

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
B. GALLO

) OTA Case No. 22019460
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OPINION

Representing the Parties:

For Appellant:

B. Gallo

For Respondent:

Camille Dixon, Attorney

For Office of Tax Appeals:

Deborah Cumins,
Business Taxes Specialist III

A. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, B. Gallo (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$2,214.00, a late-filing penalty of \$553.50, and applicable interest for the 2019 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 shown error in the proposed assessment.
2. Whether appellant has established reasonable cause to abate the late-filing penalty.
3. Whether the Office of Tax Appeals (OTA) will impose the frivolous appeal penalty.

FACTUAL FINDINGS

1. Appellant has not filed a California personal income tax return for the 2019 tax year.
2. Through FTB’s Integrated Non-Filer Compliance Program, FTB obtained information that appellant had received proceeds from broker transactions of \$59,699 from Morgan Stanley Domestic Holdings, Inc. (Morgan Stanley) and \$145 from Folio Investments, Inc.

3. FTB issued a Request for Tax Return requiring appellant to respond by July 21, 2021, by either filing a 2019 tax return, providing evidence that a return had already been filed, or filling out the attached questionnaire (Form 4602J). Appellant did not file a return or otherwise reply to the Request for Tax Return.
4. On August 20, 2021, FTB issued appellant a Notice of Proposed Assessment (NPA), based on estimated income of \$59,699.00.¹ The NPA proposed to assess tax of \$2,214.00 and imposed a late-filing penalty of \$553.50.
5. On September 2, 2021, FTB received appellant's Form 4602J. On that form, appellant indicated that he had zero income from (1) wages, (2) income for services performed and reported on federal Form 1099, (3) taxable gain from sale of properties, and (4) interest and dividend income.
6. FTB issued a Notice of Action affirming the NPA.
7. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has shown any error in the proposed assessment.

California residents are taxed upon their entire taxable income (regardless of source). (R&TC, § 17041(a).) R&TC section 18501 requires every individual subject to the Personal Income Tax Law, whose gross income from all sources exceeds certain filing thresholds,² 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....” (R&TC, § 18501(a)(1)-(4).)

If any 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 proposes a tax assessment based on an estimate of income, its initial burden is to show that the proposed assessment was reasonable and rational. (*Appeal of Sheward*, 2022-OTA-228P.) A proposed assessment based on unreported income is presumed to be correct when the taxing agency introduces a minimal factual foundation to support the assessment. (*Ibid.*) When a taxpayer fails to file a valid return and refuses to

¹ The \$145 proceeds from Folio Investments were not included in the assessment of tax because appellant did not realize any gain on these proceeds due to a reported cost basis of \$145.

² For the 2019 tax year, a single individual, under 65 years of age, with no dependents realizing gross income of \$18,241 or adjusted gross income of \$14,593 was required to file a California income tax return.

cooperate in the ascertainment of his income, FTB is given “great latitude” in determining the amount of the taxpayer’s tax liability. (*Appeals of Tonsberg* (85-SBE-034) 1985 WL 15812.)

Once FTB meets its initial burden, FTB’s determination is presumed to be correct, and the taxpayer has the burden of proving otherwise. (*Appeal of Bindley*, 2019-OTA-179P.) Unsupported assertions are insufficient to satisfy a taxpayer’s burden of proof. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing error, FTB’s determination must be upheld. (*Ibid.*) The burden of proof requires proof by a preponderance of the evidence. (Cal. Code Regs, tit. 18, § 30219(b).)

Here, FTB obtained information that appellant had received proceeds of \$59,699 in broker transactions from Morgan Stanley. FTB requested from appellant any additional information, such as a Form 1099 with the cost/basis information related to the broker transactions from which a more accurate assessment could be made. However, appellant did not provide any additional information. As such, FTB’s assessment based on estimated income is reasonable and rational, and the burden shifts to appellant.

Appellant asserts that he “[e]arned zero dollars in the lockdown and received zero aid for [his] business.”³ Appellant does not, however, deny receiving the proceeds from Morgan Stanley, and he has not provided evidence demonstrating that the proceeds were not subject to tax. Further, appellant has not presented evidence that FTB incorrectly calculated the amount of tax. Therefore, appellant has not shown any error in the proposed assessment.

Issue 2: Whether appellant has established a basis for abatement of the late-filing penalty.

FTB will impose a late-filing penalty when a taxpayer does not file a tax 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. (R&TC, § 19131(a).) When FTB imposes a late-filing penalty, it is presumed to have been correctly imposed, and the burden of proof is on the taxpayer to show that reasonable cause exists to abate the penalty. (*Appeal of Xie*, 2018-OTA-076P.) To overcome the presumption of correctness, the taxpayer must provide credible and competent evidence supporting a claim of reasonable cause. (*Ibid.*) To establish reasonable cause, the taxpayer must show the failure to timely file occurred despite the exercise of “ordinary business care and prudence.” (*Appeal of Fisher*, 2022-OTA-337P.)

³ Although it is not material to the analysis of this matter, OTA notes that there was no “lockdown” (COVID-19 related or otherwise) during 2019, which is the tax year at issue.

Here, appellant has offered no arguments directly related to the penalty. Other than contending that he did not earn income during the tax year at issue, appellant has offered no evidence that his failure to timely file an income tax return for the 2019 tax year is due to reasonable cause. Accordingly, appellant has not established a basis to abate the late-filing penalty.

Issue 3: Whether OTA will impose a frivolous appeal penalty.

R&TC section 19714 allows OTA to impose a frivolous appeal penalty when OTA finds that an appeal before it was instituted or maintained primarily for delay, or that the taxpayer's position is frivolous or groundless. (See Cal. Code Regs., tit. 18, § 30217(a).) OTA may consider any relevant factors in determining whether an appeal is frivolous or is maintained primarily for delay. (Cal. Code Regs., tit. 18, § 30217(b).) The following is a non-exclusive list of factors that may indicate a frivolous appeal penalty is warranted: (1) whether appellant is making arguments that have been previously rejected by OTA in a precedential Opinion, by the Board of Equalization in a precedential Opinion, or by the courts; (2) whether appellant is making the same arguments that the same appellant made in prior appeals; (3) whether appellant filed the appeal with the intent of delaying legitimate tax proceedings or the legitimate collection of tax owed; (4) whether appellant has a history of filing frivolous appeals or failing to comply with California's tax laws; or (5) whether appellant has been notified in the current or past appeal that a frivolous appeal penalty may apply. (*Ibid.*)

The R&TC and existing regulations promulgated thereunder do not specifically define what is meant by "frivolous or groundless" or "instituted or maintained by the taxpayer primarily for delay." Nevertheless, R&TC section 19714 applies the same standard and uses substantially identical language as Internal Revenue Code section 6673(a)(1)(A)-(B), which is the comparable federal statute authorizing a frivolous appeal penalty. Therefore, it is appropriate to look to federal authority for guidance. (*Douglas v. State* (1948) 48 Cal.App.2d 835, 838.)

Existing federal authorities explain that the purpose of the frivolous appeal penalty is not to compensate the government for time spent handling frivolous appeals; instead, the purpose is to penalize taxpayers who raise frivolous claims. (*Sauers v. Commissioner* (3d Cir. 1985) 771 F.2d 64, 67.) A position maintained by the taxpayer "is frivolous if it is contrary to established law and unsupported by a reasoned, colorable argument for change in the law." (*Coleman v. Commissioner* (7th Cir. 1986) 791 F.2d 68, 71.)

Here, appellant has presented brief, unsupported arguments, stating that he “earned zero dollars” and “received zero aid” for his business during “the lockdown.” Appellant opines that the lockdown was “unconstitutional, immoral, illegal and evil.” Appellant further opines, “Voting and State is [sic] entirely fraudulent and treasonous.”

Although FTB requested documentation from appellant to establish errors in the NPA, appellant has provided nothing to support his assertion that he received no income in 2019. Appellant’s brief statements on the Request for Appeal imply that California does not have the authority to impose income tax. Such arguments have been rejected consistently by OTA, the Board of Equalization (OTA’s predecessor), and state and federal courts.

FTB included a summary regarding non-filer frivolous arguments with its opening brief. That summary describes various frivolous arguments, including arguments such as those raised by appellant. Further, the summary explains that OTA may impose a penalty, not to exceed \$5,000, when it finds that a taxpayer’s position on appeal is frivolous or groundless. In other words, appellant was informed that the arguments he is raising have been determined to be frivolous, and he was cautioned that a penalty could be assessed. Nevertheless, appellant has not withdrawn his Request for Appeal, revised his arguments, or filed a return for tax year 2019.

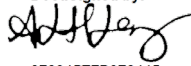
OTA has the statutory authority to impose a penalty of up to \$5,000 if it finds that an appeal before it has been instituted or maintained primarily for delay or that a taxpayer’s position in the appeal is frivolous or groundless. (R&TC, § 19714; see also Cal. Code Regs., tit. 18, § 30217(a).) Because this is appellant’s first appeal containing these frivolous arguments, OTA will not impose the penalty in this proceeding. However, appellant’s positions and conduct in this appeal suggest that such a penalty may be warranted in the future should he file another appeal with OTA raising the same or similar arguments.

HOLDINGS

1. Appellant has not shown any error in the proposed assessment.
2. Appellant has not established a basis for abatement of the late-filing penalty.
3. OTA will not impose a frivolous appeal penalty.

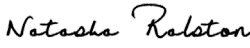
DISPOSITION

FTB’s actions are sustained.


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Andrea L.H. Long
 Administrative Law Judge

We concur:

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Natasha Ralston
 Administrative Law Judge

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John O. Johnson
 Administrative Law Judge

Date Issued: 8/31/2023