

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:  
**G. QUEVEDO**

) OTA Case No. 21119106  
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**OPINION**

Representing the Parties:

For Appellant: G. Quevedo

For Respondent: David Muradyan, Attorney

For Office of Tax Appeals: Ethan Choy, Graduate Student Assistant

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, G. Quevedo (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$4,194.00, a late filing penalty of \$1,048.50, a notice and demand (demand) penalty of \$1,048.50, a filing enforcement cost recovery fee (filing enforcement fee) of \$97.00, and applicable interest for the 2018 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 demonstrated error in FTB’s proposed assessment of tax.
2. Whether the late filing penalty may be abated.
3. Whether the demand penalty may be abated.
4. Whether the filing enforcement fee may be abated.

**FACTUAL FINDINGS**

1. Appellant did not file a 2018 California income tax return. However, FTB obtained information from two federal Forms 1098, Mortgage Interest Statement, that appellant paid a total of \$15,182 in mortgage interest in 2018, consisting of \$13,048 paid to

Seterus, Inc. (Seterus) and \$2,134 paid to 21st Mortgage Corp (21st Mortgage). Based on this information, FTB determined that appellant made sufficient income in 2018 which would require him to file a return for that year.<sup>1</sup>

2. On May 4, 2021, FTB issued a Demand for Tax Return (Demand) to appellant, which required that he file a return, provide evidence that he already filed his return, or respond with a completed questionnaire form showing that he had no California filing requirement.

Appellant did not respond to the Demand by the due date provided.

3. On July 9, 2021, FTB issued a Notice of Proposed Assessment (NPA) which estimated appellant's 2018 income to be \$91,092.00, which is based on a 6 to 1 ratio of income to the mortgage interest paid of \$15,182.00. The NPA proposed an assessment of tax of \$4,194.00, a late filing penalty of \$1,048.50, a demand penalty of \$1,048.50, a filing enforcement fee of \$97.00, and applicable interest.<sup>2</sup>
4. Appellant timely protested the NPA, and FTB affirmed the NPA in a Notice of Action.
5. This timely appeal followed.

### DISCUSSION

#### Issue 1: Whether appellant has demonstrated error in FTB's proposed assessment of tax.

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).) If FTB proposes an assessment of tax based on an estimate of income, 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.*) Once FTB has met its initial burden, its proposed assessment is presumed correct, and the taxpayer has the burden of proving that the assessment is

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<sup>1</sup> Pursuant to R&TC section 18501, an individual must file a California return if his or her gross income or adjusted gross income (AGI) exceeded minimum thresholds for the particular tax year. For 2018, an individual using a filing status of single with no dependents had a filing requirement if his or her California gross income exceeded \$17,693 or California AGI exceeded \$14,154.

<sup>2</sup> For the 2017 tax year, FTB issued a Demand and an NPA which proposed an assessment of tax.

incorrect. (*Ibid.*) FTB's determination must be upheld in the absence of credible, competent, and relevant evidence showing error in its determination. (*Ibid.*)

Appellant does not deny that he paid mortgage interest in 2018. FTB introduced evidence showing that this amount was \$15,182. In the absence of a return by appellant, Office of Tax Appeals (OTA) finds that the use of the \$15,182 mortgage interest paid was a reasonable means of estimating appellant's income. Here, FTB provides a study to support its method of using a six to one ratio of income to mortgage interest paid. This method is based on the reasonable inference that a taxpayer must have had sufficient income to pay for cost-of-living expenses, including their mortgage interest payments. The ratio itself is not arbitrary, but is derived from a study conducted by FTB in 2019 of over 17 million tax returns, which found that the average total income to mortgage interest ratio ranged from six to one, to 14 to one. Therefore, the study provides FTB's methodology with a rational foundation. Accordingly, FTB has established a sufficient evidentiary basis linking appellant to the estimated unreported income of \$91,029. Accordingly, OTA finds that FTB has met its initial burden of showing that its assessment was reasonable and rational and is entitled to a presumption of correctness. The burden now shifts to appellant to show that this assessment was incorrect.

Appellant contends that he received income less than the \$91,029 estimated by FTB. In support, appellant provides bank statements from 2018, showing deposits of approximately \$10,000. Appellant also asserts that he had a lower income because he was behind on his mortgage payments by the end of 2018 and that he had to get a loan modification which resulted in a second mortgage. Appellant also provides an account statement from Seterus, dated December 10, 2018, showing that \$10,459 in interest was paid as of the date of the statement in 2018 on the mortgage in his name.<sup>3</sup>

Appellant does not provide evidence to show that he did not make the mortgage payments and does not appear to dispute that he made the payments. Given this, appellant does not explain how he was able to make the mortgage interest payments totaling \$15,182, while his bank statements show deposits totaling a lesser amount. Therefore, the evidence indicates that appellant may have received more income than shown on the bank statements. Appellant does

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<sup>3</sup> The mortgage interest paid per the account statement of \$10,459 is \$2,589 less than the mortgage interest paid of \$13,048 reflected on the Form 1098 issued by Seterus. The difference appears to be due to additional payment(s) made by appellant in December 2018, which are not reflected on the December 10, 2018, account statement.

not provide any evidence to establish the amount of his actual income or how he was able to make the mortgage payments or pay for his other living expenses. Therefore, appellant has not shown error in FTB's estimate of his income.

Issue 2: Whether the late filing penalty may be abated.

FTB shall impose a late filing penalty when a taxpayer fails to file a tax return on or before the due date, unless the taxpayer can establish that the late filing was the result of reasonable cause and not willful neglect. (R&TC, § 19131(a).) Appellant's 2018 tax return had an original due date of April 15, 2019. (R&TC, § 18566.) To date, no such return has been filed. The late filing penalty was therefore properly imposed.

On appeal, appellant does not dispute that he failed to timely file a return, but rather seeks abatement of the late filing penalty based on reasonable cause. Reasonable cause requires a showing 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 Auburn Old Town Gallery, LLC*, 2019-OTA-319P.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.)

Appellant claims he lacked complete information with which to file an accurate return. Appellant asserts that the bank information as to his interest was wrong, and that he reached out to Seterus to provide him with a Form 1098 but had no luck. Appellant contends that there were many issues with his 2018 taxes and that if he filed timely then the amounts would be incorrect, and he did not want to file with false information.

Appellant does not provide any evidence establishing the difficulties that prevented him from filing his 2018 return, or of steps taken to timely file. Appellant provides no evidence that there was incorrect bank information or that he was unable to acquire the proper records to file. In addition, difficulty in obtaining information does not constitute reasonable cause for the late filing of a return. (*Appeal of Xie*, 2018-OTA-076P.) Taxpayers have an obligation to file timely returns with the best available information, and to then subsequently file an amended return, if necessary. (*Ibid.*) Therefore, appellant has not shown reasonable cause for failing to timely file.

Issue 3: Whether the demand penalty may be abated.

R&TC section 19133 imposes a penalty when a taxpayer fails to file a return or provide information upon FTB's notice and demand to do so, unless it is shown that the failure was due to reasonable cause and not willful neglect. 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 has 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 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 properly imposed the demand penalty because FTB issued appellant the 2018 Demand and appellant did not timely respond in the prescribed manner. Furthermore, FTB issued an NPA following appellant's failure to timely respond in the prescribed manner to a prior Demand for the 2017 tax year, which is within the four-taxable-year period preceding the 2018 Demand and NPA. Therefore, the demand penalty was properly imposed.

To establish reasonable cause, a taxpayer must show that the failure to timely respond to a demand occurred despite the exercise of ordinary business care. (*Appeal of Jones*, 2021-OTA-144P.) Appellant does not specifically address or provide evidence to show reasonable cause for the failure to respond to the Demand. As discussed above, appellant's assertions regarding the failure to timely file a return also do not establish reasonable cause for failing to timely respond to the Demand. Accordingly, appellant has not shown that the demand penalty may be abated.

Issue 4: Whether the filing enforcement fee may be abated.

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 shall impose a filing enforcement fee. Once properly imposed, there is no provision in the R&TC that provides grounds upon which the fee may be abated, including reasonable cause. (See R&TC, § 19254; see also *Appeal of Jones*, *supra*.)


FTB sent appellant a Demand for appellant's 2018 return, to which appellant did not respond within 25 days. Therefore, FTB properly imposed the filing enforcement fee, and there is no basis for abating the fee.

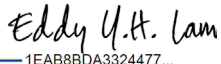
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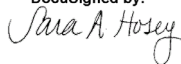
1. Appellant has not demonstrated error in FTB’s proposed assessment of tax.
2. The late filing penalty may not be abated.
3. The demand penalty may not be abated.
4. The filing enforcement fee may not be abated.

DISPOSITION

FTB’s action is sustained.

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 Josh Lambert  
 Administrative Law Judge

We concur:  
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 Eddy Y. H. Lam  
 Administrative Law Judge

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 Sara A. Hosey  
 Administrative Law Judge

Date Issued: 10/10/2023