

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

In the Matter of the Appeal of: ) OTA Case No. 230312900  
A. STARK )  
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**OPINION**

Representing the Parties:

For Appellant: A. Stark

For Respondent: Camille Dixon, Attorney

A. KLETTER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, A. Stark (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing to assess tax of \$36,290, a notice and demand penalty (demand penalty) of \$9,072.50, a late-filing penalty of \$9,072.50, a filing enforcement cost recovery fee (filing enforcement fee) of \$100, and applicable interest for the 2020 tax year.

Appellant waived the right to an oral hearing; therefore, the Office of Tax Appeals (OTA) decides this matter based on the written record.

**ISSUES**

1. Whether appellant has demonstrated error in FTB’s determination that he has a filing requirement for the 2020 tax year, or in FTB’s proposed assessment of tax.
2. Whether appellant has shown reasonable cause to abate the late-filing penalty.
3. Whether appellant has shown reasonable cause to abate the demand penalty.
4. Whether the filing enforcement fee may be abated.
5. Whether appellant is entitled to interest abatement.

**FACTUAL FINDINGS**

1. FTB received information reported by First Data Reporting Services LLC (First Data), a third party, on a 2020 federal Form 1099-K that it made gross payments totaling

- \$409,472 to appellant in 2020.<sup>1</sup> FTB determined that appellant earned sufficient income for the 2020 tax year to prompt a filing requirement.
2. FTB subsequently issued appellant a Demand for Tax Return (Demand) for the 2020 tax year requiring appellant to file or provide evidence that he already filed his 2020 California income tax return (2020 return), or to explain why he had no filing requirement for the 2020 tax year.
  3. When appellant did not respond, FTB issued a Notice of Proposed Assessment (NPA) estimating appellant's 2020 income and proposing to assess tax, a demand penalty, a late-filing penalty, a filing enforcement fee, and applicable interest, for the 2020 tax year.
  4. Appellant protested the NPA. On February 24, 2023, FTB issued appellant a Notice of Action proposing to affirm the NPA.
  5. This timely appeal followed.
  6. As of the date briefing closed, appellant has not filed a 2020 return. As relevant here, FTB previously issued appellant an NPA for the 2016 tax year following appellant's failure to respond to a 2016 Request for Tax Return (Request).

### DISCUSSION

Issue 1: Whether appellant has demonstrated error in FTB's determination that he has a filing requirement for the 2020 tax year, or in FTB's proposed assessment of tax.

R&TC section 18501 requires every individual subject to the Personal Income Tax Law to make and file a return with FTB "stating specifically the items of the individual's gross income from all sources and the deductions and credits allowable," if an individual has gross income or adjusted gross income (AGI) exceeding certain filing thresholds.<sup>2</sup> (R&TC, § 18501(a)(1)-(4).) Gross income means all income from whatever source derived, unless specifically excluded. (Internal Revenue Code (IRC), § 61(a); R&TC, § 17071.)

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<sup>1</sup> Federal Form 1099-K, "Payment Card and Third Party Network Transactions," is an IRS form that reports payments taxpayers receive from credit, debit or stored value cards such as gift cards, or payment apps or online marketplaces for goods and services. (See *General information FAQs, Q1. What is Form 1099-K and why would I receive one?*, available at: <https://www.irs.gov/newsroom/form-1099-k-faqs-general-information>.) There is a \$1 difference between the gross receipts reported on the federal account transcript and FTB's records, which does not affect the outcome of this appeal.

<sup>2</sup> For the 2020 tax year, the filing threshold for a single individual under 65 years of age with no dependents is gross income of more than \$18,496 or California AGI of more than \$14,797.

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 of tax based on an estimate of income, FTB’s initial burden is to show that its proposed assessment is reasonable and rational. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514 (*McColgan*); *Appeal of Bindley*, 2019-OTA-179P (*Bindley*)). An assessment based on unreported income is presumed correct when the taxing agency introduces a minimal factual foundation to support the assessment. (*Bindley, supra.*)

Here, FTB determined that the federal Form 1099-K reported gross income in excess of the 2020 filing threshold. On appeal, appellant fails to address the gross payments which First Data reported that it made to him. There appears to be no dispute that appellant was a California resident. FTB’s use of third-party information to estimate appellant’s income is reasonable and rational because evidence of appellant’s receipt of the gross income sufficiently links him with California source income.<sup>3</sup> Thus, appellant had a 2020 California filing requirement.<sup>4</sup>

Once FTB has met its initial burden, the proposed assessment of tax is presumed correct, and the taxpayer has the burden of providing it to be wrong. (*McColgan, supra; Bindley, supra.*) Unsupported assertions are insufficient to satisfy a taxpayer’s burden of proof. (*Bindley, supra.*) In the absence of credible, competent, and relevant evidence showing error in FTB’s determination, the determination must be upheld. (*Ibid.*)

On appeal, appellant asserts without elaborating that his California AGI was less than the 2020 filing threshold. Appellant produces no evidence showing that FTB’s estimate of his income is incorrect. Because appellant provides no credible and competent evidence showing error in FTB’s determination, its proposed assessment of tax must be upheld. (*Bindley, supra.*)<sup>5</sup>

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<sup>3</sup> The 1099-K reflects appellant’s tax identification number, but references an entity called “HHC LLC.” The federal account transcript indicates that the entity has a California address. Appellant’s appeal questions which entity he should provide the taxpayer identification number for, which indicates he is aware there is an entity, but appellant does not identify any entity or explain its relevance, if any.

<sup>4</sup> Appellant did not file a 2020 federal income tax return.

<sup>5</sup> A portion of appellant’s arguments on appeal concern constitutional questions and issues of due process at the audit or protest level; issues over which OTA does not have jurisdiction. Arguments such as these have been found to be frivolous or groundless in prior precedential opinions. (See *Appeal of Balch*, 2018-OTA-159P.) Appellant is hereby notified for future reference that if an appeal is maintained primarily for delay or based on frivolous or groundless positions, then a frivolous appeal penalty of up to \$5,000 under R&TC section 19714 may apply.

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

R&TC section 19131(a) 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 was due to reasonable cause and not willful neglect. When FTB imposes a late-filing penalty, it is presumed to have been correctly imposed, and the burden of proof is on the taxpayer to show that reasonable cause exists to abate the penalty. (*Appeals of Cremel and Koepfel*, 2021-OTA-222P.) To overcome the presumption of correctness, the taxpayer must provide credible and competent evidence supporting a claim of reasonable cause. (*Ibid.*) To establish reasonable cause, the taxpayer must show that the failure to timely file a return occurred despite the exercise of ordinary business care and prudence. (*Ibid.*)

Here, appellant's 2020 return was due on May 17, 2021.<sup>6</sup> As of the date briefing closed, appellant has not yet filed a 2020 return. Appellant provides no evidence demonstrating reasonable cause; he only asserts that he did not earn sufficient income to file. However, taxpayers must acquaint themselves with the requirements of California tax law. (*Appeals of Cremel and Koepfel, supra.*) Even if a taxpayer has a sincere belief that they are not required to file a return for the tax year, that belief alone does not constitute reasonable cause for the failure to file a timely return. (*Ibid.*) Thus, appellant has not demonstrated that the late-filing penalty should be abated for reasonable cause.

Issue 3: Whether appellant has shown reasonable cause to abate the demand penalty.

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 timely 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).) The burden of proving reasonable cause for the failure to respond to FTB's

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<sup>6</sup> In response to COVID-19, pursuant to R&TC section 18572(b), FTB postponed to May 17, 2021, the 2020 individual tax filing and payment due dates. (See <https://www.ftb.ca.gov/about-ftb/newsroom/news-releases/2021-03-state-tax-deadline-for-individuals-postponed-until-may-17-2021.html>.)

Demand is on the taxpayer. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) An appellant's failure to respond to a Demand must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*)

FTB properly imposed the demand penalty because FTB issued appellant the Demand and appellant failed to timely respond in the prescribed manner. Moreover, FTB issued appellant an NPA following his failure to timely respond in the prescribed manner to a Request for the 2016 tax year, within the four-taxable-year period preceding the Demand for the 2020 tax year. Appellant bears the burden to prove reasonable cause, but appellant provides no explanation or evidence to show that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. Thus, OTA has no basis to abate the demand penalty.

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 formal legal demand to file the tax return is mailed to that person by FTB, FTB shall impose a filing enforcement fee (currently set at \$121 for individuals.)<sup>7</sup> Once properly imposed, the statute provides no grounds upon which the fee may be abated. (R&TC, § 19254; see *Appeal of Jones*, 2021-OTA-144P.)

Here, FTB informed appellant in the 2020 Demand that appellant may be subject to the filing enforcement fee if appellant did not file the 2020 tax return. However, appellant did not timely respond to the Demand in the prescribed manner. Therefore, FTB properly imposed the filing enforcement fee and OTA has no basis to abate it.

Issue 5: Whether appellant is entitled to interest abatement.

Interest must be assessed from the date a tax payment is due through the date that it is paid. (R&TC, § 19101(a).) Imposing interest is mandatory; it is not a penalty, but 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.) Generally, to obtain relief from interest, a taxpayer must qualify under R&TC section 21012 or 19104.<sup>8</sup> R&TC section 21012 does not apply because

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<sup>7</sup> FTB annually adjusts the filing enforcement fee to reflect actual costs as reflected in the annual Budget Act.

<sup>8</sup> Under R&TC section 19112, FTB may waive interest for any period for which FTB determines that an individual or fiduciary is unable to pay interest due to extreme financial hardship. OTA does not have authority to review FTB's denial of a request to waive interest under R&TC section 19112. (*Appeal of Moy, supra.*)

FTB did not provide appellants with any requested written advice. 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.

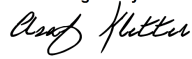
Appellant does not allege that either statutory provision for interest abatement applies to the facts of this case, and OTA concludes based on the evidence in the record that no statutory provision for abatement applies. Therefore, FTB properly imposed interest and OTA has no basis to abate it.

HOLDINGS


1. Appellant has not demonstrated error in FTB’s determination that he has a filing requirement for the 2020 tax year, or in FTB’s proposed assessment of tax.
2. Appellant has not shown reasonable cause to abate the late-filing penalty.
3. Appellant has not shown reasonable cause to abate the demand penalty.
4. The filing enforcement fee may not be abated.
5. Appellant is not entitled to interest abatement.

DISPOSITION

FTB’s action is sustained.

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 Asaf Kletter  
 Administrative Law Judge

We concur:

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 John O. Johnson  
 Administrative Law Judge

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 Tommy Leung  
 Administrative Law Judge

Date Issued: 9/6/2024