hardship caused by significant disability or other catastrophic circumstance), or 21012 (pertaining to


reasonable reliance on the written advice of a legal ruling by FTB’s chief counsel). (*Appeal of Moy, supra.*) Appellant has not alleged, and the record does not reflect, that any of these waiver provisions are applicable here, and appellant does not contend that interest should be waived. Thus, no relief of interest is warranted.

HOLDINGS

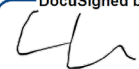
1. Appellant has not established error in FTB’s proposed assessment for the 2019 taxable year.
2. Appellant has not established a basis to waive the late-filing penalty.
3. Appellant has not established a basis to waive the demand penalty.
4. The filing enforcement fee was properly imposed and may not be waived.
5. Relief of interest is not warranted.


DISPOSITION

FTB’s action is sustained.

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 Tommy Leung  
 Administrative Law Judge

We concur:

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 Andrew J. Kwee  
 Administrative Law Judge

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 Amanda Vassigh  
 Administrative Law Judge

Date Issued: 7/25/2023