

ISSUES

1. Whether appellant has shown error in FTB's determination that appellant has filing requirements and owes tax for the 2018 and 2019 tax years.
2. Whether appellant has shown reasonable cause for failing to timely file 2018 and 2019 California income tax returns.
3. Whether appellant has established grounds to abate the demand penalties.
4. Whether appellant has established grounds to abate the filing enforcement fees.
5. Whether appellant is entitled to interest abatement.

FACTUAL FINDINGS

1. Appellant did not timely file California income tax returns for the 2018 and 2019 tax years. As of the date briefing closed, appellant has not filed 2018 or 2019 California income tax returns.

2018 Tax Year

2. FTB received information from appellant's employer that appellant earned sufficient wage income to prompt a filing requirement.
3. On December 14, 2020, FTB issued appellant a Demand for Tax Return (Demand) for the 2018 tax year (2018 Demand) to appellant's Barstow, California address (Barstow Address). The 2018 Demand required appellant to respond by filing his 2018 California income tax return, providing evidence that he already filed his 2018 return, or explaining why appellant had no filing requirement for the 2018 tax year. The 2018 Demand notified appellant that if he did not timely respond in the prescribed manner, FTB would assess a demand penalty, a late-filing penalty, a filing enforcement fee, and interest.
4. When appellant did not respond to the 2018 Demand, FTB issued appellant a Notice of Proposed Assessment (NPA) for the 2018 tax year (2018 NPA) to appellant's Lynwood, California address (Lynwood Address). The 2018 NPA estimated appellant's income to exceed the 2018 filing threshold based on appellant's wage income reported by his

employer.¹ The 2018 NPA proposed tax, a late-filing penalty, a demand penalty, and a filing enforcement fee, plus interest.

5. Appellant protested the 2018 NPA. FTB sent appellant letters requesting that he call and schedule an oral hearing for the matter. On August 28, 2021, appellant sent correspondence requesting an in-person hearing closer to his home. The correspondence was captioned from his Lynwood Address. No hearing was scheduled.
6. FTB subsequently issued appellant a Notice of Action (NOA) affirming the 2018 NPA.

2019 Tax Year

7. FTB received information from appellant's employer that appellant earned sufficient wage income to prompt a filing requirement.
8. On November 16, 2021, FTB issued appellant a Demand for the 2019 tax year (2019 Demand) to appellant's Lynwood Address. The 2019 Demand required appellant to respond by filing his 2019 California income tax return, providing evidence that he already filed his 2019 return, or explaining why appellant had no filing requirement for the 2019 tax year. The 2019 Demand notified appellant that if he did not timely respond in the prescribed manner, FTB would assess a demand penalty, a late-filing penalty, a filing enforcement fee, and interest.
9. When appellant did not respond to the 2019 Demand, FTB issued appellant an NPA for the 2019 tax year (2019 NPA) to appellant's Lynwood Address. The 2019 NPA estimated appellant's income to exceed the 2019 filing threshold based on based on appellant's wage income reported by his employer.² The 2019 NPA proposed tax, a late-filing penalty, a demand penalty, and a filing enforcement fee, plus interest.
10. Appellant protested the 2019 NPA.
11. FTB subsequently issued appellant an NOA affirming the 2019 NPA.

¹ As discussed below under Issue 1, the 2018 filing threshold for a single individual under 65 years of age with no dependents was gross income of \$17,693 or adjusted gross income of \$14,154. Appellant's 2018 wage income was \$61,092.

² As discussed below under Issue 1, the 2019 filing threshold for a single individual under 65 years of age with no dependents was gross income of \$18,241 or adjusted gross income of \$14,593. Appellant's 2019 wage income was \$64,133.

Current Consolidated Appeal and 2017 NPA

12. This timely appeal followed.
13. Following the hearing, OTA reopened the record and requested additional briefing. OTA requested briefing on whether FTB had reason to believe that the Barstow Address was appellant's most current address when it mailed the 2018 Demand. FTB provided appellant's protest letter for a prior tax year, which listed the Barstow address and resulted in FTB's recording of an address change. In response, appellant stated that he always used his Lynwood Address. He also stated that when correspondence was sent to his Barstow Address, he called FTB to request that it send mail to his Lynwood Address.
14. As relevant here, FTB previously issued appellant an NPA for the 2017 tax year (2017 NPA) following his failure to respond to a 2017 Request for Tax Return (2017 Request). The 2017 NPA was sent to appellant's Barstow Address.

DISCUSSION

Issue 1: Whether appellant has shown error in FTB's determination that appellant has filing requirements and owes tax for the 2018 and 2019 tax years.

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 deduction and credits allowable," if an individual has gross income or adjusted gross income (AGI) exceeding certain filing thresholds. The 2018 filing threshold for a single individual under 65 years of age with no dependents was gross income of \$17,693 or AGI of \$14,154. The 2019 filing threshold for a single individual under 65 years of age with no dependents was gross income of \$18,241 or AGI of \$14,593.³

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." When FTB makes a proposed assessment of additional tax based on an estimate of income, FTB's initial burden is to show why its proposed assessment is reasonable and rational. (*Appeal of Bindley*, 2019-OTA-179P (*Bindley*); *Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514.) An assessment based on

³ FTB annually adjusts the filing thresholds for tax years beginning on or after January 1, 1996. (See R&TC, § 18501(d).)

unreported income is presumed correct when the taxing agency introduces a minimal factual foundation to support the assessment. (*Bindley, supra.*)

Here, as of the date briefing closed, appellant has not filed 2018 or 2019 California income tax returns. FTB estimated appellant's income for the 2018 and 2019 tax years based on the wage income of \$61,092 for the 2018 tax year and \$64,133 for the 2019 tax year reported by appellant's employer. Appellant's wages exceed the 2018 and 2019 gross income filing thresholds of \$17,693 and \$18,241, respectively. Thus, appellant had 2018 and 2019 California filing requirements. FTB's use of third party payor information, such as the reporting of appellant's employer, to estimate appellant's taxable income is both reasonable and rational. (*Bindley, supra.*)

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. (*Bindley, supra.*) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing error in FTB's determination, the determination must be upheld. (*Ibid.*)

Here, even after FTB issued appellant the 2018 and 2019 Demands, appellant failed to file 2018 or 2019 California income tax returns. Appellant states that he does not know why he is being assessed income tax. However, appellant does not dispute the wage income reported by appellant's employer, and appellant provides no evidence to demonstrate that he does not have 2018 and 2019 California filing requirements. The record indicates, and appellant does not dispute that, he was a California resident during the taxable years under appeal. In the absence of credible, competent, and relevant evidence showing error in FTB's determination, the determination must be upheld. (*Bindley, supra.*) Therefore, appellant has not met his burden of showing error in FTB's proposed assessments of tax.

Issue 2: Whether appellant has shown reasonable cause for failing to timely file 2018 and 2019 California income tax returns.

R&TC section 19131 provides that a late-filing penalty shall be imposed when a taxpayer fails to 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. When FTB imposes a late-filing penalty, the law presumes that it is correct, and the burden of proof is on the taxpayer to show that reasonable cause exists to abate the penalty. (*Appeal of Cremel and Koepfel,*

2021-OTA-222P.) The late-filing penalty is calculated at 5 percent of the tax for each month or fraction thereof that the return is late, with a maximum penalty of 25 percent of the tax. (R&TC, § 19131(a).) As of the date briefing closed, appellant still has not filed 2018 and 2019 California income tax returns. As the returns are more than five months late, appellant is subject to the maximum penalty of 25 percent on the tax due for the 2018 and 2019 tax years, which is \$602.25 and \$647.25, respectively.⁴ OTA finds that FTB correctly imposed the late-filing penalties.

To establish reasonable cause, a taxpayer must show that the failure to file a timely return occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinary intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Here, appellant states that he does not understand why he must pay tax. However, as discussed above, the record shows that appellant was notified in the 2018 and 2019 Demands and NPAs that he had 2018 and 2019 California filing requirements. As of the date briefing closed, appellant has still not filed 2018 or 2019 California income tax returns. Appellant's failure to acquaint himself with the requirements of California tax law does not constitute ordinary care and does not excuse his failure to comply with the statutory requirement of timely filing a return. (*Appeal of Cremel and Koepfel, supra.*)

Appellant asserts that difficult personal circumstances prevented him from filing a return. Illness or other personal difficulties may be considered reasonable cause if taxpayers present credible and competent proof that they were continuously prevented from filing a tax return. (*Appeal of Head and Feliciano*, 2020-OTA-127P.) However, if the difficulties simply caused appellant to sacrifice the timeliness of one aspect of his affairs to pursue other aspects, appellant must bear the consequences of that choice. (*Ibid.*) While appellant testified to difficult personal circumstances, he provides no evidence to show that he was unable to file California income tax returns for the 2018 and 2019 tax years. He also provides no evidence of steps taken to timely file his California income tax returns, or that he was prevented from filing his return despite the exercise of ordinary business care and prudence. Therefore, appellant has not established reasonable cause for the late filing of his 2018 and 2019 California income tax returns. A review of the record shows no facts or circumstances illustrating that appellant had reasonable cause for failing to timely file his 2018 and 2019 California income tax returns.

⁴ For the 2018 tax year, $\$2,409 \times 0.25 = \602.25 ; for the 2019 tax year, $\$2,589 \times 0.25 = \647.25 .

Appellant contends that he is entitled to a refund for the 2015 tax year, a tax year that is not before OTA in this consolidated appeal. In general, OTA's jurisdiction over a claim for refund denial is to determine the correct liability for the tax years at issue. An administrative agency's authority to act is of limited jurisdiction, and it "has no powers except such as the law of its creation has given it." (*Appeal of Moy*, 2019-OTA-057P; *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 97, 105.) This appeal arises from appellant's timely appeal of FTB's NOAs for the 2018 and 2019 tax years. Accordingly, this appeal does not concern the 2015 tax year, and OTA has no jurisdiction over appellant's refund claim for the 2015 tax year.

Appellant testified that he faces significant financial hardship as a result of FTB's proposed assessments. Although FTB in certain instances may waive payment for financial hardship,⁵ no statute authorizes OTA to take any action based on appellant's assertion of financial hardship. (See *Appeal of Robinson*, 2018-OTA-059P.) Therefore, no basis exists to abate the late-filing penalties.

Issue 3: Whether appellant has established grounds to abate the demand penalties.

R&TC section 19133 imposes a penalty when a taxpayer fails to file a return or provide information upon FTB's demand to do so. 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 proposed an assessment of tax under the authority of R&TC section 19087(a), after the taxpayer failed to timely respond to a Request or a 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).)

FTB imposed the demand penalties because appellant did not timely respond to the 2018 and 2019 Demands in the prescribed manner. As described above, as of the date briefing closed, appellant still has not filed his 2018 or 2019 California income tax returns, and appellant failed to establish that he has no 2018 and 2019 California filing requirements. Moreover, FTB issued appellant the 2018 and 2019 NPAs following appellant's failure to timely respond in the

⁵ For example, R&TC section 19112 states that FTB may waive interest if a taxpayer shows that the taxpayer's inability to pay interest was solely due to extreme financial hardship caused by a significant disability or catastrophic circumstance. FTB may also consider appellant's inability to pay under its payment arrangement or offer-in-compromise programs. If appellant is experiencing difficulties in paying his liabilities once the decision in this appeal is final, appellant may contact FTB to discuss payment options. (See <https://www.ftb.ca.gov/pay/if-you-cant-pay/index.html>.)

prescribed manner to a Request for the 2017 tax year, which is within the four-taxable-year period preceding the 2018 and 2019 NPAs. Thus, FTB properly imposed the demand penalties.

The demand penalty can be abated if the taxpayer establishes that the failure to timely respond to a demand was due to reasonable cause and not willful neglect. (R&TC, § 19133.) To establish reasonable cause, the taxpayer must show that the failure occurred despite the exercise of ordinary business care. (*Appeal of Jones*, 2021-OTA-144P.) The taxpayer's reason must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of GEF Operating, Inc.*, *supra*.)

On appeal, appellant claims that since 2010, when his home at the Barstow Address was foreclosed on, he stopped using the Barstow Address and no longer resides at that address. Appellant contends that he was not notified of the demand penalties, that FTB issued notices to a wrong address, and that it continued to send mail to appellant's Barstow Address, even though he had notified the agency of his preferred Lynwood Address.

It is well settled that any notice to a taxpayer shall be sufficient if it is mailed to the taxpayer's last-known address, which is the address that appears on the taxpayer's last return filed with FTB, unless the taxpayer has provided to the FTB clear and concise written or electronic notification of a different address, or the FTB has an address it has reason to believe is the most current address for the taxpayer. (R&TC, § 18416(b), (c); *Appeal of Goodwin* (97- SBE-003) 1997 WL 258474.) Here, FTB issued the 2018 Demand to appellant's Barstow Address on December 14, 2020. The most recent tax return filed by appellant was for the 2016 tax year on or around April 15, 2017. That return lists the Lynwood address as appellant's address. However, on appeal, FTB provides appellant's protest letter for the 2017 tax year, dated January 24, 2020, which is captioned from the Barstow Address. FTB submits records showing that following its receipt of appellant's protest letter for the 2017 tax year, it updated appellant's address to the Barstow Address. Therefore, FTB was notified and had reason to believe that the Barstow Address was appellant's most current address when it mailed the 2018 Demand.

Appellant provided no correspondence or documentation showing that he notified FTB of a different address between January 24, 2020, and December 14, 2020, or that FTB had reason to believe that appellant's last-known address was not the current address when it mailed the

2018 Demand. The 2018 Demand was sent to appellant's last-known address and legally sufficient.⁶

FTB issued the 2019 Demand to appellant's Lynwood address, appellant's preferred address, on November 16, 2021. On appeal, FTB provided appellant's August 28, 2021, response to FTB's letters requesting that he schedule an oral hearing for the 2018 tax year. Appellant's response was captioned from his Lynwood address. Accordingly, FTB had reason to believe that it was appellant's last-known address. The 2019 Demand was issued after appellant's written notification to FTB. Appellant has not provided any correspondence or documentation showing that between August 28, 2021, and November 16, 2021, appellant notified FTB of a different address, or that FTB had reason to believe that appellant's last-known address was not the current address prior to mailing the 2019 Demand. Thus, OTA finds that the 2019 Demand was sent to appellant's last-known address and legally sufficient.

To summarize, appellant has not shown reasonable cause for failing to respond to the 2018 and 2019 Demands, and his claims regarding a refund for the 2015 tax year, and financial difficulty, do not constitute grounds for relief. Thus, the demand penalties cannot be abated.

Issue 4: Whether appellant has established grounds to abate the filing enforcement fees.

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 fee (in 2018 and 2019, set at \$97 for individuals).⁷ Once properly imposed, the statute provides no grounds upon which the fee may be abated, including reasonable cause. (R&TC, § 19254; *Appeal of GEF Operating, Inc., supra.*)

Here, FTB informed appellant in the 2018 and 2019 Demands that he may be subject to the filing enforcement fee if he did not file the 2018 and 2019 California income tax returns. Appellant did not timely respond to the 2018 and 2019 Demands in the prescribed manner, and as of the date briefing closed, has not filed his 2018 and 2019 California income tax returns. Thus, FTB properly imposed the filing enforcement fees, and OTA has no basis to abate them.

⁶ FTB issued the 2017 NPA and 2018 Demand to appellant's Barstow Address based on his 2017 protest letter. OTA notes that appellant continues to use the Barstow Address in correspondence, such the filing of this consolidated appeal, which suggests it is a current address of appellant.

⁷ FTB annually adjusts the filing enforcement fee to reflect actual costs as reflected in the annual Budget Act.

Issue 5: Whether appellant is entitled to interest abatement.

Interest must be assessed from the date a tax payment is due through the date that it is paid. (R&TC, § 19101.) Imposing interest is mandatory, and FTB cannot abate interest except where authorized by law. (R&TC, § 19101; *Appeal of Balch*, 2018-OTA-159P.) Interest is not a penalty; it is compensation for the use of money. (*Appeal of Balch, supra.*) Generally, to obtain relief from interest, taxpayers must qualify under R&TC section 19104 or 21012.⁸ (*Ibid.*) Under R&TC section 19104, FTB may be authorized to abate or refund interest if there has been an unreasonable error or delay in the performance of a ministerial or managerial act by an FTB employee. Under R&TC section 21012, an individual may be relieved from interest if that person reasonably relies on FTB's written advice in response to a written request. Appellant does not allege that either statutory provision for interest abatement applies to the facts of this case, and OTA concludes based on the evidence in the record that none of these statutory provisions apply. Therefore, FTB properly imposed interest and OTA has no basis to abate it.

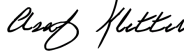
⁸ Under R&TC section 19112, FTB may waive interest for any period for which FTB determines that an individual has extreme financial hardship. OTA does not have authority to review extreme financial hardship determinations under R&TC section 19112. (See *Appeal of Moy, supra.*)

HOLDINGS

1. Appellant has not shown error in FTB’s determination that appellant has filing requirements and owes tax for the 2018 and 2019 tax years.
2. Appellant has not shown reasonable cause for failing to timely file 2018 and 2019 California income tax returns.
3. Appellant has not established grounds to abate the demand penalties.
4. Appellant has not established grounds to abate the filing enforcement fees.
5. Appellant is not entitled to interest abatement.

DISPOSITION

FTB’s actions are sustained.

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Asaf Kletter
Administrative Law Judge

Date Issued: 11/20/2023