

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:	)	OTA Case No. 230312827
<b>A. NESTORAS</b>	)	
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**OPINION**

Representing the Parties:

For Appellant:	A. Nestoras
For Respondent:	Sarah J. Fassett, Attorney Jaclyn Zumaeta, Assistant Chief Counsel

E. LAM, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, A. Nestoras (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$617, a late filing penalty of \$154.25, and applicable interest for the 2020 tax year.

Appellant elected to have this appeal determined pursuant to the procedures of the Small Case Program. Those procedures require the assignment of a single administrative law judge. (Cal. Code Regs., tit. 18, § 30209.05.) Office of Tax Appeals (OTA) Administrative Law Judge Eddy Y.H. Lam held an oral hearing for this matter in Cerritos, California, on February 15, 2024. At the conclusion of the hearing, the record was closed and this matter was submitted for an opinion.

**ISSUES**

1. Whether appellant has demonstrated error in FTB's proposed assessment.
2. Whether appellant has demonstrated reasonable cause to abate the late filing penalty.
3. Whether appellant has established that interest should be abated.

FACTUAL FINDINGS

1. Appellant did not file a 2020 California resident income tax return.
2. Through FTB's Integrated Non-Filer Compliance Program, FTB obtained information that appellant received income from State Farm Life Insurance Company and Amazon.com Inc., sufficient to trigger a California filing requirement for the 2020 tax year. Therefore, FTB issued to appellant a Request for Tax Return for the 2020 tax year, requesting that he file a return or explain why no return was required.
3. Appellant responded by submitting a questionnaire opting for married filing separately status, reporting no dependents, and indicating an age of 65 or older. Appellant did not report any income information, checked the box that he did not have a California filing requirement, and explained that he received social security income.
4. On November 17, 2022, FTB issued a Notice of Proposed Assessment (NPA) for the 2018 tax year based on the \$38,695 of 1099-R income received from State Farm Life Insurance Company, and \$11 of 1099-MISC income from Amazon.com Inc. The NPA proposed additional tax, a late filing penalty, and applicable interest.
5. On December 20, 2022, FTB received appellant's protest, asserting that the \$38,695 of 1099-R income received from State Farm Life Insurance was a result of a divorce settlement ordered by a judge and half of the distribution belongs to his former spouse. Appellant also requested a three-month extension of time to resolve the matter because he was taking care of his sick and elderly mom.
6. On February 15, 2023, FTB issued appellant a Notice of Action affirming the NPA.
7. This timely appeal followed.
8. On appeal, FTB submits appellant's IRS Wage and Income Transcript, which, in pertinent part, indicates that appellant received a gross distribution of \$80,446 in 1099-R income from State Farm Life Insurance Company, of which only \$38,694 is taxable.<sup>1</sup>
9. During the hearing, appellant testified that he is facing financial hardship due to his advanced age, declining health, and being legally handicapped. Appellant also testified that he is facing housing challenges where he is at risk of becoming homeless.

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<sup>1</sup> The NPA states that appellant received \$38,695 of 1099-R Income from State Farm Life Insurance, but the IRS Wage and Income Transcript lists the amount as \$38,694. OTA determines that the \$1 difference is attributable to a rounding error and that it has no impact on the proposed tax assessment, late filing penalty, and interest in this appeal.

## DISCUSSION

### Issue 1: Whether appellant has demonstrated 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 FTB makes a proposed assessment based on an estimate of income, FTB's initial burden is to show why its proposed tax assessment is reasonable and rational. (*Appeal of Bindley*, 2019-OTA-179P.) Federal courts have held that the taxing agency need only introduce some evidence linking the taxpayer with the unreported income. (*Appeal of Sheward*, 2022-OTA-228P.) 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. (*Ibid.*) Once FTB has met its initial burden, the proposed assessment is presumed correct and the taxpayer has the burden of proving it wrong. (*Ibid.*)

Here, FTB obtained third party information indicating that appellant received 1099-R and 1099-MISC income, which is evidence linking appellant with the unreported income at issue. FTB used this information to estimate appellant's taxable income for the 2020 tax year. Consequently, FTB met its initial burden to show that the proposed tax assessment is reasonable and rational. (*Appeal of Bindley, supra.*) Therefore, the proposed assessment is presumed correct, and appellant has the burden of proving that the proposed assessment is wrong. (*Ibid.*)

Appellant alleges that the 1099-R income received from State Farm Life Insurance Company is community property and half of the proceeds belong to his former spouse. Appellant further asserts that he does not have the financial means to pay the tax due to his advanced age, declining health, being legally handicapped, and facing housing challenges where he is at risk of becoming homeless. However, these contentions do not address the correctness of FTB's estimation of appellant's income and the proposed tax. Specifically, appellant fails to provide any documentation disputing that he received the \$80,446 gross distribution from State Farm Life Insurance Company, and that the reported taxable amount of \$38,694 from the Form 1099-R income does not already represent half of his share of community property. Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Bindley, supra.*) On appeal, appellant was given the opportunity to submit evidence of either a (1) corrected Form 1099-R from State Farm Life Insurance Company, or (2) a copy of a divorce

decree and evidence of the payment made to his former spouse for half of the proceeds. However, appellant did not provide any evidence in dispute of the 1099-R income he received from State Farm Life Insurance. A taxpayer's failure to produce evidence that is within his or her control gives rise to a presumption that such evidence is unfavorable to his or her case. (*Ibid.*) Consequently, appellant's assertions are insufficient to overcome the presumption of correctness that applies to FTB's proposed deficiency assessment.

As to appellant's financial hardship argument, OTA is cognizant of appellant's contention regarding his financial hardship, but lacks authority to make discretionary adjustments to a proposed assessment based on a taxpayer's ability to pay.<sup>2</sup> (*Appeal of Robinson*, 2018-OTA-059P.) Therefore, OTA has no legal basis to make any adjustments to the proposed assessment. Accordingly, appellant has not met his burden of proving error in FTB's proposed assessment.

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

California imposes a penalty for the failure to file a return by its due date, unless the failure to file was due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) 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 Head and Feliciano*, 2020-OTA-127P.)

Appellant's 2020 return had an original due date of April 15, 2021. (R&TC, § 18566.) Due to the COVID-19 pandemic, FTB postponed the filing due date for 2020 tax returns from April 15, 2021, to May 17, 2021.<sup>3</sup> As of the date the record was closed in this matter, there is no evidence that appellant filed a tax return with FTB for the 2020 tax year. Appellant has not provided any documentation or other corroborating evidence to support a finding that appellant's failure to timely file a 2020 California resident tax return occurred despite exercising ordinary business care and prudence. (*Appeal of Head and Feliciano*, *supra.*) Accordingly, OTA finds no basis to abate the penalty.

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<sup>2</sup> Although OTA lacks jurisdiction to adjust a final tax liability based on financial hardship, FTB may consider appellant's inability to pay under its payment arrangement or offer in compromise programs. (See <https://www.ftb.ca.gov/pay/if-you-cant-pay/index.html>.)

<sup>3</sup> See <https://www.ftb.ca.gov/about-ftb/newsroom/2020-tax-year-extension-to-file-and-pay-individual.html>.

Issue 3: Whether appellant has established that interest should be abated.

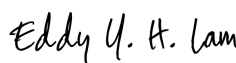
R&TC section 19101 provides that taxes are due and payable as of the original due date of the taxpayer's return (without regard to extension). If tax is not paid by the original due date or if FTB assesses additional tax and that assessment becomes due and payable, the taxpayer is charged interest on the resulting balance due, compounded daily. (R&TC, § 19101.) Interest is not a penalty, but is compensation for a taxpayer's use of money after it should have been paid to the state. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) There is no reasonable cause exception to the imposition of interest, and interest is mandatory except where abatement is authorized under the law. (*Appeal of Moy*, 2019-OTA-057P.) Generally, to obtain relief from interest, a taxpayer must qualify under one of the following three R&TC sections: 19104, 19112, or 21012. (*Ibid.*) OTA has no authority to review FTB's action under R&TC section 19112. (*Ibid.*) Here, appellant does not allege and evidence in the record does not indicate that there is any basis for interest abatement under R&TC sections 19104 and 21012.<sup>4</sup> Therefore, appellant has not established that interest should be abated.

HOLDINGS

1. Appellant has not demonstrated error in FTB's proposed assessment.
2. Appellant has not demonstrated reasonable cause to abate the late filing penalty.
3. Appellant has not established that interest should be abated.

DISPOSITION

FTB's action is sustained.

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Eddy Y.H. Lam  
Administrative Law Judge

Date Issued: 5/1/2024

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<sup>4</sup> Pursuant to 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 does not assert, and evidence in the record does not indicate, any such errors or delays occurred. Furthermore, relief pursuant to R&TC section 21012 is not relevant here because FTB did not provide appellant with any written advice.