

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 220911482
M. MILLS)
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OPINION

Representing the Parties:

For Appellant: M. Mills
For Respondent: Christopher T. Tuttle, Tax Counsel III
For Office of Tax Appeals: Amber Poon, Graduate Legal Assistant

V. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, M. Mills (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing tax of \$7,264, a late-filing penalty of \$1,816, and applicable interest, for the 2019 tax year.¹

Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUES

1. Has appellant shown that FTB erred in its proposed assessment for the 2019 tax year?
2. Has appellant established reasonable cause to abate the late-filing penalty?
3. Has appellant established a basis to abate interest?

FACTUAL FINDINGS

1. Appellant did not file a 2019 California income tax return.
2. FTB received information indicating that appellant received sufficient income to prompt

¹ On appeal, FTB agrees to revise the proposed assessment of tax and late-filing penalty based on revising estimated income from \$114,406 to \$67,092.

a filing requirement for the 2019 tax year.² Appellant's IRS wage and income transcript reported that appellant received income of \$51,806 from Form 1099 sources, including \$47,314³ from Lyft, Inc. (Lyft). In addition, the Employment Development Department (EDD) reported appellant received California wage income of \$62,623, including \$47,311 from Lyft.

3. FTB issued appellant a Request for Tax Return for the 2019 tax year. Appellant responded, stating the reported wages were unsupported and do not constitute taxable income.
4. FTB issued a Notice of Proposed Assessment (NPA), proposing tax of \$7,264, based on estimated income of \$114,406 and allowing for the standard deduction, and proposing a late-filing penalty of \$1,816, plus interest.
5. Appellant protested the NPA and asserted he did not have any taxable income in 2019.
6. FTB issued a Notice of Action affirming the NPA. This timely appeal followed.
7. On appeal, FTB concedes that Form 1099 income from Lyft should be removed from appellant's estimated income because Lyft issued a Form W-2, Form 1099-K, and Form 1099-MISC to appellant, and in California appellant earned the income as an employee, rather than an independent contractor.⁴

DISCUSSION

Issue 1: Has appellant shown that FTB erred in its proposed assessment for the 2019 tax year?

If a taxpayer fails to file a return, FTB may, at any time, 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 may estimate income when a taxpayer fails to file a return or provide the information necessary to ascertain their tax liability. (*Appeal of Bindley*, 2019-OTA-179P.) If 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.

² For 2019, the filing threshold for California residents under the age of 65 with no dependents was gross income of \$18,241 or greater, or adjusted gross income of \$14,593 or greater.

³ There is a small discrepancy of \$2 between the amount of Lyft income reported as Form 1099 income and EDD wage income. FTB has used the larger amount of \$47,314, and because this is to the benefit of appellant, OTA will accept and use this amount.

⁴ See *Dynamex Operations W. v. Superior Court* (2018) 4 Cal.5th 903.

(*Ibid.*) 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, FTB's proposed assessment is presumed correct, and the taxpayer has the burden of proving that the assessment is incorrect. (*Ibid.*) FTB's determination must be upheld in the absence of credible, competent, and relevant evidence showing error in its determination. (*Ibid.*)

Here, FTB estimated appellant's income based on third-party income information because appellant did not file a 2019 tax return. Appellant's IRS wage and income transcript shows that appellant received Form 1099 income from various sources totaling \$51,806, including \$47,314 of income from Lyft and \$4,469 from other various sources. In addition, EDD reported appellant earning California wage income of \$62,623. During the appeal, FTB provided the IRS wage and income transcript and the EDD wage reporting information which are reliable evidence to show appellant received sufficient gross income of \$67,092 (i.e., \$4,469 of Form 1099 income, plus \$62,623 of EDD wage income) to trigger a filing requirement. Accordingly, FTB has met its initial burden of proof and appellant has the burden of proving FTB's assessment is incorrect.

Appellant asserts FTB's proposed assessment is incorrect because FTB improperly included two different amounts of income reported by Lyft in its calculation. FTB revised its assessment during this appeal to remove the \$47,314 of Form 1099 income reported by Lyft. Appellant has not provided any evidence to support any further reduction in the proposed assessment. Appellant's unsupported assertion that the remaining proposed assessment is incorrect is insufficient to satisfy his burden of proof. (*Appeal of Wright Capital Holdings LLC*, 2019-OTA-219P.) Therefore, appellant has not shown that FTB erred in the revised proposed assessment for the 2019 tax year.

Issue 2: Has appellant established reasonable cause to abate the late-filing penalty?

A late-filing penalty is imposed when a taxpayer fails to file a return on or before its due date, unless the taxpayer establishes that the late filing was due to reasonable cause and not due to willful neglect. (R&TC, § 19131(a).) The penalty is calculated at five percent of the tax liability for each month the return is past due, up to a maximum of 25 percent.⁵ (*Ibid.*) When

⁵ On March 18, 2020, FTB postponed return filing and payment deadlines until July 15, 2020, for individuals for the 2019 tax year. See FTB News Release (March 18, 2020), available at: <https://www.ftb.ca.gov/about-ftb/newsroom/news-releases/2020-3-state-postpones-tax-deadlines-until-july-15-due-to-the-covid-19-pandemic.html>.

FTB imposes a late-filing penalty, the law presumes that the penalty was properly imposed. (*Appeal of Xie*, 2018-OTA-076P.) The burden of proof is on the taxpayer to show that reasonable cause exists to support abating the penalty. (*Ibid.*)

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.) Unsupported assertions are insufficient to satisfy the taxpayer's burden of proof. (*Ibid.*) Because FTB does not assert willful neglect, the only issue is whether appellant has established reasonable cause for the late filing of his 2019 tax return.

Here, appellant argues against FTB's calculation of the proposed assessment. However, appellant offers no other argument or evidence to support a finding of reasonable cause. A taxpayer must provide credible and competent evidence supporting a claim of reasonable cause for the late-filing penalty to be abated, as unsupported assertions are insufficient to satisfy the taxpayer's burden of proof. (*Appeal of Xie, supra.*) Therefore, appellant has not established reasonable cause to abate the late-filing penalty.

Issue 3: Has appellant established a basis to abate or waive interest?

Imposing interest on a tax deficiency is mandatory. (R&TC, § 19101(a).) Interest is not a penalty imposed on the taxpayer; it is compensation for the taxpayer's use of money after it should have been paid to the state. (*Appeal of Moy*, 2019-OTA-057P.) There is no reasonable cause exception to the imposition of interest, and it can only be abated or waived in certain limited situations when authorized by law. (*Ibid.*)

To qualify for interest abatement, a taxpayer must qualify under the waiver provisions of R&TC sections 19104, 19112, or 21012. (*Appeal of Balch*, 2018-OTA-159P.) The relief of interest under R&TC section 21012 is not relevant here, because FTB did not provide appellant with any written advice. Under R&TC section 19104, FTB 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 FTB. Here, appellant has not alleged, and the record does not reflect, any such errors or delays. Appellant also does not allege financial hardship pursuant to R&TC section 19112. Moreover, OTA does not have jurisdiction to overturn FTB's decision with respect to whether appellant qualifies for relief under R&TC section 19112. (*Appeal of*

Moy, supra.) Based on the foregoing, appellant has failed to establish a basis to abate or waive interest.

HOLDINGS

1. FTB’s proposed assessment is adjusted, as modified on appeal, to reflect estimated income of \$67,092. Appellant has not otherwise shown any error in the revised proposed assessment.
2. The late-filing penalty should be recalculated in accordance with the revised estimated income of \$67,092. Otherwise, appellant has not established reasonable cause to abate the late-filing penalty.
3. Interest should be recalculated based on the above revisions. Otherwise, appellant has not established a basis to abate or waive interest.

DISPOSITION


FTB’s proposed assessment is adjusted based on estimated income of \$67,092, and the late-filing penalty and interest should be recalculated accordingly. Otherwise, FTB’s action is sustained.

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 Veronica I. Long
 Administrative Law Judge

We concur:

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 Sara A. Hosey
 Administrative Law Judge

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 Amanda Vassigh
 Administrative Law Judge

Date Issued: 8/2/2023