

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)
S. KELLY) OTA Case No. 240917484
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OPINION

Representing the Parties:

For Appellant: S. Kelly

For Respondent: John Ly, Graduate Legal Assistant

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, S. Kelly (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing an assessment of tax of \$3,136, a late filing penalty of \$784, a notice and demand (demand) penalty of \$2,117.75, and a filing enforcement fee of \$108, plus interest, for the 2021 tax year.¹

Appellant waived the right to an oral hearing; therefore, the matter was submitted to the Office of Tax Appeals (OTA) on the written record pursuant to California Code of Regulations, title 18, section 30209(a).

ISSUES

1. Whether appellant was a resident of California in 2021.
2. Whether appellant established error in FTB’s proposed assessment of tax.
3. Whether appellant established a basis to abate the late filing penalty.
4. Whether appellant established a basis to abate the filing enforcement fee.

FACTUAL FINDINGS

1. FTB obtained information from the IRS that appellant filed a 2021 federal income tax return using a California address. Therefore, FTB determined that appellant may have a California filing requirement. FTB issued a Demand for Tax Return notice (Demand)

¹ On appeal, FTB agrees to abate the demand penalty.

- requiring appellant to file a California return, provide a copy of the return if already filed, or explain why filing a return was not required.
2. After appellant failed to respond, FTB issued a Notice of Proposed Assessment (NPA) on June 14, 2024, that estimated appellant's income to be \$161,273 based on, among other information, federal Form W-2 income of \$119,930 from a Maryland employer and \$41,341 from the U.S. Coast Guard, and numerous Forms 1099 reporting income.
 3. The Forms W-2 and 1099 indicate an address for appellant in California. The Form W-2 from the Maryland employer reported the income as California income to the California Employment Development Department.
 4. The NPA proposed an assessment of tax of \$3,136, a late filing penalty of \$784, a demand penalty of \$2,117.75, and a filing enforcement fee of \$108, plus interest, for the 2021 tax year.
 5. Appellant timely protested the NPA.
 6. FTB affirmed the NPA in a Notice of Action issued on September 10, 2024.
 7. This timely appeal followed.
 8. On appeal, FTB agrees to abate the demand penalty. FTB also provides a list of appellant's California tax filings, which shows that appellant filed a California Resident Income Tax Return (Form 540) for the 2020 tax year.

DISCUSSION

Issue 1: Whether appellant was a resident of California in 2021.

R&TC section 17041 imposes a tax “upon the entire taxable income of every resident of this state” California defines a “resident” as including: (1) every individual not domiciled in California who is in California for other than a temporary or transitory purpose; or (2) every individual domiciled in California who is outside of California for a temporary or transitory purpose. (R&TC, § 17014(a)(1)-(2); Cal. Code Regs., tit. 18, § 17014; *Appeal of Mazer*, 2020-OTA-263P.) FTB's determinations of residency are presumptively correct, and the taxpayer bears the burden of showing error in those determinations. (*Appeal of Mazer, supra*.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing that FTB's determination is incorrect, it must be upheld. (*Ibid.*)

An individual can have only one domicile at any given time. (Cal. Code Regs., tit. 18, § 17014(c).) Domicile is defined as the one location where an individual has the most settled and permanent connection, and the place to which an individual intends to return when absent.

(*Appeal of Mazer, supra*; Cal. Code Regs., tit. 18, § 17014(c).) A domicile once acquired is presumed to continue until it is shown to have been changed. (*Appeal of Mazer, supra*.) The burden of proof as to a change of domicile is on the party asserting such change. (*Ibid.*)

In this case, FTB determined that appellant was a resident of California and, therefore, had a California filing requirement. The record shows that a California address was used on appellant's federal tax return, which is evidence of California residency. (See *Appeal of Housman and Pena*, 2022-OTA-375P.) In addition, the Forms W-2 and 1099 were issued to appellant's address in California, and appellant's Maryland employer reported the income as California income to the California Employment Development Department. Appellant also filed a California tax return as a California resident in the previous tax year, 2020. Appellant contends that he was a resident of South Carolina in 2021, filed a tax return in that state, and was in the military. However, appellant does not provide further information or evidence.

For servicemembers not domiciled in California and present in California only in compliance with military orders, the servicemember does not become a California resident. (R&TC, § 17140.5(c).) Compensation for military service of a servicemember not domiciled in this state is not income even if that income is earned in the state. (*Ibid.*) Appellant was in the military but has not shown that he was not domiciled in California in 2021 or where he was stationed. The record does not establish that appellant changed his domicile or that he did not intend to return to California when absent. As a result, appellant has not shown that he was not a California resident or domiciliary.

Issue 2: Whether appellant established error in FTB's proposed assessment of tax.

R&TC section 17041 imposes a tax "upon the entire taxable income of every resident of this state" R&TC section 18501 requires every individual subject to the personal income tax to make and file a return with the FTB "stating specifically the items of the individual's gross income from all sources and the deductions and credits allowable" R&TC section 19087(a) provides:

If any taxpayer fails to file a return, or files a false or fraudulent return with intent to evade the tax, for any taxable year, the Franchise Tax Board, at any time, may require a return or an amended return under penalties of perjury or 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.

If FTB proposes a tax assessment 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.) Federal courts have held that the taxing agency need only introduce some

evidence linking the taxpayer with the unreported income. (See *Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932.) When a taxpayer fails to file a valid return, FTB's use of information from various sources to estimate a taxpayer's taxable income is a reasonable and rational method of determining taxable income. (See *Palmer v. Internal Revenue Service* (9th Cir. 1997) 116 F.3d 1309, 1313; *Appeal of Sheward*, 2022-OTA-228P.) Once FTB has met its initial burden, the assessment is presumed correct, and the taxpayer has the burden of proving it to be wrong. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Myers*, *supra*.)

As discussed above, the evidence shows that appellant was a resident of California and is taxed on his entire taxable income. FTB used wage and income information reported to the IRS as a basis for estimating income, which is reasonable and rational. Therefore, FTB has met its initial burden, and appellant has the burden of showing error. Appellant asserts that he was a resident of South Carolina, filed taxes in that state, and was in the military. A taxpayer can be a resident of more than one state and being a resident of South Carolina² and filing a tax return in that state does not mean that appellant owes no tax in California.³ And as noted above, even though appellant was in the military, this fact does not mean that he is not taxed on California income because he is a California resident and domiciliary. Therefore, appellant has not shown error in FTB's proposed assessment.

Issue 3: Whether appellant established a basis to abate the late filing penalty.

California imposes a penalty for the failure to file a return on or before the due date, unless it is shown that the failure is due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) When FTB imposes a penalty, the law presumes that the penalty was imposed correctly, and the burden of proof is on taxpayers to establish otherwise. (*Appeal of Fisher*, 2022-OTA-337P.) To overcome the presumption of correctness attached to the penalty, taxpayers must provide credible and competent evidence supporting a claim of reasonable cause; otherwise, the penalty cannot be abated. (*Ibid.*) Ignorance of a filing requirement or a misunderstanding of the law generally does not excuse a late filing. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.)

² Under some circumstances, California resident taxpayers may be eligible for the other state tax credit (OSTC) for taxes paid to other states on double-taxed income pursuant to R&TC section 18001. However, appellant has not provided argument or evidence showing entitlement to the OSTC, such as by providing a copy of his South Carolina tax return or other evidence of taxes paid to another state.

³ Under R&TC section 18501, appellant is required to file a return because his estimated gross income of \$161,273 exceeds the \$43,760 income filing requirement threshold based on, as reported on his federal return, a head of household filing status with 2 dependents.

Appellant has not filed a California tax return for 2021 and has not provided any evidence showing that the penalty was not properly imposed or that reasonable cause exists for the late filing. Therefore, appellant has not shown a basis to abate the penalty.

Issue 4: Whether appellant established a basis to abate the filing enforcement fee.


If FTB mails a demand for a tax return to a taxpayer, a filing enforcement fee is required to be imposed when the taxpayer fails or refuses to file the return within the 25-day period. (R&TC, § 19254.) Once properly imposed, there is no provision in the R&TC that would relieve the imposition of the filing enforcement fee for any circumstances, including reasonable cause. The filing enforcement fee was properly imposed because appellant failed to respond to FTB’s Demand for Tax Return. Therefore, there is no basis upon which to provide relief from the fee.

HOLDINGS


1. Appellant was a resident of California in 2021.
2. Appellant has not established error in FTB’s proposed assessment of tax.
3. Appellant has not established a basis to abate the late filing penalty.
4. Appellant has not established a basis to abate the filing enforcement fee.

DISPOSITION

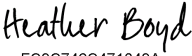
FTB’s action is modified as conceded to abate the demand penalty. FTB’s action is otherwise sustained.

Signed by:

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 Josh Lambert
 Administrative Law Judge

We concur:
 Signed by:

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 Veronica I. Long
 Administrative Law Judge

Signed by:

 FC3C746C471043A...

 Heather Boyd
 Administrative Law Judge

Date Issued: 12/2/2025