

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

J. TWO

) OTA Case No. 21119065
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OPINION

Representing the Parties:

For Appellant:

J. Two

For Respondent:

Christopher M. Cook, Tax Counsel

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, J. Two (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$9,717.00, a late filing penalty of \$2,429.25, a notice and demand (demand) penalty of \$2,429.25, a filing enforcement cost recovery fee of \$93.00, 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 proposed assessment.
2. Whether appellant has established reasonable cause for failing to timely file his tax return.
3. Whether appellant has established reasonable cause for failing to timely respond to the Demand for Tax Return (Demand).
4. Whether FTB properly imposed the filing enforcement cost recovery fee.
5. Whether appellant is entitled to interest abatement.
6. Whether to impose a frivolous appeal penalty.

FACTUAL FINDINGS

1. Appellant did not file a California Resident Income Tax Return (return) for 2017.
2. The most recent tax year for which appellant filed a return is 2002.
3. Based on information FTB received from third parties (e.g., appellant is a California licensed optometrist according to the California Board of Optometry; who, according to Yelp, operates as an optometrist in California, etc.), FTB sent appellant a Demand via letter, dated April 26, 2019, for the 2017 tax year. The Demand established a deadline of May 29, 2019, for appellant to respond by filing a 2017 return, providing evidence that a return had already been filed, or providing information as to why appellant was not required to file a return.
4. Appellant did not respond to the Demand or file a 2017 return by the deadline.
5. FTB has sent appellant a Demand for each tax year from 2014, through 2019.
6. For the 2017 tax year, FTB sent appellant the Notice of Proposed Assessment (NPA) via letter dated September 23, 2019. Based on the information received from third parties that appellant was a licensed optometrist and ran an optometry practice, the NPA estimated appellant's income to be \$138,365. The NPA assessed: (1) tax of \$9,717.00; (2) a late filing penalty of \$2,429.25; (3) a demand penalty of \$2,429.25; (4) a filing enforcement cost recovery fee of \$93.00; and (5) applicable interest.
7. FTB has sent appellant NPA for the following tax years: 2001, 2004, 2005, 2006, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017.
8. On November 20, 2019, appellant protested the NPA and requested a protest hearing through FTB's administrative process.
9. By letter dated August 9, 2021, FTB sent appellant notice of a rescheduled oral hearing on protest scheduled for September 27, 2021.¹
10. By letter dated September 29, 2021, FTB sent appellant a Notice of Determination. Based on appellant's failure to appear and/or request a postponement prior to the hearing, FTB indicated that it will be issuing a Notice of Action (NOA) affirming the NPA.

¹ The first Notice of Oral Hearing on Protest is not in the written record. According to FTB, "[t]he originally scheduled protest hearing had been rescheduled due to the COVID-19 pandemic; this hearing date on the included notice was then rescheduled numerous times at appellant's request. All previous Notices of Oral Hearing on Protest and appellant's postponements requests may be provided upon request."

11. By letter dated October 13, 2021, FTB issued a NOA affirming the NPA. The NOA included the following warning:

The Office of Tax Appeals has regularly imposed up to a \$5,000 penalty under Personal Income Tax Law Section 19714 on frivolous appeals after stating, “We take this opportunity to advise all individuals who proceed with frivolous cases that serious consideration will be given to the imposition of damages under Section 19714. The cost of processing an appeal is significant, and we will not condone repeated appeals where the arguments have been considered and rejected previously. *Appeals of Fred Daubeger, et al*, 82-SBE-1982, March 31, 1982.
12. By letter dated November 12, 2021, appellant submitted a Request for Appeal from the NOA to the Office of Tax Appeals (OTA). Appellant indicated that the grounds for his appeal were incomplete and that he would be submitting evidence with his opening brief. Appellant requested a copy of the rules of evidence and procedures applicable before the OTA.
13. Pursuant to appellant’s request, OTA granted extensions on January 18, 2022, and March 1, 2022, for appellant to submit supplemental briefing.
14. On August 22, 2022, FTB submitted its opening brief. Therein, FTB gave appellant notice that under R&TC section 19714 and California Code of Regulations, title 18, (Regulation) section 30217, OTA may impose a frivolous appeal penalty, not to exceed \$5,000.
15. On August 23, 2022, OTA sent appellant a Notice of Oral Hearing, which requested that appellant respond by September 22, 2022. Appellant did not respond.
16. On October 12, 2022, OTA sent appellant notice that since OTA had not received a response, his appeal would be removed from the oral hearing calendar and his appeal will be decided on the written record.

DISCUSSION

Issue 1: Whether appellant has demonstrated error in FTB’s proposed assessment.

R&TC section 18501 requires every individual subject to the Personal Income Tax Law to make and file a return with FTB when their gross income exceeds certain thresholds. (R&TC, § 18501(a)(1)-(4).) If a taxpayer fails to file a return, FTB 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 FTB makes a proposed assessment of tax based on an estimate of income, FTB has the initial burden to show that its 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. (*In re Olshan* (9th Cir. 2004) 356 F.3d 1078, 1084; *Appeal of Bindley*, *supra*.) Federal courts have held that the taxing agency need only introduce some evidence linking the taxpayer with the unreported income. (*Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932, 935.) When a taxpayer fails to file a valid return, FTB has wide discretion in choosing an income-reconstruction method and where a rational method of calculating is used, courts will presume it is correct. (See *Palmer v. Internal Revenue Service*, (9th Cir. 1997) 116 F.3d 1309, 1312.) Once FTB has met its initial burden, the assessment is presumed correct, and the taxpayer has the burden of proving error in the assessment. (*Todd v. McColgan*, (1949) 89 Cal.App.2d 509, 514; *Appeal of Bindley*, *supra*.)

Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Chen and Chi*, 2020-OTA-021P.) In the absence of credible, competent, and relevant evidence showing that FTB's determination is incorrect, it must be upheld. (*Ibid*.) A taxpayer's failure to introduce evidence that is within his control gives rise to the presumption that the evidence, if provided, would be unfavorable to the taxpayer's position. (*Appeal of Bindley*, *supra*.)

In the instant appeal, appellant did not file a return for the 2017 tax year. Likewise, appellant did not respond to FTB's Demand. Since appellant did not file a return or otherwise respond to FTB's request for information, it was reasonable and rational for FTB to make its proposed assessment based on third party information. As such, the burden of proof shifts to appellant.

Appellant's contentions are not clear from the record. Appellant indicated that the grounds for his appeal were incomplete and that he would be submitting evidence with his opening brief. He also requested a copy of the rules of evidence and procedures applicable before the OTA. While OTA granted appellant two extensions to submit supplemental briefing, appellant did not avail himself of those opportunities. In appellant's November 20, 2019 protest,

however, appellant asserted that he did not have income of \$138,365² in 2017. Appellant also claimed that FTB's assessment was incorrect, erroneous, and baseless.

Appellant has only provided argument asserting that FTB's NOA is incorrect, which is insufficient to carry his burden. Further, though appellant implies that he has evidence to counter FTB's proposed assessment, appellant has not submitted any such evidence. Therefore, OTA finds appellant has not demonstrated error in FTB's proposed assessment.

Issue 2: Whether appellant has established reasonable cause for failing to timely file his tax return.

R&TC section 19131 imposes a penalty for the failure to file a return on or before the due date, unless it is shown that the late filing is due to reasonable cause and not due to willful neglect. A late-filing penalty imposed by FTB is presumed to be correct, and the burden of proof is on the taxpayer to establish that reasonable cause exists to support an abatement of the penalty. (*Appeal of Xie*, 2018-OTA-076P.) The burden of proof requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) A preponderance of the evidence means that the taxpayer must establish by documentation or other evidence that the circumstances he asserts are more likely than not to be correct. (*Appeal of Estate of Gillespie*, 2018-OTA-052P.)

A taxpayer must provide credible and competent evidence supporting reasonable cause to abate the penalty. (*Appeal of Estate of Gillespie, supra.*) To establish reasonable cause, the taxpayer must show that the failure to file a timely tax return occurred despite the exercise of ordinary business care and prudence, or that 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.)

As discussed above, appellant has not submitted any argument or evidence that would support his appeal or a claim of reasonable cause. While appellant asserts that his income was not \$138,365 for the 2017 tax year, appellant does not affirmatively state what his income for the 2017 tax year was. To the extent appellant is asserting that the late filing of his return was the result of the mistaken belief that he did not have a California filing requirement for the 2017 tax year, OTA notes that ignorance of the law is not reasonable cause for the failure to comply with

² In appellant's protest, appellant indicated \$13,365. However, since the NPA at protest indicates estimated income of \$138,365, OTA infers that appellant made a typographical error.

statutory requirements. (*Appeal of Porreca*, 2018-OTA-095P.) Accordingly, OTA finds that appellant has not established reasonable cause to abate the late filing penalty.

Issue 3: Whether appellant has established reasonable cause for failing to timely respond to the Demand.

R&TC section 19133 provides that if a taxpayer fails to file a return upon notice and demand by FTB, then FTB may impose a penalty of 25 percent of the amount of tax assessed pursuant to R&TC section 19087, unless the failure is due to reasonable cause and not willful neglect. 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 Demand. (Cal. Code Regs., tit. 18, § 19133(b)(1)-(2).) A "timely response" is a response within the time period specified in the Demand.³ (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, since appellant did not file a 2017 tax return or otherwise respond to the Demand within the deadline provided and FTB issued an NPA during the preceding four tax years. Thus, OTA finds that FTB properly imposed the demand penalty for the 2017 tax year.

To establish that reasonable cause exists to support abatement of the demand penalty, a taxpayer must show that the failure to timely respond to the Demand occurred despite the exercise of ordinary business care and prudence. (*Appeal of Wright Capital Holdings, LLC*, 2019-OTA-219P.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of GEF Operating, Inc., supra.*)

As discussed above, appellant has failed to demonstrate that he exercised ordinary business care and prudence with respect to filing his 2017 return or responding to the Demand, and as such, OTA finds that appellant has not established reasonable cause to abate the demand penalty.

³ A "Demand for Tax Return" is defined as a written notice and demand for a return from FTB, 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 April 26, 2019 Demand meets the definition of a Demand for Tax Return.

Issue 4: Whether FTB properly imposed the filing enforcement cost recovery fee.

R&TC section 19254(a)(2) provides if a person fails or refuses to make and file a tax return within 25 days after FTB mails to that person a formal legal demand to file the tax return, then FTB shall 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; *Appeal of Wright Capital Holdings, LLC, supra.*)

Here, FTB informed appellant in the Demand that the filing enforcement cost recovery fee (fee) may be assessed if he did not timely respond. FTB properly imposed the fee after it did not receive a response by the prescribed deadline set forth in the Demand. Since the fee was properly imposed, there is no authority for the abatement of this fee. Therefore, OTA sustains FTB's imposition of the fee.

Issue 5: Whether appellant is entitled to interest abatement.

Interest is not a penalty; rather it is compensation for a taxpayer's use of money after it should have been paid to the state. (*Appeal of Gorin, 2020-OTA-018P.*) To obtain relief from interest, a taxpayer must qualify under one of three statutes: R&TC sections 19104, 19112, or 21012. Only interest abatement under R&TC section 19104 is relevant to this appeal.⁴

Under R&TC section 19104, FTB may abate interest related to a proposed deficiency assessment to the extent the interest is attributable, in whole or in part, to: (1) unreasonable error or delay; (2) by an officer or employee of FTB; (3) in performing a ministerial or managerial act; and (4) which occurred after FTB contacted the taxpayer in writing regarding the proposed deficiency assessment, provided no significant aspect of that error or delay is attributable to the taxpayer. (R&TC, § 19104(a)(1), (b)(1); *Appeal of Gorin, supra.*)

OTA's jurisdiction in an interest abatement case, however, is limited to a review of whether FTB abused its discretion in determining whether to abate interest. (*Appeal of Gorin, supra.*) To show an abuse of discretion in refusing to abate interest, the taxpayer must establish FTB exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law.

(*Ibid.*) Interest abatement provisions are not intended to be routinely used to avoid the payment

⁴ OTA does not have jurisdiction to review an FTB interest abatement determination made under R&TC section 19112, a section relating to extreme financial hardship. (*Appeal of Moy, 2019-OTA-057P.*) R&TC section 21012 is not relevant here because there is no argument or evidence that appellant relied on FTB's written advice.

of interest and should be ordered only “where failure to abate interest would be widely perceived as grossly unfair.” (*Ibid.*, quoting *Lee v. Commissioner* (1999) T.C. 145, 149.)

FTB has not agreed to abate any interest. FTB argues that appellant has not asserted any basis to abate or waive interest in this appeal.

Here, FTB send appellant a Demand on April 26, 2019. After appellant did not respond by the prescribed deadline, FTB issued its NPA to appellant on September 23, 2019. On November 20, 2019, appellant protested the NPA. Pursuant to appellant’s request, an oral hearing at FTB was scheduled. Then it was rescheduled due to COVID-19. According to FTB, it was subsequently rescheduled multiple times at appellant’s request. After appellant failed to appear or reschedule the oral hearing set for September 27, 2021, FTB issued the Notice of Determination dated September 29, 2021. Thereafter, FTB issued the NOA to appellant on October 13, 2021, which affirmed the NPA. On November 12, 2021, appellant filed the instant appeal before OTA. Based on OTA’s review of the written record, OTA finds that appellant has not shown that FTB abused its discretion arbitrarily, capriciously, or without sound basis in fact or law in denying appellant’s interest abate request.

Issue 6: Whether to impose a frivolous appeals penalty.

R&TC section 19714 provides that a penalty of up to \$5,000 shall be imposed whenever it appears that proceedings before OTA have been instituted or maintained primarily for delay, or that the appellant’s position is frivolous or groundless. (*Appeal of Balch*, 2018-OTA-159P.) Regulation section 30217(a) provides that OTA shall 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 in determining whether, and in what amount, to impose a frivolous appeal penalty: (1) whether the appellant is making arguments that OTA, in a precedential Opinion, or the State Board of Equalization (BOE), in a precedential Opinion, or courts have rejected; (2) whether the appellant is making the same arguments that the same appellant made in prior appeals; (3) whether the appellant submitted the appeal with the intent of delaying legitimate tax proceedings or the legitimate collection of tax owed; (4) whether the appellant has a history of submitting frivolous appeals or failing to comply with California’s tax laws; or (5) whether the appellant has been notified, in a current or prior appeal, that a frivolous appeal penalty may apply.

As previously discussed, appellant requested to reschedule the oral hearing at FTB several times. Further, appellant submitted an incomplete Request for Appeal; and when given the opportunity to supplement his appeal, appellant did not submit any evidence or argument despite two briefing extensions. These actions tend to show that appellant was attempting to delay legitimate tax proceedings or the legitimate collection of tax owed. OTA finds that appellant was attempting to delay legitimate tax proceedings or the legitimate collection of tax owed, which is a factor in favor of imposing the frivolous appeal penalty.

Appellant has consistently failed to comply with California's tax law. Approximately twenty years have passed since appellant filed a return in 2002. Between 2001 and 2017, FTB issued proposed assessments for the following tax years: 2001, 2004, 2005, 2006, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, and 2017. FTB issued Demands for 2014, 2015, 2016, 2017, 2018, and 2019. In other words, appellant's failure to comply with R&TC section 18501 is egregious. OTA finds that appellant has a history of failing to comply with California's tax law which factors in favor of imposing the frivolous appeal penalty.

On October 13, 2021, FTB placed appellant on notice that OTA may impose a frivolous appeal penalty. On August 22, 2022, FTB once again placed appellant on notice that OTA may impose a frivolous appeal penalty. The prior notice supports the imposition of the frivolous appeal penalty. OTA notes, however, there is no evidence that the frivolous appeal penalty has previously been imposed on appellant which tends to support leniency.

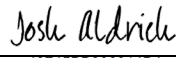
Based on the above, OTA imposes a frivolous appeal penalty of \$500. If appellant files additional appeals that raise frivolous arguments, OTA may impose additional frivolous appeal penalties pursuant to R&TC section 19714, up to the maximum \$5,000, per appeal.

HOLDINGS


1. Appellant has not established error in FTB’s proposed assessment.
2. Appellant has not established reasonable cause for failing to timely file his tax return.
3. Appellant has not established reasonable cause for failing to timely respond to the Demand.
4. FTB properly imposed the filing enforcement cost recovery fee.
5. Appellant is not entitled to interest abatement.
6. A frivolous appeal penalty of \$500 is imposed.

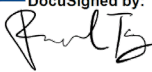
DISPOSITION

FTB’s action is sustained. In addition, a frivolous appeal penalty in the amount of \$500 is imposed pursuant to R&TC section 19714.

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 Josh Aldrich
 Administrative Law Judge

We concur:

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 Veronica I. Long
 Administrative Law Judge

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 Richard Tay
 Administrative Law Judge

Date Issued: 8/25/2023