

In the Matter of the Appeal of:) OTA Case No. 241017617
J. ROMAN)
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1. Appellant has not provided evidence of a 2021 California tax return being filed with FTB.
2. FTB received information that appellant received California source income sufficient for appellant to file a California tax return based on a professional license held during the 2021 tax year.

3. FTB sent appellant a Demand for Tax Return requiring appellant to respond by: (1) filing a 2021 tax return; (2) providing evidence that a return had already been filed; or (3) explaining why a return was not required. FTB notified appellant that it would impose a filing enforcement fee if there is a filing requirement and appellant fails to file a tax return by the due date provided.
4. When no response followed, FTB issued appellant a Notice of Proposed Assessment (NPA), reflecting estimated taxable income of \$83,170, tax of \$4,482, a late filing penalty of \$1,120.50, a demand penalty of \$1,120.50, and a filing enforcement fee of \$108, plus applicable interest.
5. Appellant protested the NPA, explaining that a return was filed and would be provided to FTB when found.
6. When no response followed, FTB issued a Notice of Action, affirming the NPA.
7. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has established error in FTB's proposed assessment for the 2021 tax year.

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,” when certain filing thresholds are exceeded. (R&TC, § 18501(a)(1)-(4).) If a taxpayer fails to file a return, then FTB, at any time, “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.” (R&TC, § 19087(a).) FTB 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 FTB proposes a tax assessment based on an estimate of income, then FTB’s initial burden is to show that its proposed assessment is reasonable and rational. (*Ibid.*) An assessment based on unreported income is presumed correct when the taxing agency introduces a minimal factual foundation to support the assessment. (*Ibid.*) Federal courts have held that the taxing agency may use statistics, including average-income statistics for a particular profession, to estimate a taxpayer’s income, and that it lay in the taxpayer’s power to prove the taxpayer’s actual income and to controvert the statistics. (*Ibid.*)

Here, appellant held a license as an accountant. When appellant did not file a return, FTB estimated his income as \$83,170, based on the average income reported by accountants. OTA finds that FTB's use of statistics, including average-income statistics for a particular profession, to estimate appellant's income is both reasonable and rational. Accordingly, FTB has met its burden of proof.

Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof, and a taxpayer's failure to produce evidence that is within his or her control gives rise to a presumption that such evidence is unfavorable to his or her case. (*Ibid.*) FTB's determination must be upheld in the absence of credible, competent, and relevant evidence showing error in its determination. (*Ibid.*)

Appellant argues that he filed a California income tax return for the 2021 tax year as married filing jointly. However, appellant has not provided evidence of this tax return or provided corroborating evidence establishing his income for the 2021 tax year. Appellant concedes that he received income, but not in the amount estimated by FTB. "A taxpayer is not in a good position to criticize [FTB's] estimate of his or her liability when he or she fails to file a required return and, in addition, subsequently refuses to submit information upon request." (*Appeals of Dauberger, et al.* (82-SBE-082) 1982 WL 11759.) Accordingly, appellant has not demonstrated error in FTB's proposed assessment.

Issue 2: Whether appellant has established reasonable cause 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.) 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.) Ignorance of the law does not establish reasonable cause and unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

Appellant does not specifically address the late filing penalty issue and offers no evidence of reasonable cause to abate the penalty. As discussed above, appellant concedes that he received income, but has not provided evidence of a filed return or corroborated evidence of when such return was filed. Therefore, appellant has not met his burden of showing that his failure to file was due to reasonable cause and not due to willful neglect.

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

If any taxpayer fails or refuses to file a tax return or provide information upon notice and demand by FTB, then, unless the failure is due to reasonable cause and not willful neglect, FTB may add a penalty of 25 percent of any deficiency tax assessed by FTB concerning the assessment of which the return was required. (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) FTB has proposed an 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.¹ (Cal. Code of Regs., tit. 18, § 19133(b).)

A properly imposed demand penalty may be abated if a taxpayer can establish reasonable cause to abate the penalty. To establish reasonable cause to abate the demand penalty, a 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.)

Appellant does not specifically address the demand penalty issue and offers no evidence of reasonable cause to abate the penalty. As discussed above, appellant concedes that he received income, but has not provided evidence of a filed return or reasonable cause for his failure to respond to the Demand sent by FTB. Therefore, appellant has not met his burden of showing reasonable cause to abate the penalty.

Issue 4: Whether the filing enforcement fee can be abated.

FTB shall impose a filing enforcement fee if a taxpayer fails or refuses to file a required tax return within 25 days after FTB mails a formal legal demand to file the tax return. (R&TC, § 19254(a)(2).) Once properly imposed, the statute provides no grounds, including reasonable cause, upon which the fee may be abated. (R&TC, § 19254; see *Appeal of Auburn Old Town Gallery, LLC*, 2019-OTA-319P.) Therefore, OTA's inquiry is limited to whether FTB complied with the statutory notice requirements for imposing the filing enforcement fee.

¹ OTA finds this requirement satisfied as FTB previously issued to appellant an NPA for the 2020 tax year when appellant did not respond to a Demand demanding that appellant file a 2020 tax return.

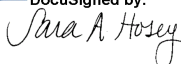
Here, FTB issued appellant a Demand for the 2021 tax year notifying him that it would impose a filing enforcement fee if he has a filing requirement and fails to file a tax return by the due date stated in the Demand. FTB properly imposed the fee after appellant, who has a 2021 tax return filing requirement, did not file a tax return or show evidence that a tax return had been filed. Since the fee was properly imposed, there is no authority for the abatement of this fee; therefore, OTA cannot abate the filing enforcement fee.

HOLDINGS

1. Appellant has not established error in FTB's proposed assessment for the 2021 tax year.
2. Appellant has not established reasonable cause to abate the late filing penalty.
3. Appellant has not established reasonable cause to abate the demand penalty.
4. The filing enforcement fee cannot be abated.

DISPOSITION

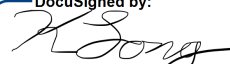
FTB's action is sustained in full.

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Sara A. Hosey
Administrative Law Judge

We concur:

Signed by:

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Josh Lambert
Administrative Law Judge

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Keith T. Long
Administrative Law Judge

Date Issued: 6/18/2026