

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
D. NOSEK

) OTA Case No. 230112475
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OPINION

Representing the Parties:

For Appellant: D. Nosek
For Respondent: Camille Dixon, Tax Counsel

A. KLETTER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, D. Nosek (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing a notice and demand (demand) penalty of \$9,517 and filing enforcement cost recovery fee (filing enforcement fee) of \$100 for the 2020 tax year.¹

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

ISSUES

- 1. Whether appellant has established grounds to abate the demand penalty.
- 2. Whether appellant has established grounds to abate the filing enforcement fee.

FACTUAL FINDINGS

- 1. Appellant did not timely file a 2020 California individual tax return (2020 return).
- 2. FTB received third party information that appellant earned wage income, prompting a filing requirement for the 2020 tax year.²

¹ The Notice of Proposed Assessment also proposed additional tax, a late filing penalty, and applicable interest. The late filing penalty was abated, and appellant concedes the additional tax and applicable interest on appeal.

² For the 2020 tax year, the filing threshold for a single individual under 65 years of age with no dependents was California gross income of at least \$18,496 or adjusted gross income of at least \$14,797. The 2020 filing

3. On June 21, 2022, FTB issued appellant a Demand for Tax Return (Demand), which required that, by July 27, 2022, appellant file or provide evidence that appellant already filed the 2020 return, or respond with a completed questionnaire form showing that appellant had no filing requirement for the 2020 tax year. The Demand notified appellant that if appellant did not timely respond to the Demand in the manner prescribed, FTB would assess, as relevant here, a demand penalty and a filing enforcement fee.
4. When FTB did not receive a response to the Demand, it issued appellant a Notice of Proposed Assessment (NPA) for the 2020 tax year. The NPA estimated appellant's income to exceed the 2020 filing threshold, and, as relevant here, proposed to assess a demand penalty and a filing enforcement fee.
5. On August 26, 2022, appellant responded to the Demand, stating that the 2020 return "is being filed now but I'm waiting on IRS PIN[.]" On September 6, 2022, appellant protested the NPA and requested an additional 30 days to file the 2020 return because appellant's 2020 personal identification number (PIN), which was required to file the 2020 return, was misplaced.
6. On January 3, 2023, appellant untimely filed a joint 2020 return with appellant's spouse/registered domestic partner and with two dependents.
7. On January 9, 2023, FTB issued a Notice of Action affirming the NPA.
8. This timely appeal followed.
9. As relevant here, FTB previously issued appellant an NPA for the 2017 tax year following appellant's failure to respond to a 2017 Request for Tax Return (Request).

DISCUSSION

Issue 1: Whether appellant has established grounds to abate 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 timely respond to a current Demand in the manner prescribed; and (2) FTB has proposed an assessment of tax under the authority of R&TC

threshold for spouses electing a married filing jointly status, both of whom were under 65 years of age with two or more dependents, was California gross income of at least \$59,338 or adjusted gross income of at least \$51,941.

section 19087(a), after the taxpayer failed to timely respond to a Request 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).) The burden of proving “reasonable cause” for the failure to respond to FTB’s demand is on the taxpayer. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) An appellant’s failure to respond to a demand must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*)

FTB properly imposed the demand penalty because FTB issued appellant the 2020 Demand and appellant did not timely respond in the prescribed manner. Furthermore, FTB issued an NPA following appellant’s failure to timely respond in the prescribed manner to a prior Request for the 2017 tax year, within the four-taxable-year period preceding the 2020 Demand. On appeal, appellant asserts that he did reply to the 2020 Demand. However, appellant did not timely reply to the 2020 Demand. Thus, the demand penalty was properly imposed.

Appellant’s explanation that the necessary 2020 PIN to file the return was lost does not establish reasonable cause for appellant’s failure to timely respond to the 2020 Demand. Appellant bears the burden to prove reasonable cause and appellant’s explanation does not show that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. A 2020 PIN was not necessary to timely respond to the Demand. Thus, OTA has no basis to abate the demand penalty.

Issue 2: Whether appellant has established grounds to abate the filing enforcement 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 formal legal demand to file the tax return is mailed to that person by FTB, FTB shall impose a filing enforcement fee (currently set at \$100 for individuals).³ Once properly imposed, the statute provides no grounds upon which the fee may be abated. (R&TC, § 19254; see *Appeal of Jones*, 2021-OTA-144P.)

Here, FTB informed appellant in the Demand that appellant may be subject to the filing enforcement fee if appellant did not file the 2020 tax return. However, appellant did not timely respond to the Demand in the prescribed manner. Therefore, FTB properly imposed the filing enforcement fee and OTA has no basis to abate it.


³ FTB annually adjusts the filing enforcement fee to reflect actual costs as reflected in the annual Budget Act.

HOLDINGS


1. Appellant has not established grounds to abate the demand penalty.
2. Appellant has not established grounds to abate the filing enforcement fee.


DISPOSITION

FTB’s action is sustained.

DocuSigned by:

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 Asaf Kletter
 Administrative Law Judge

We concur:

DocuSigned by:

 8A4294817A67463
 Andrew Wong
 Administrative Law Judge

DocuSigned by:

 1A9B52FF88AC4C7
 Michael F. Geary
 Administrative Law Judge

Date Issued: 7/5/2023