

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)
J. HANEY) OTA Case No. 221111913
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OPINION

Representing the Parties:

For Appellant: J. Haney

For Respondent: Annika McClure, Attorney

For Office of Tax Appeals: Mai C. Tran, Attorney

V. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, J. Haney (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$481.90, a late filing penalty of \$120.48, a notice and demand penalty (demand penalty) of \$201.75, 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 shown error in FTB’s proposed assessment.
2. Whether appellant has shown reasonable cause for abating the late filing and demand penalties.
3. Whether a frivolous appeal penalty should be imposed.

FACTUAL FINDINGS

1. Appellant filed a 2019 California income tax return reporting zero taxable income and claiming a refund for withholdings of \$325.

2. FTB determined that appellant's return was frivolous and imposed a \$5,000 frivolous return penalty.¹
3. FTB subsequently received information from the California Employment Development Department (EDD) that Toy Locker, Inc. reported paying appellant wage income of \$39,467. Accordingly, FTB issued appellant a Request for Tax Return (Request), requesting that appellant to file a valid tax return.
4. Appellant responded asserting that his originally filed tax return was valid.
5. FTB issued a Demand for Tax Return (Demand) to appellant, requiring appellant to file a valid California income tax return.
6. Appellant filed an identical 2019 California income tax return reporting zero taxable income and claiming a refund for withholdings of \$325.
7. FTB subsequently issued appellant a Notice of Proposed Assessment (NPA) proposing additional tax of \$481.90 based on appellant's wage income reported by Toy Locker, Inc. FTB imposed a late filing penalty of \$124.48 and a demand penalty of \$322.23.
8. Appellant protested the NPA. FTB issued a Notice of Action (NOA) affirming the NPA. Appellant then filed this timely appeal.
9. Appellant instituted an appeal for 2016 and 2018 on the same basis, asserting that his Form W-2 wages from Toy Locker, Inc. are not taxable income.² The Opinion in that appeal was issued on April 18, 2023. In that appeal, the Office of Tax Appeals (OTA) determined that appellant's argument was frivolous, but it did not impose a frivolous appeal penalty because appellant did not have a history of filing frivolous appeals before OTA. In the Opinion, OTA notified appellant that if appellant instituted any subsequent frivolous appeals, OTA would not hesitate to impose a frivolous appeal penalty up the maximum of \$5,000 per appeal.

¹ Appellant's arguments regarding FTB's imposition of a frivolous return penalty under R&TC section 19179 are not before OTA in this appeal, as the penalty was not imposed in the NOA from which appellant appeals.

² *Appeal of Haney*, 2023-OTA-489.

DISCUSSION

Issue 1: Whether appellant has shown error in FTB's proposed assessment.

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 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.) When the FTB makes a proposed assessment of additional tax based on an estimate of income, the FTB’s initial burden is to show why its proposed assessment is reasonable and rational. (*Appeal of Bindley*, 2019-OTA-179P.) Once FTB satisfies this requirement, appellant bears the burden of demonstrating error in the assessment. (*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(b).)

Here, FTB proposed an assessment based on Form W-2 information reported to EDD by appellant’s employer. FTB’s reliance on this third-party reporting information is a reasonable and rational basis for the proposed assessment. Therefore, appellant bears the burden of demonstrating error in the proposed assessment. Appellant argues that the proposed assessment is incorrect because his wages are not evidence of taxable activity. Appellant contends that he did not engage in any taxable activities that gave rise to taxable income. This argument has been determined to be frivolous by OTA, the Board of Equalization (BOE), the IRS and the courts. (*Appeal of Balch*, 2018-OTA-159P.) As such, appellant has not shown error in FTB’s proposed assessment.

Issue 2: Whether appellant has shown reasonable cause for abating the late filing and demand penalties.

If a taxpayer files a false or fraudulent return with intent to evade the tax, the FTB may propose to assess the amount of penalties due. (R&TC, § 19087(a).) 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 to timely file the return was due to reasonable cause and not willful neglect. 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 section 19133 imposes a demand penalty on a taxpayer who fails or refuses to make and file a return upon notice and demand by FTB, unless the failure is due to reasonable cause and not willful neglect. The amount of the penalty is 25 percent of the amount of tax determined pursuant to R&TC section 19087 or of any deficiency tax assessed by FTB concerning the assessment for which the return was required.

When the FTB imposes these penalties, the law presumes that the penalties were imposed correctly. (*Appeal of Xie*, 2018-OTA-076P; *Appeal of Wright Capital Holdings, LLC*, 2019-OTA-219P.) Appellant bears the burden of demonstrating reasonable cause exists to abate these penalties. (*Appeal of Xie, supra.*) To establish reasonable cause to abate the late filing penalty, appellant must show that the failure to file a timely return occurred despite the exercise of ordinary business care and prudence. (*Ibid.*) To establish reasonable cause to abate the demand penalty, appellant must show that the failure to file a return in response to a demand occurred despite the exercise of ordinary business care and prudence. (*Appeal of Wright Capital Holdings, LLC, supra.*) Appellant must provide credible and competent evidence supporting a claim of reasonable cause; otherwise, the penalties cannot be abated. (*Ibid.*)

Appellant filed a tax return reporting zero wages despite receiving wage income from Toy Locker, Inc. Appellant failed to file a valid tax return after receiving FTB's Request and its subsequent Demand. Instead, appellant untimely filed an identical tax return reporting zero wages in response to the Demand. Appellant has not shown reasonable cause for his failure to file a valid tax return. Therefore, FTB properly imposed the late filing and demand penalties.

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

OTA may impose a frivolous appeal penalty of up to \$5,000 whenever it appears that an appeal has been instituted or maintained primarily for delay, or that an appellant's position is frivolous or groundless. (R&TC, § 19714; Cal. Code Regs., tit. 18, § 30217(a); *Appeal of Balch, supra.*) OTA may consider any relevant factors in determining whether, and in what amount, to impose a frivolous appeal penalty, including, but not limited to: (1) whether the appellant is making arguments that OTA, in a precedential Opinion, or BOE, in a precedential Opinion, or courts have rejected; (2) whether the appellant is making the same arguments that the same appellant made in prior appeals; (3) whether the appellant submitted the appeal with the intent of

delaying legitimate tax proceedings or the legitimate collection of tax owed; (4) whether the appellant has a history of submitting frivolous appeals or failing to comply with California's tax laws; and (5) whether the appellant has been notified, in a current or prior appeal, that a frivolous appeal penalty may apply. (Cal. Code Regs., tit. 18, § 30217(b).)

In this appeal, appellant argues that he did not engage in any taxable activity and that the wage information is not evidence of taxable activity.³ Despite receiving FTB's notices which informed him that this argument is frivolous, appellant maintained this appeal. As stated previously, these arguments have been determined to be frivolous by OTA, BOE, the IRS and the courts. (*Appeal of Balch, supra*; *Appeals of Wesley, et al.* (2005-SBE-002) 2005 WL 3106917; *U.S. v. Romero*, (9th Cir. 1981) 640 F.2d 1014, 1016.)

In addition, appellant instituted appeals for prior years and similarly argued that his wages are not taxable income. In the Opinion issued on April 18, 2023, OTA informed appellant that if he made similar arguments in a subsequent appeal, OTA would not hesitate to impose a frivolous appeal penalty up to the maximum of \$5,000. Subsequent to OTA's Opinion, appellant submitted a reply brief in this appeal on June 25, 2023, continuing to make the same arguments that were the basis of his prior appeal. These facts suggest that appellant filed and continued this appeal with the intent of delaying the legitimate tax proceedings and the legitimate collection of tax owed. Therefore, it is appropriate to impose a frivolous appeal penalty of \$1,000.

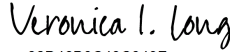
³ Appellant also raises the argument that FTB violated his due process rights. OTA has no authority to resolve any grievances that appellant may have against FTB aside from the correct amount of appellant's California income tax liability, if any. (*Appeals of Dauberger, et al.* (82-SBE-082) 1982 WL 11759.) "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 96, 105).

HOLDINGS

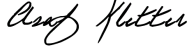
1. Appellant has not shown error in FTB’s proposed assessment.
2. Appellant has not shown reasonable cause for abating the late filing and demand penalties.
3. A frivolous appeal penalty of \$1,000 is imposed.

DISPOSITION


FTB’s proposed assessment is sustained. In addition, a frivolous appeal penalty of \$1,000 is imposed.

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 Veronica I. Long
 Administrative Law Judge

We concur:
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 Asaf Kletter
 Administrative Law Judge

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 Keith T. Long
 Administrative Law Judge

Date Issued: 2/2/2024