

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 19085136
J. SHANAHAN)
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OPINION

Representing the Parties:

For Appellant: J. Shanahan

For Respondent: Christopher T. Tuttle, Tax Counsel III

For Office of Tax Appeals: David Kowalczyk, Tax Counsel

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, J. Shanahan (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing \$1,208 of additional tax, a late filing penalty of \$302, a demand penalty of \$302, and a filing enforcement cost recovery fee of \$88, plus applicable interest, for the 2016 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 established error in FTB’s proposed assessment for the 2016 tax year, which is based on information received from its Integrated Non-Filer Compliance (INC) Program.
2. Whether appellant has established reasonable cause for failing to timely file his 2016 tax return.
3. Whether appellant is liable for the demand penalty.
4. Whether FTB properly imposed the filing enforcement cost recovery fee (filing enforcement fee).

FACTUAL FINDINGS

1. Appellant has not filed a 2016 California resident income tax return.
2. Through its INC Program, FTB obtained information indicating that appellant received income sufficient to require him to file a 2016 return.¹ Specifically, FTB received information reported on Form 1099-MISC indicating that appellant received \$2,600 in income, as well as information from the Board of Professional Engineers, Land Surveyors, and Geologists (BPELSG) that appellant had an active license to practice engineering in California.²
3. On May 10, 2018, FTB issued to appellant a Demand for Tax Return (Demand), demanding that by June 13, 2018, appellant either: (1) file a 2016 tax return; (2) send a copy of the tax return if one had already been filed; or (3) “[p]rovide information that [appellant does] not have a requirement to file a 2016 tax return. / Complete Section B of the enclosed Reply to FTB form [(Reply Form)]”
4. On June 13, 2018, appellant sent a response indicating that he did not complete the Reply Form because the form required him to sign his name under penalty of perjury and that he “might have considered” signing and returning the form if FTB swore under penalty of perjury that the information in the Demand was correct. Appellant argued that he was not required to file a California tax return because he did not earn any “income.” Specifically, appellant, contending that the United States Supreme Court ruled that the essential meaning of “income” is profit, argued that corporations make a profit, appellant is not a corporation, and “[c]ompensation for [his] personal labor (manual and intellectual)” is not profit and thus not “income.”
5. Upon review, FTB issued to appellant a Notice of Proposed Assessment (NPA) for the 2016 tax year notifying appellant that FTB had no record of receiving appellant’s tax return or information indicating that he does not have a filing requirement, and that FTB estimated appellant’s income based on the average income amount reported to FTB by individuals in appellant’s type of industry. The NPA estimated appellant’s income as

¹ A California resident who is a single individual 65 years old or older with no dependents, such as appellant, has a California filing requirement for the 2016 tax year if the individual’s California gross income exceeds \$22,147 or the individual’s California adjusted gross income exceeds \$18,828.

² Appellant acknowledges that he received \$2,600 from J. Mee in 2016 for providing engineering services and that he has been a licensed engineer in California for approximately 33 years.

- \$45,631 based on the information FTB received, and proposed a tax liability, a late filing penalty, a demand penalty, and a filing enforcement fee, plus applicable interest.
6. Appellant timely protested the NPA, contending that FTB did not sufficiently explain how it estimated appellant's income, nor that it has authority to estimate his income. Appellant asserted that gross revenue is not income, and that FTB continues to misuse the term "income." Appellant also asserted that the NPA notifying him that FTB has no record of receiving information that he does not have a filing requirement is "an outrageously incorrect statement," and FTB did not properly impose the demand penalty because he timely responded to the Demand.
 7. FTB subsequently issued a Notice of Action affirming the NPA because appellant did not establish that the proposed assessment was incorrect.
 8. As relevant to the imposition of the demand penalty for the 2016 tax year, FTB previously issued to appellant a Demand on January 28, 2014, demanding that appellant file a 2012 tax return, and, when appellant did not respond to that Demand, an NPA on August 11, 2014, for the 2012 tax year.
 9. Thereafter, appellant timely filed this appeal.

DISCUSSION

Issue 1: Whether appellant has established error in FTB's proposed assessment for the 2016 tax year, which is based on information received from its INC Program.

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," when certain filing thresholds are exceeded. (R&TC, § 18501(a)(1)-(4).) If a taxpayer fails to file a return, then 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." (R&TC, § 19087(a).) FTB is given "great latitude" in estimating income when a taxpayer fails to file a return or provide the information necessary to ascertain the taxpayer's tax liability. (*Appeal of Tonsberg* (85-SBE-034) 1985 WL 15812.) When FTB proposes a tax assessment based on an estimate of income, then FTB's initial burden is to show that its proposed 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. (*Ibid.*) Federal courts have held that the taxing agency may use statistics, including average-income statistics for a particular profession, to estimate a taxpayer's income, and that it lay in the taxpayer's power to prove the taxpayer's actual income and to controvert the statistics. (*Pollard v. Commissioner* (11th Cir. 1986) 786 F.2d 1063, 1066; see also *Palmer v. Internal Revenue Service* (9th Cir. 1997) 116 F.3d 1309, 1313.)

Here, appellant held a license to practice engineering in California in 2016 and used his license to earn income as an engineer. When appellant did not file a 2016 tax return, FTB estimated appellant's income as \$45,631 based on the average income reported by engineers, land surveyors, and geologists. The Office of Tax Appeals (OTA) finds that FTB's use of statistics, including average-income statistics for a particular profession, to estimate a taxpayer's income is both reasonable and rational. Accordingly, FTB has met its initial burden of proof.

Once FTB has met its initial burden, FTB's proposed assessment is presumed correct and the taxpayer has the burden of proving that the assessment is incorrect. (*Appeal of Bindley, supra.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof, and 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.*) FTB's determination must be upheld in the absence of credible, competent, and relevant evidence showing error in its determination. (*Ibid.*)

Appellant argues that FTB's proposed assessment is incorrect because he earned only \$2,600 in 2016. However, appellant has not filed a tax return and failed to provide corroborating evidence establishing his income for the 2016 tax year or how he supported himself and afforded basic living expenses. "A taxpayer is not in a good position to criticize [FTB's] estimate of his or her liability when he or she fails to file a required return and, in addition, subsequently refuses to submit information upon request." (*Appeals of Dauberger, et al.* (82-SBE-082) 1982 WL 11759.) Accordingly, appellant has not demonstrated error in FTB's proposed assessment.

Furthermore, appellant's contentions, such as a taxpayer who "is merely compensated for his labor and makes no profit . . . has no income," compensation for services is not taxable income, and the Sixteenth Amendment to the United States Constitution "was not intended to tax the average working man's wages," have been consistently and emphatically rejected by federal

and state courts as frivolous.³ (See, e.g., *Commissioner v. Glenshaw Glass Co.* (1955) 348 U.S. 426, 431; *Appeal of Balch*, 2018-OTA-159P; *Appeals of Wesley, et al.* (2005-SBE-002) 2005 WL 3106917; *U.S. v. Romero* (9th Cir. 1981) 640 F.2d 1014, 1016; *Reading v. Commissioner* (1978) 70 T.C. 730.) As appellant did not submit any evidence or argument that may help meet his burden of proof,⁴ appellant has not established error in FTB's proposed assessment.

Issue 2: Whether appellant has established reasonable cause for failing to timely file his 2016 tax return.

California imposes a penalty for the failure to file a return on or before the due date, unless it is shown that the failure is due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) 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 ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Ignorance of the law does not establish reasonable cause and unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

For the 2016 tax year, a California resident who is a single individual 65 years old or older with no dependents, such as appellant, has a California filing requirement if the individual's California gross income exceeds \$22,147 or the individual's California adjusted gross income exceeds \$18,828.⁵ As discussed above, FTB properly estimated appellant's income as \$45,631, which exceeds the filing threshold; however, appellant did not file a 2016 tax return. Accordingly, FTB properly imposed the late filing penalty. Appellant does not specifically address the late filing penalty issue and offers no evidence of reasonable cause to

³ Appellant's argument is the same as or similar to positions that the IRS has identified as frivolous. (IRS Notice 2010-33, Internal Revenue Bill. 2010-17 (Apr. 2010) pp. 609-612; *The Truth About Frivolous Tax Arguments* (Mar. 2022) at <https://www.irs.gov/privacy-disclosure/the-truth-about-frivolous-tax-arguments-introduction>.)

⁴ While appellant provides copies of email communications between appellant and an employee at BPELSG who informed appellant that BPELSG does not provide FTB with salary information, OTA notes that it was not appellant's salary information that FTB received from BPELSG. Rather, FTB received information from BPELSG that appellant had an active license to practice engineering in California. With that information, FTB then estimated appellant's income based on the average income amount reported to FTB by individuals in appellant's type of industry.

⁵ FTB annually recomputes the filing threshold amounts for inflation. (R&TC, § 18501(d).)

abate the penalty. As discussed above, appellant did not establish that he had no filing requirement for the 2016 tax year. Therefore, appellant has not met his burden of showing that his failure to file was due to reasonable cause and not due to willful neglect.

Issue 3: Whether appellant is liable for the demand penalty.

If any taxpayer fails or refuses to file a tax return or provide information upon notice and demand by FTB, then, unless the failure is due to reasonable cause and not willful neglect, FTB may add a penalty of 25 percent of any deficiency tax assessed by FTB concerning the assessment of which the return was required. (R&TC, § 19133.) The demand penalty will only be imposed if: (1) the taxpayer fails to timely “respond to a current Demand for Tax Return *in the manner prescribed,*” and (2) FTB has proposed an assessment of tax under R&TC section 19087(a) after the taxpayer failed to timely respond to a Demand in the manner prescribed, for any taxable year that is within the four-taxable-year period immediately preceding the taxable year for which the current Demand is issued.⁶ (Cal. Code of Regs., tit. 18, § 19133(b), emphasis added.)

Appellant argues that he provided a timely response to the Demand and, therefore, the demand penalty was improperly imposed. Referencing his June 13, 2018 response, appellant contends he “thought that it was obvious why [he] did not explain why a 2016 return was not required: [he] made very little money as evidenced by a single 1099 [F]orm for \$2,600 and [FTB] ignored [his] letters.”⁷

While appellant sent a response to the Demand that FTB issued to appellant on May 10, 2018, OTA finds that appellant’s response does not satisfy the requirement that the taxpayer timely “respond to a current Demand for Tax Return *in the manner prescribed.*” (Cal. Code of Regs., tit. 18, § 19133(b)(1), emphasis added.) The Demand required appellant to respond by either filing a return or providing a copy of the return if already filed, or to “[p]rovide information that [appellant does] not have a requirement to file a 2016 tax return. / Complete Section B of the enclosed [Reply Form]” The top of the Reply Form reiterates that “[t]his

⁶ OTA finds this requirement satisfied as FTB previously issued to appellant an NPA for the 2012 tax year when appellant did not respond to a Demand demanding that appellant file a 2012 tax return.

⁷ Appellant included numerous questions directed to FTB in his June 13, 2018 response, and indicated that if FTB did not provide a “meaningful response to each of these statements and numbered questions” within 30 days, then appellant would “assume” FTB has no response and appellant does not “owe” a 2016 tax return.

Reply Form and/or a Tax Return is Due to FTB by June 13, 2018.” Section B of the Reply Form (which is to be filled out if the taxpayer does not have a filing requirement or is unsure whether the taxpayer must file), provides statements pertaining to the tax year at issue which are to be completed by the taxpayer. These statements include the following: provide information as to how the taxpayer supported themselves; the total amount of wages and/or tips earned; realized gain from property sale; and the total amount of “all other income.”

Appellant concedes that he did not “fill out and sign” the Reply Form, as required by the Demand. With regard to appellant’s June 13, 2018 response, OTA finds that it did not provide the requested information such that it can be considered a response to the Demand “in the manner prescribed.”⁸ To conclude otherwise would defeat the penalty’s purpose of enforcing taxpayers to promptly file returns or provide adequate information in the manner prescribed upon demand. Accordingly, the demand penalty was properly imposed.

A properly imposed demand penalty may be abated if a taxpayer can establish reasonable cause to abate the penalty. To establish reasonable cause to abate the demand penalty, a taxpayer has the burden of proof to establish that the failure to respond to the Demand in the manner prescribed occurred despite the exercise of ordinary business care and prudence or that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of GEF Operating, Inc., supra.*) OTA finds that appellant offers no evidence establishing reasonable cause for his failure to respond to the Demand in the manner prescribed.⁹ Accordingly, appellant is liable for the demand penalty.

⁸ OTA notes that appellant did provide the following information as to his income for 2016:

I have received absolutely \$0.00 of “income” for the 2016 calendar/tax year, in accordance with the meaning of the word “income” as defined above by SCOTUS. I am not a “trade or business” as defined by the USC 26 Section 7701. I also have NEVER been an employee, since the IRC defines an employer as the federal government and, therefore, an employee works for the federal government.

However, as discussed above, such arguments have been consistently and emphatically rejected as frivolous. OTA finds that arguments or information provided in response to a Demand which are frivolous do not meet the requirement to respond “in the manner prescribed.”

⁹ Appellant asserts that he did not complete the Reply Form because it required him to sign his name under penalty of perjury. OTA finds that appellant’s unwillingness to “fill out and sign” the Reply Form under penalty of perjury is not reasonable cause to abate the demand penalty.

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

FTB shall impose a filing enforcement fee if a taxpayer fails or refuses to file a required tax return within 25 days after FTB mails a formal legal demand to file the tax return. (R&TC, § 19254(a)(2).) Once properly imposed, the statute provides no grounds, including reasonable cause, upon which the fee may be abated. (R&TC, § 19254; see *Appeal of Auburn Old Town Gallery, LLC*, 2019-OTA-319P.) Therefore, OTA's inquiry is limited to whether FTB complied with the statutory notice requirements for imposing the filing enforcement fee.

Here, FTB issued appellant a Demand for the 2016 tax year notifying him that it would impose a filing enforcement fee if he has a filing requirement and fails to file a tax return by the due date stated in the Demand. FTB properly imposed the fee after appellant, who has a 2016 tax return filing requirement, did not file a tax return. Since the fee was properly imposed, there is no authority for the abatement of this fee; therefore, OTA cannot abate the filing enforcement fee.

HOLDINGS

1. Appellant has not established error in FTB’s proposed assessment for the 2016 tax year, which is based on information received from its INC Program.
2. Appellant has not established reasonable cause for failing to timely file his 2016 tax return.
3. Appellant is liable for the demand penalty.
4. FTB properly imposed the filing enforcement fee.

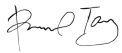
DISPOSITION

FTB’s determination is sustained in full.¹⁰

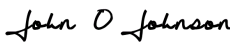
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Sheriene Anne Ridenour
 Administrative Law Judge

We concur:

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 Administrative Law Judge

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John O. Johnson
 Administrative Law Judge

Date Issued: 3/2/2023

¹⁰ OTA has the statutory authority to impose a penalty of up to \$5,000 if it finds that an appeal has been instituted or maintained primarily for delay or that a taxpayer’s position in the appeal is frivolous or groundless. (R&TC, § 19714; Cal. Code Regs., tit. 18, § 30217(a).) Although OTA does not impose the penalty in this appeal, appellant’s positions and conduct suggest that a penalty may be warranted in the future if appellant files another appeal with OTA raising the same or similar issues.