

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
S. MILLMAN

) OTA Case No. 20096657
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OPINION

Representing the Parties:

For Appellant: S. Millman

For Respondent: Topher Tuttle, Attorney

A. VASSIGH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, S. Millman (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$22,792, a late filing penalty of \$5,698, a demand penalty of \$5,698, a filing enforcement fee of \$93, and applicable interest for the 2016 tax year; and an action by FTB proposing additional tax of \$26,540, a late filing penalty of \$6,635, a demand penalty of \$6,635, and a filing enforcement fee of \$93, and applicable interest for the 2017 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 had a California tax filing requirement for tax years 2016 and 2017.
2. Whether appellant has established reasonable cause to abate the late filing penalties imposed on tax years 2016 and 2017.
3. Whether appellant has established reasonable cause to abate the demand penalties imposed on tax years 2016 and 2017.
4. Whether the filing enforcement fees were properly imposed on tax years 2016 and 2017.

5. Whether appellant has established that interest on tax years 2016 and 2017 may be abated.

FACTUAL FINDINGS

1. FTB received third party information indicating that appellant paid mortgage interest for a California property in 2016. As such, FTB issued appellant a Demand for Tax Return (Demand) for the 2016 tax year, but appellant did not timely file a tax return or respond to the Demand.
2. Following appellant's nonresponse to the Demand, FTB issued appellant a Notice of Proposed Assessment (NPA) for the 2016 tax year proposing a tax liability of \$22,792, a late filing penalty of \$5,698, a demand penalty¹ of \$5,698, and a filing enforcement fee of \$93, plus interest.
3. FTB also received third party information indicating that appellant paid mortgage interest for a California property in 2017. As such, FTB issued appellant a Demand for the 2017 tax year, but appellant did not timely file a tax return or respond to the Demand.
4. Following appellant's nonresponse to the Demand, FTB issued appellant an NPA for the 2017 tax year proposing a tax liability of \$26,540, a late filing penalty of \$6,635, a demand penalty of \$6,635, and a filing enforcement fee of \$93, plus interest.
5. FTB based its income estimates on its analysis of millions of tax returns, which showed a statistical relationship between the mortgage interest paid by taxpayers and the income shown on taxpayers' returns.
6. Thereafter, appellant protested both NPAs, stating that tax returns for 2016 and 2017 could not be filed until appellant had finished filing his tax returns for earlier years. On February 14, 2020, FTB responded by letters stating that based on the information appellant submitted, appellant had California tax filing requirements.
7. Appellant did not provide the requested tax returns; therefore, FTB issued Notices of Action affirming each of the NPAs.
8. This timely appeal followed.
9. On September 29, 2022, the Office of Tax Appeals (OTA) asked the parties to provide an update on the status of appellant's 2016 and 2017 tax returns. Appellant did not respond to OTA's request. On December 14, 2022, FTB responded that "a search of the

¹ FTB had previously issued a Demand and NPA for the 2013 tax year.

Franchise Tax Board’s records revealed that appellant [had] still not filed the tax returns for tax years 2016 and 2017.”

10. To date, appellant has not provided evidence establishing that he has filed a 2016 or a 2017 California Resident Income Tax Return (Form 540).

DISCUSSION

Issue 1: Whether appellant has demonstrated error in FTB’s determination that appellant had a California tax filing requirement for tax years 2016 and 2017.

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).)² For the 2016 tax year, the filing threshold for a single individual under 65 years of age with no dependents was gross income of more than \$16,597 or adjusted gross income of more than \$13,278; and the filing threshold for a single individual 65 years of age or older with no dependents was gross income of more than \$22,147 or adjusted gross income of more than \$18,828. For the 2017 tax year, the filing threshold for a single individual under 65 years of age with no dependents was gross income of more than \$17,029 or adjusted gross income of more than \$13,623; and the filing threshold for a single individual 65 years of age or older with no dependents was gross income of more than \$22,729 or adjusted gross income of more than \$19,323.

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.” 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*)).) 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

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

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.*)

In this case, regarding the 2016 tax year, FTB received information indicating that appellant paid mortgage interest in the amounts of \$44,733 and \$9,745 during the 2016 tax year, leading FTB to make an estimate of appellant's 2016 income. Regarding the 2017 tax year, FTB received information indicating that appellant paid mortgage interest in the amounts of \$50,762 and \$11,259 during the 2017 tax year, which led FTB to make an estimate of appellant's 2017 income. FTB's use of third-party information to estimate appellant's taxable income is both reasonable and rational. (*Bindley, supra.*)

OTA finds that it was reasonable and rational for FTB to infer that appellant earned sufficient income to make mortgage interest payments in 2016 and 2017 based on this information.³ Furthermore, OTA finds that FTB's estimate is reasonable and rational as it is based on an analysis of millions of tax returns which showed a statistical relationship between the mortgage interest paid by taxpayers and the income shown on taxpayers' returns. Thus, FTB has met its initial burden of proof for its proposed assessments on the 2016 and 2017 tax years and appellant has the burden of proving FTB's assessments are incorrect.

Appellant argues that FTB's assessments are incorrect because appellant claims he has a loss from tax year 2013 which would carry over to tax years 2016 and 2017, and that appellant "had no taxable income from business," resulting in little to no taxable income for 2016 and 2017. In his opening brief, appellant asserted that he was "working to complete [and] bring filing of all tax years up to date." However, appellant failed to provide 2016 and 2017 California tax returns. As explained above, OTA asked the parties during this appeal to provide an update on the status of appellant's 2016 and 2017 tax returns. Appellant did not respond to OTA's request. In December 2022, FTB responded that "a search of [FTB's] records revealed that appellant [had] still not filed the tax returns for tax years 2016 and 2017." OTA has not been provided with any information indicating that appellant has since filed these returns.

Appellant has failed to provide any evidence to refute FTB's assessments and has not explained how he was able to make his mortgage payments without income. Appellant's failure

³ FTB multiplied appellant's mortgage interest paid by six to compute the total estimated income for each of the tax years.

to provide the returns gives rise to the presumption that such evidence would be unfavorable to his case. (*Bindley, supra.*) Appellant has failed to meet his burden to show that FTB's assessments were in error. FTB has provided evidence that appellant paid mortgage interest in 2016 and in 2017 in amounts which indicate he earned income sufficient to trigger a filing requirement, and computed appellant's estimated income. Thus, OTA finds that appellant has failed to meet his burden to show that FTB's proposed assessments are in error.

Issue 2: Whether appellant has established reasonable cause to abate the late filing penalties imposed on tax years 2016 and 2017.

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; *Appeal of Fisher*, 2022-OTA-337P.)

To date, appellant has not provided evidence showing that he has filed either his 2016 or 2017 California tax returns. Appellant provides no evidence, and the record contains no indication, that appellant had reasonable cause for failing to timely file his tax returns. Appellant appears to blame his failure to meet the 2016 and 2017 filing deadlines on the fact that he had not completed the preparation of his 2014 tax return (which he explains was due to missing documents), and that subsequent tax year returns would be affected by a carry-over loss from 2013. Appellant does not provide evidence to support his assertion that he was missing documents, nor does he provide any explanation for why he did not procure the information necessary to file his 2014 tax return in a timely manner. Regardless, difficulty obtaining information does not constitute reasonable cause for the late filing of returns. (*Appeal of Xie*, 2018-OTA-076P.) Based on the above, appellant's failure to file his prior year returns does not establish reasonable cause for failing to file his 2016 and 2017 tax returns.

Appellant also asserts that his tax preparer's "ability to devote their professional time to accommodate" him and delays resulting from COVID-19 impact his ability to file his tax returns.

This argument is provided without evidence, and regardless, does not constitute reasonable cause for appellant's failure to file his returns by the due dates. The 2016 and 2017 tax returns were due in 2017 and 2018, respectively, well before the COVID-19 pandemic took place.

Furthermore, it is well established that each taxpayer has a personal, non-delegable obligation to ensure the timely filing of a tax return, and thus, reliance on an agent to perform this act does not constitute reasonable cause to abate a late filing penalty. (*U.S. v. Boyle, supra*, 469 U.S. at pp. 251-252; *Appeal of Quality Tax & Financial Services, Inc.*, 2018-OTA-130P.) Therefore, OTA finds no error in FTB's imposition of the late filing penalties.

Issue 3: Whether appellant has established reasonable cause to abate the demand penalties imposed on tax years 2016 and 2017.

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 tax year within the four-taxable-year period immediately preceding the tax year for which the current Demand is issued. (Cal. Code Regs., tit. 18, § 19133(b)(1)-(2).)

Here, appellant failed to respond to the Demands for the 2016 and 2017 tax years. In addition, FTB issued a Demand and NPA for the 2013 tax year, which was during the four-taxable-year period preceding the 2016 and 2017 tax years. Appellant provided no evidence, and the record contains no indication, that appellant had reasonable cause for failing to respond to the Demands. Therefore, FTB properly imposed the demand penalties and appellant has not established a basis for abating the demand penalties.

Issue 4: Whether the filing enforcement fees were properly imposed on tax years 2016 and 2017.

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; See also *Appeal of Jones*, 2021-OTA-144P.)

Here, appellant did not file the tax returns within the time period prescribed by the Demands, which informed appellant that the filing enforcement cost recovery fee would be imposed if appellant did not file the tax returns. Therefore, FTB properly imposed the filing enforcement cost recovery fees for the 2016 and 2017 tax year accounts and there is no basis to abate them.

Issue 5: Whether appellant has established that interest on tax years 2016 and 2017 may be abated.

R&TC section 19001 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 21012.⁴ Therefore, appellant has not established that interest should be abated.

⁴ Under R&TC section 19104, FTB is authorized to abate or refund interest if there has been an unreasonable error or delay in the performance of ministerial or managerial act by an employee of FTB. R&TC section 21012 may apply where there has been reliance on written advice requested of FTB. Appellant does not allege any unreasonable error or delay by FTB or that he relied upon written advice from FTB.

HOLDINGS

1. Appellant has not demonstrated error in FTB’s determination that appellant had a California tax filing requirement for tax years 2016 and 2017.
2. Appellant has not established reasonable cause to abate the late filing penalties imposed on tax years 2016 and 2017.
3. Appellant has not established reasonable cause to abate the demand penalties imposed on tax years 2016 and 2017.
4. The filing enforcement fees were properly imposed on tax years 2016 and 2017.
5. Appellant has not established that interest on tax years 2016 and 2017 may be abated.

DISPOSITION

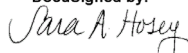
FTB’s actions are sustained.

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Amanda Vassigh
 Administrative Law Judge

We concur:

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Sara A. Hosey
 Administrative Law Judge

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Natasha Ralston
 Administrative Law Judge

Date Issued: 9/26/2023