

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)
D. FRONK) OTA Case No. 240917525
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OPINION

Representing the Parties:

For Appellant: D. Fronk
For Respondent: Nancy E. Parker, Attorney

K. SHELTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, appellant D. Fronk (appellant) appeals an action by the Franchise Tax Board (respondent) proposing additional tax due of \$4,555, a late-filing penalty of \$1,138.75, a demand penalty of \$1,138.75, a filing enforcement fee of \$108, and applicable interest for the 2021 tax year.

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, (Regulation) section 30209(a).

ISSUES

1. Whether appellant has demonstrated that respondent's proposed assessment of tax was issued in error.
2. Whether appellant has demonstrated reasonable cause to support abatement of the proposed late-filing penalty.
3. Whether appellant has established reasonable cause to support abatement of the proposed demand penalty.
4. Whether appellant has established that the proposed filing enforcement fee should be abated.
5. Whether appellant has established any basis for the abatement of interest.

FACTUAL FINDINGS

1. Appellant did not file a Form 540, California Resident Income Tax Return, for the 2021 tax year.
2. Respondent received information from a third party that appellant was paid income in the 2021 tax year and may have had a requirement to file an income tax return. Respondent issued appellant a Demand for Tax Return (Demand) in which respondent indicated that it would assess a late-filing penalty, a demand penalty, a filing enforcement cost recovery fee, and interest unless appellant filed a return for the 2021 tax year by April 17, 2024. Appellant did not file a return in response to the Demand.
3. Respondent subsequently issued appellant a Notice of Proposed Assessment (NPA) for the 2021 tax year. In the NPA, respondent estimated that appellant was paid taxable income that was reported to respondent on a Schedule K-1 by a third-party pass-through entity, that is, either a partnership, limited liability company, an S-corporation, or an estate or trust. Respondent proposed in the NPA that appellant had tax due of \$4,555, a late-filing penalty of \$1,138.75, a demand penalty of \$1,138.75, a filing enforcement fee of \$108, and applicable interest. Appellant protested the NPA, but still did not file a return for the 2021 tax year.
4. Respondent then issued appellant a Notice of Action that affirmed the proposed adjustments in the NPA.
5. Respondent previously issued appellant a Request for Tax Return and then an NPA for both the 2019 and 2020 tax years.
6. Appellant timely filed an appeal.

DISCUSSION

Issue 1: Whether appellant has demonstrated that respondent's proposed assessment of tax was issued in error.

California residents are taxed upon their entire taxable income. (R&TC, § 17041(a).) Every individual subject to California's Personal Income Tax Law is required to make and file a return with respondent when the taxpayer's income exceeds certain dollar amounts. (R&TC, § 18501(a)(1)-(4).) If a taxpayer fails to file a return, then respondent may, at any time, "make an estimate of the net income, from any available information, and may propose to assess the amount of tax, interest, and penalties due." (R&TC, § 19087(a).)

Respondent is given "great latitude" in estimating income when a taxpayer fails to file a return or provide the information necessary to ascertain the taxpayer's tax liability. (*Appeal of*

Shanahan, 2024-OTA-039P.) When respondent proposes a tax assessment based on an estimate of income, respondent's initial burden is to show that its proposed assessment of tax is reasonable and rational. (*Appeal of Bindley*, 2019-OTA-179P.) An assessment based on unreported income is presumed correct when the taxing agency introduces a minimal factual foundation to support the proposed assessment. (*Ibid.*)

Once respondent has met its initial burden, its proposed assessment of tax is presumed correct, and the taxpayer has the burden of proving that the assessment is incorrect. (*Appeal of Bindley*, *supra.*) The taxpayer bears the burden of proving that the determination is erroneous. (*Appeal of Gorin*, 2020-OTA-018P.)

Here, respondent determined that appellant had unreported income based on a Schedule K-1 issued by a third party that reflects income paid to appellant in the 2021 tax year. Respondent has introduced a minimal factual foundation to support the estimated income and proposed assessment of tax and has, therefore, met its burden of proof. Respondent's proposed assessment of tax is presumed correct, and the burden shifts to appellant to prove that the proposed assessment is incorrect.

In the appeal, appellant acknowledges that appellant has not yet filed a 2021 tax return, and alleges that appellant suffered financial difficulty due to an industry-wide strike and the COVID-19 pandemic as the reasons for failing to file a return. Appellant does not challenge the existence or amount of income that was reported to have been paid to appellant on the Schedule K-1, nor does appellant dispute the proposed assessment of tax or present any facts or argument that would change the amount of the proposed assessment. As the burden is on appellant and appellant has not provided any facts indicating that the estimated income or proposed assessment of tax is incorrect, respondent's proposed assessment must be upheld.

Issue 2: Whether appellant has demonstrated reasonable cause to support abatement of the proposed late-filing penalty.

Respondent imposes a late-filing penalty for failing to file a tax return on or before the due date or extended due date, unless the taxpayer shows that the failure is due to reasonable cause and not due to willful neglect. (R&TC, § 19131(a).) The amount of the penalty is equal to five percent of the amount of tax due for each month between the due date of the return and the date on which the return is filed, up to 25 percent of the amount of tax. (R&TC, § 19131(a).) The amount of the tax required to be shown on the return (and, therefore, the amount of the late-filing penalty itself) can be reduced by the amount of tax paid on or before the date

prescribed for payment of the tax, and any credit against the tax that may be claimed upon the return. (R&TC, § 19131(c).)

Generally, the date prescribed for the payment of the tax is the due date of the return (without regard to extensions of time for filing). (R&TC, § 19001.) For the 2021 tax year, the filing and payment due date was April 15, 2022. (R&TC, § 18566.) Appellant has not filed a return for the 2021 tax year; therefore, respondent properly asserted the late-filing penalty.

When respondent imposes a late-filing penalty, it is presumed that the late-filing penalty was correctly imposed, and the burden of proof is on the taxpayer to show that reasonable cause exists to abate the penalty. (*Appeal of Xie*, 2018-OTA-076P.) 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 the failure to timely file a return occurred despite the exercise of “ordinary business care and prudence.” (*Appeal of Auburn Old Town Gallery, LLC*, 2019-OTA-319P.)

Appellant has not paid any taxes for the 2021 tax year, and acknowledges that appellant has not yet filed a return for the 2021 tax year. Appellant argues that financial difficulties caused by an industry-wide strike and the COVID-19 shutdown generally are responsible for the failure to timely file, and that appellant is still on a payment plan for the 2019 tax year. An inability to pay taxes due to financial difficulties is not reasonable cause for failing to timely file a return. (*Lerma v. Commissioner*, T.C. Memo. 1995-586.)¹ Appellant does not otherwise specifically address the late-filing penalty or provide any facts that would support a finding of reasonable cause. Appellant, therefore, has not made any argument that the failure to timely file a return was due to reasonable cause, and the proposed assessment of the late-filing penalty is upheld.

Issue 3: Whether appellant has established reasonable cause to support abatement of the proposed demand penalty.

If any taxpayer fails or refuses to file a tax return or provide information upon notice and demand by respondent, respondent may add a penalty equal to 25 percent of the amount of tax deficiency assessed, unless the failure is due to reasonable cause and not willful neglect. (R&TC, § 19133.)

The demand penalty will only be imposed if: (1) the taxpayer fails to timely “respond to a current Demand for Tax Return in the manner prescribed,” and (2) respondent has proposed an

¹ The United States Tax Court in this decision referenced Internal Revenue Code section 6651(a), which is the federal corollary to California’s late-filing penalty statute, R&TC section 19131.

assessment of tax under R&TC section 19087(a) after the taxpayer failed to timely respond to a Demand in the manner prescribed, for any taxable year that is within the four-taxable-year period immediately preceding the taxable year for which the current Demand is issued, under Regulation section 19133(b). (*Appeal of Shanahan, supra.*)

The regulations clarify that respondent will only impose the penalty if respondent has proposed an assessment of tax under R&TC section 19087(a) “after the taxpayer failed to timely respond to a Request for Tax Return or a Demand for Tax Return in the manner prescribed, for any taxable year that is within the four-taxable-year period immediately preceding the taxable year for which the current Demand for Tax Return is issued.” (Cal. Code Regs., tit. 18, § 19133(b).) The intent of Regulation section 19133 is to impose the demand penalty only upon an individual taxpayer who is a repeat nonfiler, that is, a taxpayer who received an NPA for previously failing to timely file a return within any one of the preceding four taxable years. (*Appeal of Jones, 2021-OTA-144P.*)

The burden of proving “reasonable cause” for the failure to file upon demand is on the taxpayer. (*Appeal of GEF Operating Inc., 2020-OTA-057P.*) A taxpayer’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.*)

Here, respondent informed appellant in the Demand that appellant was required to file a return for the 2021 tax year and may be subject to the demand penalty if respondent did not receive the return within the period prescribed in the Demand. Appellant did not timely file a return for the 2021 tax year within the period prescribed in the Demand. Appellant failed to respond to respondent’s Requests for Tax Return and subsequently issued NPAs for the 2019 and 2020 tax years, both of which were within the four preceding tax years of the year at issue. (*Appeal of Jones, supra; Cal. Code Regs., tit., § 19133(b).*) Appellant has not provided any specific argument or facts regarding the liability for the demand penalty, and a review of the record does not show any facts and circumstances that would warrant a finding that appellant acted with reasonable cause. Accordingly, the proposed assessment of the demand penalty is upheld.

Issue 4: Whether appellant has established that the proposed filing enforcement fee should be abated.

Respondent shall impose a filing enforcement fee if a taxpayer fails or refuses to file a required tax return within 25 days after respondent mails a formal legal demand to file the tax return. (R&TC, § 19254(a)(2).) Once properly imposed, the statute provides no grounds upon which the fee may be abated, including reasonable cause. (R&TC, § 19254; *Appeal of Shanahan, supra.*) Therefore, OTA's inquiry is limited to whether respondent complied with the statutory notice requirements for imposing the filing enforcement fee.

Here, respondent issued appellant the Demand for the 2021 tax year notifying appellant that respondent would impose the filing enforcement fee if appellant failed to file a tax return by the due date stated in the Demand. Appellant had an obligation to file a return for the 2021 tax year, and respondent properly imposed the filing enforcement fee after appellant failed to file the return. Since the filing enforcement fee was properly imposed, there is no authority for its abatement; therefore, OTA cannot abate the proposed filing enforcement fee.

Issue 5: Whether appellant has established any basis for the abatement of interest.

Imposing interest is mandatory, and respondent cannot abate interest except where authorized by law. (R&TC, § 19101(a); *Appeal of Balch*, 2018-OTA-159P.) Generally, to obtain relief from interest, a taxpayer must qualify under R&TC sections 19104 (abatement of interest), 19112 (waiver of interest),² or 21012 (waiver upon certain circumstances). Interest is not a penalty; it is compensation for the use of money. (*Appeal of Balch, supra.*) There is no reasonable cause exception to the imposition of interest. (*Appeal of Gorin, supra.*)

Under R&TC section 19104, respondent 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 respondent. Here, appellant has not alleged, and the record does not reflect, any such errors or delays. The relief of interest under R&TC section 21012 is not relevant here, because respondent did not provide appellant with any written advice. Accordingly, there is no basis for waiving interest.


² OTA has no authority to review respondent's denial of a request to waive interest under R&TC section 19112. (*Appeal of Moy*, 2019-OTA-057P.)

HOLDINGS

1. Appellant has not demonstrated that respondent's proposed assessment of tax was issued in error.
2. Appellant has not demonstrated reasonable cause to support abatement of the proposed late-filing penalty.
3. Appellant has not established reasonable cause to support abatement of the proposed demand penalty.
4. Appellant has not established that the proposed filing enforcement fee should be abated.
5. Appellant has not established any basis for the abatement of interest.


DISPOSITION

Respondent's action is sustained.


Signed by:


 L. Katrine Shelton
 Administrative Law Judge

We concur:

Signed by:


 Veronica I. Long
 Administrative Law Judge

DocuSigned by:


 Sara A. Hosey
 Administrative Law Judge

Date Issued: 1/14/2026