

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
G. HOBBS

) OTA Case No. 220911320
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OPINION

Representing the Parties:

For Appellant: G. Hobbs

For Respondent: Eric R. Brown, Tax Counsel III

E. LAM, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, G. Hobbs (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$7,112, a late filing penalty of \$1,778, and applicable interest, for the 2019 tax year.

Appellant waived the right to an oral hearing; therefore, the Office of Tax Appeals (OTA) decides the matter based on the written record.

ISSUES

1. Whether appellant has shown any error in the proposed assessment.
2. Whether appellant has demonstrated reasonable cause to abate the late filing penalty.
3. Whether the frivolous appeal penalty should be imposed.

FACTUAL FINDINGS

1. Appellant has not filed his 2019 California Resident Income Tax Return.
2. Through FTB’s Integrated Non-Filer Compliance program, FTB obtained information from a Form 1099-S as reported by Fidelity National Title Company, indicating that appellant received gross proceeds from the sale of real property.

3. On September 7, 2021, FTB issued a Request for Tax Return (Request) for the 2019 tax year. The Request required appellant to file a 2019 return, provide proof that he previously filed a return, or explain why he was not required to file a return. The Request notified appellant that frivolous penalty could be imposed if appellant’s response to the Request is considered frivolous.
4. Appellant responded to the Request, but did not explain that he was not required to file a tax return. Instead, appellant requested FTB to provide proof with evidence that FTB has “legal and lawful delegated authority and jurisdiction” over his tax matters.
5. On March 25, 2022, FTB issued a Notice of Proposed Assessment (NPA) and estimated appellant’s income before standard deductions to be \$114,080, which is based on the proceeds as reported by Fidelity National Title Company on Form 1099-S. The NPA proposed a tax liability of \$7,112, a late filing penalty of \$1,778, and applicable interest. The NPA also notified appellant that frivolous penalty could be imposed if appellant’s response to the NPA is considered frivolous.
6. Appellant timely protested the NPA, contending various due process arguments. Additionally, appellant provided a letter dated March 31, 2022, from the IRS, which indicated that based on appellant’s submitted information, the IRS agrees that he is not legally required to file a federal tax return for the 2019 tax year.
7. FTB issued a Notice of Action, affirming the NPA in its entirety.
8. Appellant previously filed another appeal with the State Board of Equalization (BOE), OTA’s predecessor, for the 1996 tax year. In a decision dated November 18, 2003, BOE not only sustained FTB’s actions, but also imposed a frivolous appeal penalty in the amount of \$2,500.
9. This timely appeal followed.

DISCUSSION

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

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 Bindley*, 2019-OTA-179P.) Once FTB has met its initial burden, the proposed assessment of additional tax is presumed correct and the taxpayer has the burden of proving it to be wrong. (*Ibid.*) When a taxpayer fails to file a valid return, FTB’s use of income information from various sources to estimate a taxpayer’s taxable income is a reasonable and rational method of estimating taxable income. (*Appeal of Sheward*, 2022-OTA-228P.)

FTB’s determination is presumed to be correct, and the taxpayer has the burden of proving otherwise. (*Appeal of Bindley*, *supra.*) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing error, FTB’s determinations must be upheld. (*Ibid.*) The burden of proof requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).)

Here, FTB met its initial burden by presenting evidence that appellant received income from the sale of real property, as indicated on Form 1099-S issued by Fidelity National Title Company. However, appellant has not shown that this income was not subject to tax. Also, appellant has not presented evidence that this tax liability was incorrectly calculated. Instead, appellant made various unsupported assertions that FTB violated his due process rights.¹ Appellant also asserts that he is not legally required to file a federal income tax return for 2019; therefore, he does not need to file a California income tax return. Appellant supports his assertion by submitting the March 25, 2023 letter from the IRS, which indicates that the IRS agrees with appellant that he is not legally required to file a 2019 federal tax return based on the information he submitted to the IRS. Nevertheless, FTB is not necessarily obligated to follow a federal action that it believes to be erroneous. (*Appeal of Der Wienerschnitzel International, Inc.*, (79-SBE-063) 1979 WL 4104.) Here, appellant has not explained and has not made available as to what information was provided to the IRS for it to have reached its conclusion. Therefore, there is no evidentiary basis to overturn FTB’s proposed assessment.

Issue 2: Whether appellant has demonstrated reasonable cause to abate the late filing penalty.

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

¹ As an illustration, appellant assert that “FTB has failed to provide any Delegations of Authority Orders or proof of jurisdiction” and that the “notice of determination is defective on its face.” OTA will not address these frivolous arguments “with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit.” (*Wnuck v. Commissioner*, (2011) 136 T.C. 498, 499, citing *Crain v. Commissioner* (5th Cir. 1984) 737 F.2d 1417, 1417.)

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.) Unsupported assertions are not enough to satisfy a taxpayer’s burden of proof. (*Ibid.*)

Appellant has not contested the computation of the late filing penalty. Appellant has not shown that he had reasonable cause for failing to timely file the 2019 tax return. Instead, appellant continues to make the same meritless due process arguments, such as the assertion that there was a “violation of federal law and denial of due process” and that it “constitutes a fatal flaw in FTB’s administrative process.”² Under these circumstances, FTB properly imposed the late filing penalty and appellant has not established reasonable cause to abate the penalty.

Issue 3: Whether the frivolous appeal penalty should be imposed.

OTA may impose a penalty of up to \$5,000 whenever it appears that a proceeding before it has been instituted or maintained primarily for delay or that the taxpayer’s position in the proceeding is frivolous or groundless.³ (R&TC, § 19714.) OTA’s Rules for Tax Appeals contain the following non-exclusive list of factors to be considered when determining whether to impose the penalty, and in what amount: (1) whether the taxpayer is making arguments that have been previously rejected by OTA in a precedential opinion, by BOE in a Formal Opinion, or by the courts; (2) whether the taxpayer is repeating arguments that he advanced unsuccessfully in prior appeals; (3) whether the taxpayer filed the appeal with the intent of delaying legitimate tax proceedings or the legitimate collection of tax owed; (4) whether the taxpayer has a history of filing frivolous appeals or failing to comply with California’s tax laws; and (5) whether the taxpayer has been notified, in a current or prior appeal, that a frivolous appeal penalty might apply. (Cal. Code Regs., tit. 18, § 30217(b)(1-5).)

² Appellant makes numerous arguments relating to due process arguments, which are outside OTA’s jurisdiction, and arguments that are inconsequential and/or irrelevant. (See Cal. Code Regs., tit. 18, §§ 30103, 30104.) OTA summarily dismisses such arguments and will not discuss them further.

³ R&TC section 19714 refers to proceedings before the “[BOE] or any court of record.” However, R&TC section 20(b) provides that this phrase now refers to OTA, as the BOE’s authority to handle income and business tax appeals has been transferred to this agency.

Appellant has raised many of the same or similar due process arguments that he raised in his prior BOE appeal with respect to the 1996 taxable year.⁴ Appellant was warned by the Request and NPA that the frivolous appeal penalty might be imposed for the 2019 tax year. Therefore, OTA concludes that a frivolous appeal penalty of \$2,500 is appropriate. OTA cautions appellant that OTA will not hesitate to impose additional frivolous appeal penalties pursuant to R&TC section 19714, up to the maximum of \$5,000 per appeal, if appellant files additional appeals that raise similarly frivolous arguments.

HOLDINGS

1. Appellant has not shown any error in the proposed assessment.
2. Appellant has not demonstrated reasonable cause to abate the late filing penalty.
3. OTA imposes the frivolous appeal penalty in the amount of \$2,500.

DISPOSITION

FTB's action is sustained.

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Eddy Y.H. Lam
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Eddy Y.H. Lam
Administrative Law Judge

We concur:

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Amanda Vassigh
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Amanda Vassigh
Administrative Law Judge

DocuSigned by:
Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

Date Issued: 6/7/2023

⁴ With regard to appellant's various due process allegations, OTA has no authority to resolve any grievances that appellant may have against FTB aside from the correct amount of appellant's California income tax liability, if any. (*Appeals of Dauberger, et al.* (82-SBE-082) 1982 WL 11759.)