

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: )  
T. FLORES ) OTA Case No. 230212693  
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**OPINION**

Representing the Parties:

For Appellant: T. Flores  
For Respondent: Eric R. Brown, Attorney

T. LEUNG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, T. Flores (appellant) appeals an action by the Franchise Tax Board (respondent) proposing additional tax of \$348, an \$87 late filing penalty,<sup>1</sup> and an \$87 demand penalty, plus interest, for the 2019 taxable year.

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

**ISSUES**

1. Was respondent’s imposition of tax erroneous?
2. Can the late filing penalty be waived?
3. Can the demand penalty be waived?
4. Should a frivolous appeal penalty be imposed?

**FACTUAL FINDINGS**

1. Appellant filed his 2019 California personal income tax return on July 15, 2020, showing \$0 income and \$0 tax due; appellant attached “corrected” Forms 1099 to this document with lines 1 through 18 blank.

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<sup>1</sup> As relevant here, the law mandates a \$135 minimum late filing penalty. (See R&TC, § 19131(b).) Respondent acknowledges this error in appellant’s favor and will pursue it no further.

2. Respondent obtained Form 1099 information showing that appellant received over \$28,000 from Uber Technologies and Postmates, Inc., in 2019, which appellant does not dispute. Consequently, respondent treated appellant's July 15, 2020, filing as an invalid return.
3. Respondent sent notices to appellant demanding a valid tax return and notifying him of a frivolous return determination. Respondent had previously sent appellant a demand for his 2017 tax return and an associated Notice of Proposed Assessment (NPA).
4. Subsequently, respondent issued a NPA for 2019, imposing tax, a late filing penalty, and a demand penalty, plus interest. Appellant protested, claiming, among other things, not having received wages or other taxable income; respondent denied the protest in a Notice of Action. Respondent also advised appellant that the law allows OTA to impose a frivolous appeal penalty.

### DISCUSSION

#### Issue 1: Proposed Tax Assessment

If any taxpayer fails to file a valid return, respondent “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).) When respondent proposes a tax assessment based on an estimate of income, its initial burden is to show that the proposed assessment was reasonable and rational. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Talavera*, 2020-OTA-022P.) A proposed assessment based on unreported income is presumed to be correct when the taxing agency introduces a minimal factual foundation to support the assessment. (See *In re Olshan* (9th Cir. 2004) 356 F.3d 1078, 1084, citing *Palmer v. IRS* (9th Cir. 1997) 116 F.3d 1309, 1312.) When a taxpayer fails to file a valid return and refuses to cooperate in the ascertainment of his income, respondent is given “great latitude” in determining the amount of his tax liability. (*Appeals of Tonsberg* (85-SBE-034) 1985 WL 15812.)

Respondent's determination is presumed to be correct, and the taxpayer has the burden of proving otherwise. (*Appeal of Davis and Hunter-Davis*, 2020-OTA-182P.) 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, respondent's determinations must be

upheld. (*Ibid.*) The burden of proof requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219.)

Here, respondent met its initial burden by presenting evidence of more than \$28,000 in payments from Uber Technologies and Postmates, Inc., to appellant, which were reported on various 2019 Forms 1099. Appellant makes various assertions, but he has not denied receiving the payments, he has not shown that the payments were not subject to tax, he has not provided evidence of his actual income in 2019, and he has not presented evidence that his tax liability was incorrectly calculated. Thus, there is no evidentiary basis to overturn Respondent's proposed assessment.

### Issue 2: Late Filing Penalty

A late filing penalty is imposed when a taxpayer fails to file a tax return on or before the due date, unless the taxpayer establishes that the late filing was due to reasonable cause and not willful neglect. For every month that the return is late, the penalty is 5 percent of the tax due, up to a maximum of 25 percent. (R&TC, § 19131(a).) To establish reasonable cause, the taxpayer must show that the failure to file a timely return occurred despite the exercise of ordinary business care and prudence, or that such cause existed as would prompt an ordinarily intelligent and prudent businessman to have acted in such a way under similar circumstances. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Unsupported assertions are not enough to satisfy a taxpayer's burden of proof. (*Ibid.*) The filing of a return improperly reporting zero taxable income and zero tax is not a valid return and subjects the filer to various penalties. (*Appeal of Hodgson* (2002-SBE-001) 2002 WL 245667; also, see *Appeal of Reed*, 2021-OTA-326P.)

Here, appellant has not contested the computation of the late filing penalty. Instead, he has made various unsupported assertions,<sup>2</sup> but he has not provided any evidence showing that he had no filing requirement. In addition, appellant has not shown that he had reasonable cause for failing to file a timely, valid tax return. Under these circumstances, the late filing penalty cannot be waived.

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<sup>2</sup> OTA has no jurisdiction to determine whether "the appellant is entitled to a remedy for an Agency's actual or alleged violation of any substantive or procedural right, unless the violation affects the adequacy of a notice, the validity of an action from which a timely appeal was made, or the amount at issue in the appeal." (Cal. Code Regs., tit. 18 § 30104(e).) Appellant's various claims that respondent violated its own processes by using FAN/innocent spouse personnel on his case are insufficient to meet appellant's burden of proof with regard to the substantive tax issues in this appeal.

### Issue 3: Demand Penalty

A demand penalty may be imposed when a taxpayer fails or refuses to file a tax return upon notice and demand by respondent, unless the failure is due to reasonable cause and not willful neglect. (R&TC, § 19133.) Furthermore, the demand penalty will not be imposed unless respondent has proposed an assessment of tax under R&TC section 19087(a), after the taxpayer failed to timely respond to a Request for Tax Return or a Demand for Tax Return for any taxable year that is within the four-taxable-year period immediately preceding the taxable year for which the current Demand for Tax Return is issued. (Cal. Code Regs., tit. 18, § 19133.) As relevant here, the demand penalty is 25 percent of the taxpayer's total tax liability for the year as estimated on the NPA. (R&TC, § 19133.)

Here, the demand penalty is warranted because the NPA was issued after 2019, appellant did not respond to the Demand by filing a valid return, and appellant had previously received an NPA for the 2017 taxable year, after having failed to respond to a Demand for that year. (Cal. Code Regs., tit. 18, § 19133(b), (e).) Appellant has not contested the amount of the penalty. Appellant has not argued or proven that he responded to the Demand for the 2019 taxable year in a timely manner. Appellant has not provided any information or evidence that might demonstrate a reasonable cause for his failure to respond. Therefore, there are no obvious legal grounds for a penalty waiver.

### Issue 4: Frivolous Appeal Penalty

OTA may impose a penalty of up to \$5,000 whenever it appears that a proceeding before it has been instituted or maintained primarily for delay or that the taxpayer's position in the proceeding is frivolous or groundless.<sup>3</sup> (R&TC, § 19714.) OTA's Rules for Tax Appeals contain the following non-exclusive list of factors to be considered when determining whether to impose the penalty, and in what amount: (1) whether the taxpayer is making arguments that have been previously rejected by OTA in a precedential opinion, by BOE in a Formal Opinion, or by the courts; (2) whether the taxpayer is repeating arguments that was advanced unsuccessfully in prior appeals; (3) whether the taxpayer filed the appeal with the intent of delaying legitimate tax proceedings or the legitimate collection of tax owed; (4) whether the

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<sup>3</sup> R&TC section 19714 refers to proceedings before the "State Board of Equalization or any court of record." However, R&TC section 20(b) provides that this phrase now refers to OTA because BOE's authority to handle income and business tax appeals has been transferred to this agency.

taxpayer has a history of filing frivolous appeals or failing to comply with California's tax laws; and (5) whether the taxpayer has been notified, in a current or prior appeal, that a frivolous appeal penalty might apply. (Cal. Code Regs., tit. 18, § 30217(b)(1-5).)

In this appeal, appellant has raised frivolous arguments that have been rejected consistently by OTA, BOE, and state and federal courts. Appellant has raised many of the same sorts of arguments<sup>4</sup> that he raised during his protest with respondent, such as he has no California wages and that inappropriate personnel (FAN/Innocent Spouse units) worked on his case, and no actual audit was conducted.<sup>5</sup> Appellant was warned by respondent that the frivolous appeal penalty might be imposed. It is also noted that appellant still has not filed a valid California income tax return for the 2019 taxable year at the time this appeal was filed.

For these reasons, a frivolous appeal penalty of \$250 is appropriate. (See *Appeal of Balch*, 2018-OTA-159P.) Appellant is hereby cautioned that OTA may impose additional and greater frivolous appeal penalties pursuant to R&TC section 19714, up to the maximum of \$5,000 per appeal, if appellant files additional appeals that raise similarly frivolous arguments.

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<sup>4</sup> Appellant makes numerous arguments, including due process arguments, which are outside OTA's jurisdiction, and arguments that are inconsequential and/or irrelevant. (See Cal. Code Regs., tit. 18, §§ 30103, 30104.) Those arguments are summarily dismissed and will not be discussed further.


<sup>5</sup> With regard to appellant's various allegations, OTA has no authority to resolve any grievances that appellant may have against respondent 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.)

HOLDINGS


1. Respondent’s imposition of additional tax was correct.
2. The late filing penalty cannot be waived.
3. The demand penalty cannot be waived.
4. A frivolous appeal penalty of \$250 is imposed.


DISPOSITION

Respondent’s action is sustained.

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 Tommy Leung  
 Administrative Law Judge

We concur:

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 Teresa A. Stanley  
 Administrative Law Judge

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 Veronica I. Long  
 Administrative Law Judge

Date Issued: 12/21/2023