

3. FTB issued a Notice of Proposed Assessment (NPA) for the 2021 tax year that estimated appellant's income based on Forms 1099-B, Proceeds from Broker and Barter Exchange Transactions (Forms 1099-B), and Forms 1099-DIV, Dividends and Distributions (Forms 1099-DIV), reported to FTB by third parties. The NPA proposed to assess tax due, a late filing penalty, a demand penalty, a filing enforcement fee, and applicable interest.
4. Appellant timely protested the NPA, contending that he received a different amount of income from Form 1099-B than the amount estimated in the NPA.
5. FTB issued a Notice of Action affirming the NPA because appellant did not file a return or provide documentation to substantiate appellant does not have a filing requirement.
6. Appellant filed this timely appeal.

DISCUSSION

Issue 1: Whether appellant has established error in FTB's proposed assessment.

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 the individual's gross income exceeds certain filing thresholds. (R&TC, § 18501(a)(1)-(4).) R&TC section 19087(a) provides that if any taxpayer fails to file a return, FTB "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 additional tax based on an estimate of income, FTB's initial burden is to show why its proposed assessment is reasonable and rational. (*Appeal of Bindley*, 2019-OTA-179P.) An assessment based on unreported income is presumed correct when FTB introduces a minimal factual foundation to support the assessment. (*Ibid.*) Once FTB has met its initial burden, the proposed assessment of additional tax is presumed correct and the taxpayer has the burden of proving it to be wrong. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing error in FTB's determination, the determination must be upheld. (*Ibid.*)

Here, FTB's proposed assessment is reasonable and rational because it is based on information reported by third parties (i.e., Forms 1099-B and Forms 1099-DIV). (*Appeal of Bindley, supra.*) Therefore, appellant bears the burden of demonstrating error in the proposed assessment. On appeal, appellant appears to claim the amount of tax proposed to be assessed

is incorrect.¹ However, appellant provides no evidence that demonstrates error in FTB's determination. Importantly, appellant still has not filed a 2021 California tax return.² In the absence of credible, competent, and relevant evidence showing error in FTB's determination, the determination must be upheld. (*Appeal of Bindley, supra.*) Appellant has not met his burden to prove error in FTB's proposed assessment.

Issue 2: Whether appellant has established a basis to abate the late filing penalty.

R&TC section 19131 provides that a late filing penalty shall be imposed when a taxpayer fails to file a tax return on or before its due date, unless it is shown that the failure is due to reasonable cause and not due to willful neglect. 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 Shanahan, 2024-OTA-039P.*)

Appellant has not filed a 2021 return. On appeal, appellant requests that the penalties be reduced but provides no explanation or evidence to establish that the failure to timely file a 2021 return occurred despite the exercise of ordinary business care and prudence. Accordingly, appellant has not established a basis to abate the late filing penalty.

Issue 3: Whether appellant has established a basis to abate the demand penalty.

R&TC section 19133 provides that if a taxpayer fails to make and file a return upon notice and demand by FTB, then FTB may impose a 25 percent demand penalty unless the taxpayer's failure is due to reasonable cause. To establish reasonable cause to abate the demand penalty, the taxpayer has the burden of proof to establish that the failure to respond to the Demand in the manner prescribed occurred despite the exercise of ordinary business care and prudence or that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Jones, 2021-OTA-144P.*) On appeal, appellant requests that the penalties be reduced but provides no explanation or evidence to establish that

¹ Appellant also states he is unable to pay the entire amount due and requests to make payments in installments. However, FTB considers requests for payment plans and appellant's request should be directed to FTB, not OTA. (See www.ftb.ca.gov/pay/payment-plans/index.asp.) OTA's function in the appeals process is limited to determining the correct amount of the taxpayer's California income tax liability. (*Appeal of Robinson, OTA-2018-059P.*)

² During protest, appellant conceded receipt of Form 1099-B income sufficient to prompt a filing requirement but has not filed a return for the 2021 tax year.

the failure to respond to the Demand occurred despite the exercise of ordinary business care and prudence. Accordingly, appellant has not established a 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 a formal legal demand to file the tax return is mailed to that person by FTB, FTB shall impose a filing enforcement fee. Once properly imposed, the statute provides no grounds upon which the fee may be abated. (R&TC, § 19254; see *Appeal of Jones, supra.*)

Here, FTB informed appellant in the Demand that a filing enforcement fee would be assessed if appellant did not respond to the Demand. Appellant did not 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 has established a basis for interest abatement.

If any amount of tax is not paid by the due date, interest is required to be imposed from the due date until the date the taxes are paid. (R&TC, § 19101(a).) Interest is not a penalty but is compensation for the taxpayer's use of money that should have been paid to the state. (*Appeal of Moy, 2019-OTA-057P.*) To obtain relief from interest, a taxpayer must qualify under the waiver provisions of R&TC section 19104 (unreasonable error or delay by FTB in the performance of a ministerial or managerial act), 19112 (extreme financial hardship),³ or 21012 (reasonable reliance on FTB's written advice).

On appeal, appellant has not provided any evidence to establish that a statutory provision for interest abatement applies to the facts of this case. OTA concludes, based on the evidence in the record, that no statutory provision for abatement of interest applies.


³ OTA has no authority to review FTB's denial of a request to waive interest under R&TC section 19112. (*Appeal of Moy, supra.*)

HOLDINGS


1. Appellant has not established error in FTB’s proposed assessment.
2. Appellant has not established a basis to abate the late filing penalty.
3. Appellant has not established a basis to abate the demand penalty.
4. The filing enforcement fee may not be abated.
5. Appellant has not established a basis for interest abatement.

DISPOSITION


FTB’s action is sustained.

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 Erica Parker
 Hearing Officer

We concur:
 Signed by:

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 Seth Elsom
 Hearing Officer

Signed by:

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 L. Katrine Shelton
 Administrative Law Judge

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