OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **FISHBONE APPAREL, INC.**	)	OTA Case No. 230212546

OPINION

Representing the Parties:

For Appellant: Frank Gertzen, President

For Respondent: Alisa L. Pinarbasi, Attorney

For Office of Tax Appeals: Linda Frenklak, Attorney

S. ELSOM, Hearing Officer: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Fishbone Apparel, Inc. (appellant) appeals an action by the Franchise Tax Board (respondent) proposing tax of $800, a notice and demand (demand) penalty of $200[1], and applicable interest for the 2019 tax year.

Office of Tax Appeals (OTA) Panel Members Seth Elsom, Asaf Kletter, and Erica Parker held a virtual oral hearing for this matter on July 24, 2025. At the conclusion of the hearing, the record was held open to allow the parties to provide post-hearing briefing. After each party submitted its post-hearing brief, the record was closed on October 1, 2025, and this matter was submitted for an Opinion pursuant to California Code of Regulations, title 18, section 30209(b).

ISSUES

1. Whether appellant has established error in respondent's proposed assessment for the 2019 tax year.
2. Whether appellant has established reasonable cause to abate the late filing penalty.
3. Whether appellant has established a legal basis to abate the filing enforcement fee.
4. Whether appellant has established a legal basis to abate interest.

[1] On appeal, respondent concedes that it will not impose the demand penalty.

FACTUAL FINDINGS

1. Appellant is a Pennsylvania-based corporation that makes online sales of apparel through Amazon. During the taxable year at issue, appellant was an Amazon seller who participated in Amazon's "Fulfillment by Amazon" (FBA) program, which, as relevant here, means that appellant contracted with Amazon to hold and ship inventory from Amazon warehouses (fulfillment centers) to customers in various states.
2. On December 13, 2018, the California Department of Tax and Fee Administration (CDTFA) sent appellant a letter informing appellant that CDTFA received information that appellant had inventory stored in fulfillment centers located in California and as such, met the definition of a retailer engaged in business in California for sales and use tax purposes. CDFTA informed appellant that it was therefore required to register with CDTFA, file sales and use tax returns (SUTRs), and pay tax on sales made to consumers in California.
3. CDTFA's internal notes indicate that it advised appellant's President that appellant's "start date" should be the date inventory was first placed in California by Amazon. CDTFA provided appellant with Amazon Inventory Location Instructions, which explain how Amazon sellers may find out where their inventory was held.
4. On February 5, 2020, appellant filed its SUTR for the 4th quarter of 2019 with CDTFA, reporting taxable sales of goods in California of $9,403, a total sales tax liability of $894, and a self-assessed penalty and interest. Appellant then remitted a payment of $989.36 to CDTFA.
5. Respondent subsequently received gross sales information from CDTFA indicating that appellant may have a 2019 income tax filing requirement. On March 23, 2022, respondent sent appellant a Demand for Tax Return (Demand). The Demand required appellant to file a return, state whether appellant had already filed a return, or complete FTB form 4694 ENS, Nonqualified Business Entity Questionnaire (Questionnaire) to determine if appellant had a filing requirement.
6. Appellant timely responded to the Demand by partially completing and submitting the Questionnaire.
7. On June 27, 2022, respondent issued a Notice of Proposed Assessment (NPA) stating that because appellant had not provided a tax return or information establishing that appellant did not have a filing requirement, respondent proposed to assess the minimum tax of $800, a demand penalty of $200, a late filing penalty of $200, and a filing enforcement fee of $83, plus interest.

8. Appellant timely protested the NPA. Appellant stated that it: did not have a California filing requirement; was not a registered California corporation; did not do business in California; never filed a California sales tax return; never paid California employer withholding taxes; was not located in California; and did not have any business property or business nexus in California. Appellant also stated that it did not have any documentation to submit, since none existed.
9. On December 29, 2022, respondent sent appellant a Notice of Action affirming the NPA.
10. This timely appeal followed.
11. On appeal, appellant provides Amazon sales reports for sales made between September 1, 2023, and May 1, 2024. The reports do not indicate the state to which sales were made. Appellant states that the sales information from Amazon is limited to a two-year look back.

DISCUSSION

Issue 1: Whether appellant has established error in respondent's proposed assessment for the 2019 tax year.

Respondent's determination of tax is presumed correct, and a taxpayer has the burden of proving error. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid*.)

With limited exceptions not relevant here, R&TC section 18601(a) provides that every taxpayer subject to the tax imposed by Part 11 (i.e., the Corporation Tax Law) shall file a return with respondent on or before the 15th day of the fourth month following the close of its tax year. Unless exempted by Part 11 or the California Constitution, every corporation that is incorporated, qualified, or "doing business" in California must pay the annual minimum franchise tax of $800. (R&TC, § 23153(a-d).) "Doing business" is defined as "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." (R&TC, § 23101(a).)

R&TC section 23101 was amended for taxable years beginning on or after January 1, 2011. In addition to the definition provided in R&TC section 23101(a), R&TC section 23101(b) *also* provides that a taxpayer is doing business in California if any of the following conditions are met: (1) the taxpayer is organized or commercially domiciled in California; (2) sales of the taxpayer in California exceed the lesser of $500,000 or 25 percent of the taxpayer's total sales; (3) the real property and tangible personal property of the taxpayer in California exceed the lesser of $50,000 or 25 percent of the taxpayer's total real property and tangible property; or (4) the amount paid in California by the taxpayer for compensation exceeds

the lesser of $50,000 or 25 percent of the total compensation paid by the taxpayer. (R&TC, § 23101(b)(2)–(4).)[2] R&TC section 23101(a) and (b) provide two alternative tests to determine whether a taxpayer is doing business in California; the satisfaction of either test leads to a finding that the taxpayer is doing business in California. (*Appeal of Aroya Investment I, LLC*, 2020-OTA-255P.)

Respondent argues that appellant was doing business in California during the 2019 tax year under R&TC section 23101(a) because: (1) appellant had physical presence in California because it participated in Amazon's FBA program, under which appellant's inventory was stored at one or more Amazon fulfillment centers in California during the 2019 tax year, and (2) appellant made sales to California customers, which qualify as "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit."[3] Respondent further contends that CDTFA determined that appellant held inventory in California and established nexus under R&TC section 6203,[4] and that, following that determination, appellant filed a 2019 SUTR, which reported California sales of $9,403. Respondent asserts that these actions are persuasive evidence that show that appellant had income tax nexus in California for the 2019 tax year.

Appellant argues that it did not do business in California in the 2019 tax year, and that respondent has provided neither proof of any inventory that appellant held nor proof of taxable sales that it made in California. At the oral hearing, appellant contended that it was coerced by the State of California into filing the SUTR to quickly settle outstanding issues with California and that the SUTR did not clearly reflect appellant's sales in California. Appellant further argues that even if it held inventory in California fulfillment centers during the 2019 tax year, "any assumption that inventory merely stored in an Amazon warehouse in California meets the definition of [a] retailer engaged in business in California is ridiculous and faulty on its face." OTA interprets appellant to argue that a taxpayer who holds inventory in California, without taxable sales, is not doing business in California.

Here, it is undisputed that appellant participated in Amazon's FBA program. On December 13, 2018, CDTFA informed appellant that it obtained information from Amazon

[2] The dollar amounts are adjusted for inflation. (R&TC, § 23101(c).)

[3] The parties agree that appellant did not exceed the California sales thresholds established under R&TC section 23101(b).

[4] R&TC section 6203 generally provides that a retailer engaged in business in California and making sales of tangible personal property for storage, use, or other consumption in California shall collect sales tax from the purchaser.

indicating that appellant held inventory in California fulfillment centers and was required to file a SUTR. Appellant testified that in 2019, it had access to Amazon records indicating the location where its inventory was stored. Appellant subsequently filed a SUTR reporting taxable California sales of $9,403 and sales tax of $894. Thus, appellant's access to and review of its records and its subsequent filing of the SUTR demonstrate that appellant held inventory in and made sales to California during the 2019 tax year.

Appellant's own reporting of California sales of $9,403 on its SUTR indicates that it possessed and relied upon Amazon sales and inventory reports or other information to file the return. Appellant provides no evidence to support its assertion that the SUTR filed by appellant was coerced by the State of California or incorrectly reported California sales. Respondent's determinations cannot be successfully rebutted when the taxpayer fails to provide credible, competent, and relevant evidence as to the issues in dispute. (*Appeal of GEF Operating, Inc.*, *supra*.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid*.) It is well established that a taxpayer's failure to produce evidence that is within its control gives rise to a presumption that such evidence is unfavorable to the taxpayer's case. (*Appeals of Kwon et al.*, 2021–OTA–296P.) Though appellant asserts that respondent must provide information to support its assessment and has not done so, appellant bears the burden of proof to establish error in respondent's determination. (*Appeal of GEF Operating, Inc.*, *supra*.). Thus, appellant's filing of its SUTR is persuasive evidence to establish California nexus during the 2019 tax year.

Based on the foregoing, appellant has failed to establish error in respondent's proposed assessment under R&TC section 23101(a). Under R&TC section 23101(a), appellant's storage of inventory and sales in California during the 2019 tax year satisfies the criteria of "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit" for income tax purposes. OTA finds that appellant was doing business in California in 2019; therefore, it was required to file a California income tax return and pay the minimum tax of $800. (R&TC, §§ 18601(a); 23153(d).)

Issue 2: Whether appellant has established reasonable cause 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 the taxpayer establishes that the late filing was due to reasonable cause and was not due to willful neglect. To establish reasonable cause, the 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

ordinary intelligent and prudent businessman to have so acted under similar circumstances. (*Appeal of GEF Operating, Inc.*, *supra*.) Even if the taxpayer is unaware of a filing requirement, ignorance of the law is not an excuse for failing to file a timely return. (*Ibid*.)

Appellant asserts that the penalty was improperly imposed because appellant was not required to file a return. For the reasons discussed in Issue 1 above, appellant was required to file a California return for the 2019 tax year. As of the close of briefing for this appeal, appellant has not filed a return. Appellant does not assert, and the record in this appeal does not establish, reasonable cause for appellant's failure to file the return. Therefore, the late filing penalty cannot be abated.

Issue 3: Whether appellant has established reasonable cause to abate the late filing penalty.

R&TC section 19254 provides that if respondent mails a formal legal demand for a tax return to a taxpayer, a filing enforcement cost recovery fee is required to be imposed when the taxpayer fails or refuses to file the return within the 25-day period. Once properly imposed, there is no provision in the R&TC which would excuse respondent from imposing the fee under any circumstances, including reasonable cause. (R&TC, § 19254.)

Here, respondent informed appellant in the Demand that appellant may be subject to the filing enforcement cost recovery fee if appellant did not timely file a return. Appellant did not file a return within the period prescribed in the Demand. Therefore, respondent properly imposed the filing enforcement fee and it may not be abated.

Issue 4: Whether appellant has established a legal basis to abate interest.

The imposition of interest is mandatory. (R&TC, § 19101(a); *Appeal of Moy*, 2019-OTA-057P.) Interest is charged from the due date of the tax payment to the date the tax is paid. (R&TC, § 19101(a).) Interest is not a penalty but is compensation for the taxpayer's use of money after it should have been paid to the state. (*Appeal of Moy*, *supra*.) There is no reasonable cause exception to the imposition of interest and interest can only be waived in certain limited situations when authorized by law. (*Ibid*.)

To obtain interest relief, appellant must qualify under one of the waiver provisions of R&TC sections 19104 (pertaining to unreasonable error or delay by respondent in the performance of a ministerial or managerial act) or 21012 (pertaining to reasonable reliance on

the written advice of respondent).[5] R&TC section 19104 authorizes respondent to abate interest to the extent that interest is attributable in whole or in part to any unreasonable error or delay by an officer or employee of respondent when performing a ministerial or managerial act. R&TC section 19104 does not apply here because appellant does not allege, and the evidence does not show, that the interest at issue is attributable, in whole or in part, to any unreasonable error or delay by an officer or employee of respondent when performing a ministerial or managerial act. R&TC section 21012 does not apply as respondent did not provide appellant with any requested written advice. Therefore, we find that interest should not be abated.

HOLDINGS

1. Appellant has not established error in respondent's proposed assessment for the 2019 tax year.
2. Appellant has not established reasonable cause to abate the late filing penalty.
3. Appellant has not established a legal basis to abate the filing enforcement fee.
4. Appellant has not established a legal basis to abate interest.

DISPOSITION

The demand penalty shall be abated, as conceded by respondent on appeal. Respondent's action is otherwise sustained.

Signed by:
Seth Elsom
C04CD432E3254FD...
Seth Elsom
Hearing Officer

We concur:

DocuSigned by:
Asaf Kletter
D17AEDDCAAB045B...
Asaf Kletter
Administrative Law Judge

DocuSigned by:
Erica Parker
6651E0AAC34B4F6...
Erica Parker
Hearing Officer

Date Issued: 12/29/2025

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