OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 220911342
E. DRUEN	

OPINION

Representing the Parties:

For Appellant: E. Druen

For Respondent: AnaMarija Antic-Jezildzic, Specialist

N. RALSTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, E. Druen (appellant) appeals an action by the Franchise Tax Board (respondent) proposing additional tax of $340, a late filing penalty of $135, a notice and demand (demand) penalty of $111, a filing enforcement fee of $97, 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 a tax filing requirement with California for 2019.
2. Whether appellant has established reasonable cause to abate the late filing penalty.
3. Whether appellant has established reasonable cause to abate the demand penalty.
4. Whether appellant has established a basis to abate interest.
5. Whether appellant has established a basis to abate the filing enforcement fee.

FACTUAL FINDINGS

1. Appellant had not filed an income tax return for the 2019 tax year.
2. Respondent received records from the California Employment Development Department (EDD) indicating that appellant earned wages from three different employers sufficient to

trigger a filing requirement: $13,919.90[1] from Optum Services, Inc. (Optum); $3,944 from Randstad North America, LP; and $13,464.92 from San Diego Hospital Association/Sharp Healthcare. All three employers reported appellant's address for the 2019 tax year in either San Diego or La Mesa, California. Furthermore, at least one of the three employers, Sharp Healthcare, lists its own address in California.

3. Based on this information, respondent issued a Demand for Tax Return (Demand) dated April 19, 2022, requiring appellant to either file a 2019 tax return or explain why appellant did not have a filing requirement.
4. When appellant failed to respond, respondent issued a Notice of Proposed Assessment (NPA) for the 2019 tax year, proposing to assess tax, penalties, and interest.
5. Appellant timely protested the NPA, asserting that the income was incorrectly reported as wages, rather than proceeds from a lawsuit, and that the remaining income was incorrect because appellant resided in Arizona. After review, respondent issued a Notice of Action that affirmed the NPA. This timely appeal followed.
6. After reviewing this appeal, respondent requested additional information from appellant to clarify and substantiate appellant's claims. Respondent asserts that it has not received a response from appellant and appellant has not disputed this.
7. In a letter dated March 17, 2023, the Office of Tax Appeals (OTA) asked appellant to provide any evidence or argument that appellant had to support his contentions. Appellant was given thirty days to respond to OTA's letter, but appellant failed to do so.

DISCUSSION

Issue 1: Whether appellant has a tax filing requirement with California for 2019.

R&TC section 18501 requires every individual subject to the Personal Income Tax Law to file a return with FTB "stating specifically the items of the individual's gross income from all sources and the deductions and credits allowable," if an individual has gross income or adjusted gross income exceeding certain filing thresholds. (R&TC, § 18501(a)(1)-(4).) For the 2019 tax year, the filing threshold for a single individual under 65 years of age with no dependents was gross income of at least $18,241 or adjusted gross income of at least $14,593.

[1] Appellant's Wage and Income Transcript from the IRS shows that appellant earned $17,106 from Optum Services for 2019, but respondent used the lesser number in its proposed assessment. Since this is in appellant's favor, it will not be discussed further.

R&TC section 19087(a) provides that 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." California imposes a tax on the entire taxable income of a resident, such as appellant. (R&TC, § 17041(a).) When a taxpayer fails to file a valid return and refuses to cooperate in the ascertainment of his or her income, FTB is given "great latitude" in estimating that income. (*Appeal of Bailey* (92-SBE-001) 1992 WL 44503.)

Federal courts have held that the taxing agency need only introduce some evidence linking the taxpayer with income-producing activity. (*Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932, 935; see also *Andrews v. Commissioner*, T.C. Memo. 1998-316 [information including interest payments by the taxpayer and statistics can provide the "minimal factual predicate" for an assessment].) When respondent makes a proposed assessment based on an estimate of income, its initial burden is to show why its proposed assessment is reasonable and rational. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509.)

Appellant has not filed a 2019 tax return. Based on the wage information received from EDD, listing California addresses for appellant and at least one California address for one of his three employers, it was both reasonable and rational for respondent to conclude that appellant was a California resident and/or earned California sourced income such that all his income was taxable here.

When respondent has met its initial burden, the taxpayer has the burden of proving the proposed assessment is incorrect. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) 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 in respondent's determination, the determination must be upheld. (*Ibid.*) Proof must be by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(b).) To meet this evidentiary standard, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Appeal of Belcher*, 2021-OTA-284P.)

On appeal, appellant asserts that the wages for this tax year are not valid and are not appellant's wages. Appellant's assertions that the wages are invalid and do not belong to him are insufficient to satisfy his burden of proving that he did not have a filing requirement. Appellant further contends that he was a resident of Arizona during 2019. Appellant has not provided any evidence to corroborate his assertions, despite being given ample opportunity by both respondent

and OTA to do so. Appellant's failure to produce such evidence within his or her control gives rise to a presumption that such evidence is unfavorable to his case. (*Appeal of Kwon, et al.*, 2021-OTA-296P.) Since appellant has not provided any evidence showing that respondent's income estimate was incorrect, there is no basis to overturn the proposed assessment.

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

California imposes a penalty for failing to file a return on or before the due date, unless the taxpayer shows that the failure is due to reasonable cause and not due to willful neglect. (R&TC, § 19131(a).) When respondent 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 a return occurred despite the exercise of ordinary business care and prudence. (See *Appeal of Friedman*, 2018-OTA-077P.)

Appellant does not argue, and the record does not establish, reasonable cause for appellant's failure to file a timely tax return. Appellant's only position is that since he had no filing requirement for 2019, there can be no penalty for the failure to file. As discussed above, appellant has not provided any evidence showing that he had no income and no filing requirement, so he has not met his burden of proof. Therefore, appellant has not shown that the late-filing penalty should be waived.

Issue 3: Whether appellant has established reasonable cause to abate the demand penalty.

California imposes a penalty on taxpayers for failing to file a return or to provide information, after FTB's demand to do so, unless reasonable cause (and lack of willful neglect) prevented the taxpayer from complying with the Demand. As relevant here, this penalty is computed at 25 percent of the amount of appellant's total tax liability as proposed in the Demand, which is determined without regard to payments. (R&TC, § 19133.)

Respondent will only impose a demand penalty if: (1) the taxpayer fails to respond to a current Demand 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 Request for Tax Return or a Demand. (Cal. Code Regs., tit. 18, § 19133(b)(1)-(2).) To establish reasonable cause, a

taxpayer's failure to respond to a Demand must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Jones*, 2021-OTA-144P.)

Appellant does not dispute that the demand penalty was properly computed or imposed, but rather argues that he did not have a filing requirement for 2019. Appellant has not explained nor submitted evidence to establish reasonable cause for failure to respond to the Demand. Thus, OTA has no basis to abate the demand penalty.

Issue 4: Whether appellant has established a basis to abate interest.

Interest must be assessed from the date a tax payment is due through the date that it is paid. (R&TC, § 19101.) Imposition of interest is mandatory; it is not a penalty but, rather, is compensation for appellant's use of money after it should have been paid to the state. (*Appeal of Moy*, 2019-OTA-057P.) Interest can only be abated in certain limited situations when authorized by law. (*Appeal of Balch*, 2018-OTA-159P.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Summit Hosting, LLC*, 2021-OTA-216P.) To obtain relief from interest, appellant must qualify under R&TC section 19104, 19112, or 21012; however, based on the evidence and arguments provided in this matter, none of these statutory provisions apply.[2] Thus, OTA finds that appellant has not established any basis for abatement of interest.

Issue 5: Whether appellant has established a basis to abate the filing enforcement fee.

R&TC section 19254(a)(2) provides that, if respondent mails a formal legal demand for a tax return to a taxpayer, a filing enforcement fee is required to be imposed when the taxpayer fails or refuses to file the return within the prescribed time period. Once properly imposed, there is no provision in the R&TC which would excuse respondent from imposing the filing enforcement fee for any circumstances, including reasonable cause. (R&TC, § 19254; *Appeal of GEF Operating, Inc.*, *supra*.) Here, respondent informed appellant in the Demand that appellant may be subject to the filing enforcement fee if appellant did not file a tax return for the

[2] Pursuant to R&TC section 19104, respondent is 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 employee of respondent. Here, appellant does not assert any such errors or delays occurred. Further, relief pursuant to R&TC section 21012 is not relevant here because respondent did not provide appellant with any written advice. Relief pursuant to R&TC section 19112 is not relevant here because appellant does not allege extreme financial hardship caused by significant disability or other catastrophic circumstance, which OTA does not have authority to review. (See *Appeal of Moy*, *supra*.)

2019 tax year. Respondent did not receive a return from appellant within the prescribed period in the Demand. Therefore, respondent properly imposed the filing enforcement fee of $97 and there is no basis to abate this fee.

HOLDINGS

1. Appellant has a tax filing requirement with California for 2019.
2. Appellant has not established reasonable cause to abate the late filing penalty.
3. Appellant has not established reasonable cause to abate the demand penalty.
4. Appellant has not established a basis to abate interest.
5. Appellant has not established a basis to abate the filing enforcement fee.

DISPOSITION

Respondent's action is sustained.

DocuSigned by:
Natasha Ralston
25F8FE08FF56478...

Natasha Ralston
Administrative Law Judge

I concur:

DocuSigned by:
Huy "Mike" Le
A11783ADD49442B...

Huy "Mike" Le
Administrative Law Judge

T. LEUNG, concurring in part and dissenting in part.

I concur with the majority's Holdings except with respect to the demand penalty because the Franchise Tax Board (respondent) failed to make a *prima facie* case as required by law. (See *Todd v. McColgan* (1949) 89 Cal.App.2d 509; Cal. Code Regs., tit. 18, (Regulation) § 19133.)

Regulation section 19133 requires respondent to show that at any time during the preceding four tax years, respondent issued a Notice of Proposed assessment (NPA) following the taxpayer's failure to timely respond to a Request for Tax Return or a Demand for Tax Return. (Cal. Code Regs., tit. 18, § 19133(b)(2).) Respondent did not submit evidence of the 2017 NPA by April 26, 2023,[1] when the Office of Tax Appeals informed the parties that briefing was complete and that the appeal would be submitted for an opinion based on the written record. By the time respondent submitted a copy of the 2017 NPA, this panel's deliberations had already commenced. Therefore, I would reverse respondent's action regarding the demand penalty.

DocuSigned by:
Tommy Leung
0C90542BE88D4E7...

Tommy Leung
Administrative Law Judge

Date Issued: 12/22/2023

[1] Respondent submitted a copy of the 2017 NPA to the Office of Tax Appeals on August 11, 2023.