

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 250218823
J. SOBIESIAK)
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OPINION

Representing the Parties:

For Appellant: J. Sobiesiak, Appellant

For Respondent: Eric R. Brown, Attorney

N. RALSTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, J. Sobiesiak (appellant) appeals an action by the Franchise Tax Board (respondent) denying appellant's claim for refund of \$11,468¹ for the 2019 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, section 30209(a).

ISSUES

1. Whether appellant has shown error in respondent's proposed assessment.
2. Whether appellant has established reasonable cause to abate the late filing penalty.
3. Whether appellant has established reasonable cause to abate the demand penalty.
4. Whether OTA should impose the frivolous appeal penalty under R&TC section 19714.

¹ This amount consists of the approximate amount of withholdings by appellant's employer (\$6,149) plus the \$5,000 frivolous appeal penalty which respondent has imposed pursuant to R&TC section 19179. OTA has no authority to review frivolous return penalties imposed under R&TC section 19179. (R&TC, § 19179(c); *Appeal of Balch*, 2018-OTA-159P.) As a result, OTA does not address the frivolous filing penalty in this Opinion. In addition, respondent asserts that the correct amount of additional tax is \$442, which is the difference between the \$6,591 additional tax stated in respondent's Notice of Action and the \$6,149 withholding credit. However, as appellant has claimed that the appeal amount is \$11,468 in its filing with OTA, OTA uses that number. OTA also notes that in his reply brief, appellant states that the claim for refund amount is \$11,487.51, which is slightly different than the amount of refund appellant claimed in his opening brief.

FACTUAL FINDINGS

1. Respondent received notice that appellant received wages of \$107,170 during the 2019 tax year, but had not filed a 2019 California Income Tax Return (return). Therefore, respondent issued a Demand for Tax Return (Demand) instructing appellant to either file a 2019 tax return, provide evidence that return has already been filed, or explain why appellant was not required to file a 2019 return. The Demand notified appellant that if appellant did not respond in the manner prescribed in the Demand, respondent would assess a tax, a late filing penalty, a demand penalty, a filing enforcement cost recover fee and applicable interest.
2. Appellant did not respond to the Demand. Therefore, respondent issued a Notice of Proposed Assessment (NPA) which assessed additional tax of \$442,² a late filing penalty of \$135, a demand penalty of \$1,647.75, and a filing enforcement cost recovery fee of \$97.
3. Because appellant did not respond by the date prescribed in the NPA, the NPA became final.
4. Previously respondent issued an NPA following appellant's failure to timely respond in the prescribed manner to a prior Demand for the 2017 tax year, which is within the four-taxable-year period preceding 2019.
5. Appellant subsequently filed an untimely 2019 return on October 5, 2023, reporting \$0 income and \$0 tax liability and requesting a refund of \$6,150, which is the amount of tax withheld.
6. Appellant attached California Form 3525 "Substitute for Form W-2, Wage and Tax Statement, or Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc." (Form 3525) in lieu of a W-2 or 1099-R, to his return. Appellant asserted on Form 3525 that the payer reported incorrectly on the Form W-2, and that appellant received no wages from the payer. Also attached to appellant's tax return was a "sworn statement," which appellant indicated was a copy of the identical statement submitted to the Internal Revenue Service (IRS) along with his federal income tax return. Appellant asserted in the sworn statement that his earnings were not wages and therefore were not taxable.

² Respondent calculated this amount by computing total tax of \$6,591 and subtracting the amount of tax withheld of \$6,149.

7. Respondent determined that appellant's position was frivolous and issued to appellant a Notice of Frivolous Return Determination and Demand for Tax Return, in which respondent notified appellant that respondent determined his tax return to be frivolous and demanded appellant to file a valid return within 30 days of the notice. The notice further informed appellant that if he did not withdraw the frivolous return within 30 days, respondent would impose a frivolous return penalty.
8. Appellant did not withdraw his frivolous tax return, thus, on February 20, 2024, respondent sent a Notice of Frivolous Return Penalty and Demand for Payment to appellant, in which respondent imposed a \$5,000 frivolous return penalty.
9. Subsequently, respondent issued an NPA which proposed additional tax of \$6,591, and imposed a late filing penalty of \$135, and a demand penalty of \$1,647.75.
10. Appellant protested the proposed assessment.
11. On January 15, 2025, respondent sent a Notice of Action affirming its proposed assessment.
12. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has shown error in respondent's proposed assessment.

California residents are taxed on their entire taxable income (regardless of source). (R&TC, § 17041(a).) R&TC section 17071 incorporates Internal Revenue Code section 61, which defines "gross income" to include "all income from whatever source derived," except as otherwise provided by statute. R&TC section 18501 requires every individual subject to the Personal Income Tax Law to make and file a return with respondent "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 threshold amounts. For the 2019 tax year, the filing threshold for a single taxpayer over the age of 65 with no dependents was California gross income of \$24,341.³ The filing threshold for a single taxpayer under the age of 65 with no dependents, for tax year 2019, was California gross income of \$18,241.⁴

R&TC section 19087(a) provides that if any taxpayer fails to file a required return, respondent at any time "may make an estimate of the net income, from any available

³ Respondent annually recomputes the filing threshold amounts for inflation. (See R&TC, § 18501(d).)

⁴ Appellant's age is not part of the record before OTA. Therefore, OTA has included the filing threshold requirements for single taxpayers over 65 and under 65 years of age.

information, and propose to assess the amount of tax, interest and penalties due.” When respondent makes a proposed assessment of additional tax based on an estimate of income, respondent’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 respondent introduces a minimal factual foundation to support the assessment. (*Ibid.*)

Once respondent 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. (*Appeal of Bindley, supra.*) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing error in respondent’s determination, the determination must be upheld. (*Ibid.*) A taxpayer’s failure to produce evidence that is within the taxpayer’s control gives rise to a presumption that such evidence, if provided, would be unfavorable to the taxpayer’s case. (*Ibid.*)

Here, respondent received information indicating that appellant received gross income exceeding \$107,000 for 2019 tax year. This income amount exceeds the filing threshold for the 2019 tax year. Because appellant, a California resident, did not file a tax return for the 2019 tax year, respondent issued an NPA to appellant for this tax year estimating appellant’s income based on the information received that appellant earned wages in 2019. Respondent’s use of this information reported to it by third parties to estimate appellant’s taxable income is both reasonable and rational. (*Appeal of Bindley, supra.*) Thus, respondent’s initial burden has been met and the burden shifts to appellant to establish error in respondent’s proposed assessment for the 2019 tax year.

Appellant provides arguments that the reported wages do not constitute taxable income. Appellants’ arguments are those that have consistently been rejected by OTA, the Board of Equalization (BOE) (OTA’s predecessor), the IRS, and courts as frivolous and without merit. (See *Appeal of Balch, supra.*) OTA declines to address such frivolous arguments because “to do so might suggest that these arguments have some colorable merit.” (*Crain v. Commissioner*, (5th Cir. 1984) 737 F.2d 1417, 1418.) Accordingly, appellant has not demonstrated error in respondent’s proposed assessment.

Issue 2: Whether appellant has established reasonable call to abate the late filing penalty.

R&TC section 19131(a) imposes a late filing penalty on a taxpayer who fails to file a return by either the due date or the extended due date unless it is shown that the failure was

due to reasonable cause and not willful neglect. When respondent imposes a late filing penalty, it is presumed to have been correctly imposed, and the burden of proof is on the taxpayer to show that reasonable cause exists to abate the penalty. (*Appeal of Cremel and Koeppe*, 2021-OTA-222P.) 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 that the failure to timely file a return occurred despite the exercise of ordinary business care and prudence. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Bannon*, 2023-OTA-096P.)

Appellant does not specifically address the late filing penalty but rather disputes the entire liability and that the reported wages do not constitute taxable income. As discussed above, appellant's arguments are those that have consistently been rejected by OTA, the BOE, the IRS, and courts as frivolous and without merit. Accordingly, appellant has not demonstrated reasonable cause to abate the late filing penalty.

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

R&TC section 19133 imposes a penalty when taxpayers fail or refuse to file a return or provide information upon respondent's notice and demand to do so, unless it is shown that the failure was due to reasonable cause and not willful neglect. A demand penalty is properly imposed if: (1) the taxpayers fail to timely respond to a current Demand in the manner prescribed; and (2) Respondent has proposed an assessment of tax under the authority of R&TC section 19087(a), after the taxpayers failed to timely respond to the 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. (Cal. Code Regs., tit. 18, § 19133(b)(1)-(2).)

For the 2019 tax year, respondent properly imposed the demand penalty because respondent issued an NPA after appellant failed to properly respond to the 2019 Demand by the deadline. Furthermore, respondent issued an NPA following appellant's failure to timely respond in the prescribed manner to a prior Demand for the 2017 tax year, which is within the four-taxable-year period preceding 2019. (See Cal. Code Regs., tit. 18, § 19133(b)(2).)

Appellant does not specifically address the demand penalty but rather disputes the entire liability and argues that the reported wages do not constitute taxable income. As discussed above, appellant's arguments are those that have consistently been rejected by OTA, the BOE, the IRS, and courts as frivolous and without merit. Accordingly, appellant has not demonstrated reasonable cause to abate the demand penalty.

Issue 4: Whether OTA should impose the frivolous appeal penalty under R&TC section 19714.

R&TC section 19714 provides that a penalty of up to \$5,000 shall be imposed whenever it appears that proceedings before OTA have been instituted or maintained primarily for delay, or that an appellant's position is frivolous or groundless. (*Appeal of Balch, supra.*) Regulation section 30217(a) provides that OTA shall impose a frivolous appeal penalty pursuant to R&TC section 19714 when a panel determines that an appeal is frivolous or has been filed or maintained primarily for the purpose of delay. California law lists the following nonexclusive factors that may be considered in determining whether, and in what amount, to impose a frivolous appeal penalty: (1) whether the appellant is making arguments that OTA, in a precedential Opinion, or the BOE, in a precedential Opinion, or courts have rejected; (2) whether the appellant is making the same arguments that the same appellant made in prior appeals; (3) whether the appellant submitted the appeal with the intent of delaying legitimate tax proceedings or the legitimate collection of tax owed; (4) whether the appellant has a history of submitting frivolous appeals or failing to comply with California's tax laws; or (5) whether the appellant has been notified, in a current or prior appeal, that a frivolous appeal penalty may apply. (Cal. Code of Regs., tit. 18, § 30217(b).)

As discussed above, in the present appeal, appellant makes arguments that have been consistently held by OTA, the BOE, the IRS, and courts to be frivolous. However, there is also no evidence that appellant has a previous history of filing frivolous appeals with OTA. Furthermore, OTA has not previously notified appellant that a frivolous appeal penalty may apply here due to the arguments appellant is making on appeal. Therefore, OTA will not impose a frivolous appeal penalty for this appeal. However, appellant is cautioned that OTA will impose frivolous appeal penalties, up to the maximum of \$5,000 for each appeal, if he chooses to pursue other appeals that raise similar frivolous arguments.

HOLDINGS

1. Appellant has not shown error in respondent's proposed assessment.
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. OTA shall not impose the frivolous appeal penalty under R&TC section 19714.

DISPOSITION

Respondent's assessment is sustained.

Signed by:

Natasha Ralston

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Natasha Ralston
Administrative Law Judge

We concur:

Signed by:

Bianca Daddow

For

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Sara A. Hosey
Administrative Law Judge

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KL Long

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Keith T. Long
Administrative Law Judge

Date Issued: 7/30/2026