

ISSUE

1. Whether appellant demonstrated that the late filing penalties for the 2020 and 2021 tax years should be abated.
2. Whether appellant demonstrated that the demand penalties for the 2020 and 2021 tax years should be abated.
3. Whether appellant demonstrated that interest should be abated.

FACTUAL FINDINGS

1. On April 15, 2022, appellant filed a 2020 and 2021 California Resident Income Tax Return (Form 540 return). On both Form 540 returns, appellant reported zero wages, taxable income, and tax. Additionally, appellant requested refunds of California tax withholdings of \$641 for 2020 and \$1,138 for 2021.
2. On September 14, 2022, FTB sent appellant Notices of Frivolous Return Determination and Demand for Tax Return (Frivolous Return and Demand Notice) for the 2020 and 2021 tax years. Each of the Frivolous Return and Demand Notices indicated that: (1) FTB determined appellant's Form 540 returns were frivolous; (2) appellant was required to file valid California tax returns by October 14, 2022 (i.e., within 30 days); (3) a \$5,000 frivolous return penalty would be imposed on each tax year if appellant did not file valid California tax returns; and (4) other penalties, fees, and interest would be imposed on the tax estimated by FTB in the absence of appellant filing a valid tax return.
3. On September 23, 2022, FTB received another 2020 Form 540 return from appellant. The 2020 Form 540 return was marked as an amended return; however, appellant made no changes to the reported wages, income, tax or claimed refund. Included with the 2020 Form 540 return was a letter stating that appellant disagreed with FTB's determination.
4. Also on September 23, 2022, appellant sent a letter to FTB regarding the 2021 tax year, stating, among other things, that all matters related to the 2021 tax were deemed "final and closed" by appellant.
5. On January 23, 2023, FTB sent appellant a Notice of Frivolous Return Penalty and Demand for Payment for the 2020 and 2021 tax years. The notice indicated that FTB found appellant did not submit a valid return, resulting in a \$5,000 frivolous return penalty for each tax year. FTB did not receive a response.
6. On February 24, 2023, FTB issued a separate Notice of Proposed Assessment (NPA) for each of the 2020 and 2021 tax years proposing additional tax based on third party

- wage information. In relevant parts, the 2020 NPA included a \$351.25 late filing penalty and a \$511.75 demand penalty, and applicable interest. The 2021 NPA included a \$621.25 late filing penalty and a \$621.25 demand penalty, and applicable interest.
7. On April 24, 2023, FTB received appellant's protest letter for both the 2020 and 2021 tax years.
 8. On August 11, 2023, FTB affirmed the 2020 and 2021 NPAs in two separate Notices of Action (NOAs).
 9. Appellant filed this timely appeal for both 2020 and 2021 tax years.
 10. FTB submits the IRS Wage and Income Transcript for the 2020 and 2021 tax years, which reported that appellant received third-party-reported wages on federal Forms W-2. The wages reported in the IRS Wage and Income Transcript matched the amounts FTB used to estimate appellant's income in the NPA and NOA for both tax years at issue.²
 11. FTB submits a copy of the Demand for Tax Return (Demand) and NPA for each of the 2018 and 2019 tax years.
 12. On January 23, 2024, during the appeals proceeding, appellant filed amended Form 540 returns for the 2020 and 2021 tax years, reporting California taxable income and additional taxes in agreement with the amounts as determined in the NOAs previously issued by FTB for those years.

DISCUSSION

Issue 1: Whether appellant demonstrated that the late filing penalties for the 2020 and 2021 tax years should be abated.

FTB 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. (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 GEF Operating, Inc.*, 2020-OTA-057P.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of GEF Operating, Inc.*, *supra.*) Furthermore, zero returns are not valid returns

² OTA notes that the IRS Wage and Income Transcript reflects additional income appellant received in the 2020 tax year, including 1099-C cancellation of debt income and 1099-R distributions from an early withdrawal from a qualified retirement plan. However, FTB did not include these amounts in its 2020 NPA and NOA. As this omission is to the benefit of the appellant, OTA will not address the matter further.

for purposes of R&TC section 18501 filing requirement. (*Appeal of Reed*, 2021-OTA-326P, citing *Appeal of Hodgson* (2002-SBE-001) 2002 WL 245667.)³

As discussed above, for the 2020 and 2021 tax years, the appellant filed Form 540 returns reporting zero wages, taxable income, and tax on April 15, 2022. Appellant also filed an amended Form 540 return for the 2020 tax year, which again reported zero wages, taxable income, and tax on September 23, 2022. Here, appellant's Form 540 returns lack sufficient data for FTB to determine the proper tax liability and therefore do not qualify as valid tax returns. (See *Appeal of Hodgson, supra.*) Furthermore, FTB received information that appellant earned taxable income but appellant continued to report zero wages for each year, which does not reflect an honest and genuine endeavor to comply with California tax law. (*Ibid.*) Thus, OTA finds that appellants filings constitute zero returns and are not valid returns.

Under *Appeal of Reed, supra*, zero returns do not satisfy the filing requirement under R&TC section 18501. As a result, appellant's returns are treated as never filed, and appellant remained in non-filing status for both tax years until submitting a valid return. Filing zero returns places the filer at risk of the sanctions adopted by the legislature to enforce compliance with the tax laws, including the imposition of the late filing penalty and demand penalty. (See *Appeal of Hodgson, supra.*)⁴

During the appeal before OTA, appellant filed untimely Form 540 returns for 2020 and 2021 on January 23, 2024, with substantive financial data. FTB has acknowledged these returns, which report tax matching the liabilities included in the Notices of Action, as valid returns. However, as the 2020 and 2021 Form 540 returns were not validly filed until January 23, 2024, beyond the original and extended due dates, they are considered untimely.⁵ Therefore, FTB properly imposed the late filing penalty.

³ A precedential opinion of the State Board of Equalization that was adopted prior to January 1, 2018, may be cited as precedential authority to OTA unless OTA removes, in whole or in part, the precedential status of that opinion. (Cal. Code Regs., tit. 18, § 30504.)

⁴ The Ninth Circuit has held that a return with all zeros is a valid return—at least for the purpose of Internal Revenue Code (IRC) section 7203 (criminal misdemeanor willful failure to file). (See *U.S. v. Long* (9th Cir. 1980) 618 F.2d 74.) Although California is located in the federal Ninth Circuit, and Ninth Circuit cases (concerning federal tax law) are often helpful, they do not bind OTA in applying California tax law.

⁵ For the 2020 tax year, the personal income tax return originally due on April 15, 2021, was postponed to May 17, 2021, due to COVID-19, with an extended due date of October 15, 2021. (See <https://www.ftb.ca.gov/about-ftb/newsroom/news-releases/2021-03-state-tax-deadline-for-individuals-postponed-until-may-17-2021.htm>; R&TC, § 18567.) For the 2021 tax year, the due date for personal income tax returns is April 15, 2022, with an extended due date of October 15, 2022. (R&TC, §§ 18566, 18567.) Therefore, the January 23, 2024 date is beyond the original and extended due dates for the 2020 and 2021 tax years.

On appeal, appellant has not provided any evidence showing that appellant's failure to timely file valid 2020 and 2021 returns occurred despite exercising ordinary business care and prudence. (*Appeal of GEF Operating, Inc., supra.*) For example, appellant has not established that he took any steps to ensure compliance with timely filing valid 2020 and 2021 Form 540 returns, but were otherwise prevented from complying. Based on the foregoing, OTA finds that appellant has not demonstrated a basis for abatement of the late filing penalties for the 2020 and 2021 tax years.

Issue 2: Whether appellant demonstrated that the demand penalties for the 2020 and 2021 tax years should be abated.

R&TC section 19133 imposes a penalty when a taxpayer fails to file a return or provide information upon FTB's demand to do so. A demand penalty is properly imposed if two criteria are met: (1) the taxpayer fails to respond to a current Demand in the manner prescribed; and (2) FTB proposed an assessment of tax under the authority of R&TC section 19087(a), after the taxpayer failed to timely respond to a Request for Tax Return or a 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).)

Here, FTB issued Frivolous Return and Demand Notices for the 2020 and 2021 tax years, instructing appellant to file valid tax returns by October 14, 2022. For 2020, appellant submitted an amended return, again reporting zero wages, taxable income, and tax. As previously discussed, these zero returns lack sufficient data for FTB to determine tax liability and do not reflect a genuine effort to comply with California tax law, rendering them invalid. (*Appeal of Hodgson, supra.*) Because an invalid return is treated as never filed, appellant did not timely respond to the Frivolous Return and Demand Notice. For 2021, appellant did not file an amended return but instead sent a letter to FTB on September 23, 2022, which stated, among other things, that appellant deemed the matter final and closed. However, merely disagreeing with FTB's assessment does not satisfy the requirement to file a valid return as demanded. Appellant failed to file valid Form 540 returns for 2020 and 2021 by the manner prescribed in the Frivolous Return and Demand Notices. Thus, the first requirement to impose a demand penalty is met.

As to the second requirement, FTB issued the 2020 and 2021 NPAs under the authority of R&TC section 19087(a) following appellant's failure to timely respond to the prior Demands for the 2018 and 2019 tax years, all of which are within the four-taxable-year period immediately

preceding the 2020 and 2021 Frivolous Return and Demand Notices. Therefore, FTB properly imposed the demand penalties.

The demand penalty can be abated if the taxpayer establishes that the failure to timely respond to a demand was due to reasonable cause and not willful neglect. (R&TC, § 19133.) To establish reasonable cause, the taxpayer must show that the failure occurred despite the exercise of ordinary business care. (*Appeal of Jones*, 2021-OTA-144P.) The taxpayer's reason must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of GEF Operating, Inc.*, *supra*.)

Here, appellant has not demonstrated reasonable cause for not filing valid returns as prescribed by FTB's Frivolous Return and Demand Notices for the 2020 and 2021 tax years between the dates of September 14, 2022, and October 14, 2022. Further, appellant has not provided any evidence showing that appellant's failure to timely file valid 2020 and 2021 Form 540 returns, upon FTB's demand to do so, occurred despite exercising ordinary business care and prudence. (*Appeal of GEF Operating, Inc.*, *supra*.) Based on the foregoing, OTA finds that appellant has not demonstrated a basis for abatement of the demand penalties.

Issue 3: Whether appellant demonstrated that interest should be abated.

Interest is not a penalty but is merely compensation for a taxpayer's use of money after it should have been paid to the state. (*Appeal of Gorin*, 2020-OTA-018P.) Imposition of interest is mandatory, and it can only be abated in certain limited situations when authorized by law. (R&TC, § 19101(a); *Appeal of Balch*, 2018-OTA-159P.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Moy*, 2019-OTA-057P.) To obtain relief from interest, a taxpayer must qualify under one of three statutes: R&TC section 19104, 19112, or 21012. (*Appeal of Gorin*, *supra*.) OTA has jurisdiction to determine whether appellant is entitled to the abatement of interest under R&TC sections 19104 and 21012, but R&TC section 21012 does not apply because FTB did not provide appellant with any requested written advice.

Here, appellant has not established entitlement to interest abatement under R&TC section 19104 because appellant does not allege, and the evidence does not show, that the interest is attributable to any unreasonable error or delay by an officer or employee of FTB when performing a ministerial or managerial act. Therefore, appellant has not demonstrated any basis for interest abatement.

HOLDINGS

1. Appellant has not demonstrated that the late filing penalties for the 2020 and 2021 tax years should be abated.
2. Appellant has not demonstrated that the demand penalties for the 2020 and 2021 tax years should be abated.
3. Appellant has not demonstrated that interest should be abated.

DISPOSITION

FTB's proposed assessments are sustained in full.

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Eddy Y. H. Lam

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Eddy Y.H. Lam
Administrative Law Judge

We concur:

Signed by:

Kim Wilson

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Kim Wilson
Hearing Officer

DocuSigned by:

Keith T. Long

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Keith T. Long
Administrative Law Judge

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