

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18010705  
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 ) Date Issued: December 11, 2018  
**TONY ALFINO** )  
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**OPINION**

Representing the Parties:

For Appellant: Tony Alfino

For Respondent: Andrew Amara, Tax Counsel III

For Office of Tax Appeals: Neha Garner, Tax Counsel III

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19045,<sup>1</sup> Tony Alfino (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) denying his protest of a proposed assessment of additional tax in the amount of \$34,366.00 as well as a late-filing penalty of \$8,591.50 plus applicable interest for the 2011 tax year.<sup>2</sup>

Appellant waived his right to an oral hearing and therefore the matter is being decided based on the written record.

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<sup>1</sup> Unless otherwise indicated, all “section” or “§” references are to sections of the California Revenue and Taxation Code.

<sup>2</sup> During briefing, appellant submitted an unsigned 2011 tax return. Based on the additional information in the return, respondent agreed to reduce the proposed assessment of additional tax to \$27,036 and the late-filing penalty to \$6,759.

## ISSUES

1. Whether appellant has shown that respondent erred in disallowing \$68,244 of appellant's claimed capital loss deduction of \$71,244 for the 2011 tax year.<sup>3</sup>
2. Whether appellant has shown reasonable cause for the late filing of his 2011 return.

## FACTUAL FINDINGS

1. Appellant failed to file a timely California income tax return for the 2011 tax year. However, respondent received a Form 1099-R from Vanguard Fiduciary Trust Co. indicating that appellant received retirement benefits in excess of \$271,000, and a Form 1099-B from TD Ameritrade Inc. indicating stock sale proceeds exceeding \$619,000 during the 2011 tax year. Therefore, respondent determined that appellant had received income sufficient to prompt a return-filing requirement.<sup>4</sup>
2. Respondent calculated a portion of appellant's tax based on estimated retirement income of \$271,000. Respondent then estimated that appellant recognized a 21 percent gain on his stock sales of \$619,000.<sup>5</sup> This amounted to approximately \$131,000 in additional taxable income for the 2011 tax year. Accordingly, respondent determined that appellant had \$402,000 of income for the 2011 tax year (i.e., \$271,000 + \$131,000 = \$402,000). On October 27, 2014, respondent issued a Notice of Proposed Assessment (NPA) showing taxable income of \$398,924.49. After accounting for \$382.00 in withholding credits, the NPA proposed a total tax of \$34,366.00, and a late-filing penalty of \$8,591.50, plus interest.
3. Appellant protested the NPA arguing that the assessment of tax and the implication that he had income in excess of \$400,000 for the 2011 tax year was incorrect.

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<sup>3</sup> Based on the filing of appellant's return during the briefing process for this appeal, it appears that appellant does not dispute his filing obligation. Respondent has stated that it is willing to accept appellant's income as reported in appellant's return. Therefore, the issue as to whether appellant has demonstrated error in respondent's estimation of income and corresponding proposed assessment of additional tax for 2011 as reflected in respondent's opening brief will not be discussed.

<sup>4</sup> For the 2011 tax year, a single individual under age 65 with 2 or more dependents realizing a California gross income of \$33,527 was required to file a California income tax return. (See: <[https://www.ftb.ca.gov/forms/2011/11\\_540bk.pdf](https://www.ftb.ca.gov/forms/2011/11_540bk.pdf)>.)

<sup>5</sup> Respondent noted that this estimate was based on respondent's calculation of the average gain rate for stock sales during 2011, which was taken from California returns that respondent received.

4. When appellant failed to reply to correspondence from FTB and additional requests to file a 2011 tax return, respondent issued a Notice of Action dated April 24, 2015, affirming the NPA. Appellant then filed this timely appeal.
5. Thereafter, several deferrals of the appeal were requested. During that time, appellant submitted a 2011 return, reporting federal adjusted gross income (AGI) of \$200,188, California AGI of \$192,506, taxable income of \$184,968, a tax liability of \$17,786, and a late-filing penalty of \$4,446. The return also included a \$71,244 capital loss deduction.
6. Respondent stated that it was willing to accept appellant's income as he had reported in his return.<sup>6</sup> Respondent then prepared an amended return for appellant's signature with identical figures to appellant's original return but reduced the capital loss amount to \$3,000. Respondent asserts this is the capital loss limitation provided in section 18151, which incorporates by reference Internal Revenue Code (IRC) section 1211. Respondent requested that appellant sign the amended return; however, appellant failed to do so.

#### DISCUSSION

Issue 1 - Whether appellant has shown that respondent erred in reducing \$68,244 of appellant's claimed capital loss deduction of \$71,244 for the 2011 tax year.

Income tax deductions are a matter of legislative grace, and a taxpayer who claims a deduction has the burden of proving by competent evidence that he or she is entitled to that deduction. (See *New Colonial Ice Co. v. Helvering* (1934) 292 U.S. 435, 440; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.)

Under California's Personal Income Tax Law, a taxpayer may deduct against ordinary income, losses from the sales or exchanges of capital assets in excess of gains from such sales or exchanges up to a maximum of \$3,000 per year. (§ 18151; IRC, § 1211(b).) Capital assets are defined in IRC section 1221 as any property held by the taxpayer other than property listed in IRC section 1221. (IRC, § 1221.) The list in IRC section 1221 includes, among other things, inventory, accounts receivable, and depreciable property or real estate used in a business. (*Id.*)

Here, appellant's return includes a \$71,244 capital loss deduction, but this is \$68,244 more than the law allows appellant to deduct in a single year against ordinary income, which is

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<sup>6</sup> We note that appellant's Schedule CA reflects a \$271,400 early IRA distribution. Respondent argues that the correct California AGI is \$268,432, which includes the \$3,000 capital loss deduction and \$32 in interest income.

the only type of income appellant reported on his 2011 return (i.e., appellant reported no gains from the sale or exchange of capital assets). Therefore, based on respondent's acceptance of the income reported on appellant's 2011 return, and appellant's identification on the return that the losses are capital in nature, respondent has conceded that its proposed assessment should be reduced to \$27,036 and the late-filing penalty should be reduced to \$6,759.

Issue 2 – Whether appellant has shown reasonable cause for the late filing of his 2011 return.

Section 19131 provides that respondent shall impose a late-filing penalty 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. The penalty is computed at 5 percent of the tax due, after allowing for timely payments, for every month that the return is late, up to a maximum penalty of 25 percent. (*Ibid.*) The burden is on the taxpayer to establish reasonable cause for the untimely filing. Reasonable cause exists if it can be shown that the taxpayer acted as an ordinary intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.)<sup>7</sup>

It is well-established law that a taxpayer's ignorance of the law is not reasonable cause for the late filing of a tax return, and even if a taxpayer is sincerely unaware of the filing requirement, such ignorance is not an excuse for failing to file a timely return. (*Appeal of J. Morris and Leila G. Forbes*, 67-SBE-042, Aug. 7, 1967; *Appeal of Diebold, Inc.*, 83-SBE-002, Jan. 3, 1983.) Taxpayers do not exercise ordinary business care and prudence when they fail to acquaint themselves with California tax law requirements. (*Appeal of Diebold, Inc.*, *supra.*)

Here, appellant's 2011 income tax return was due on April 15, 2012, but it was not filed until April 12, 2017. Appellant explains that he thought he had no filing requirement because by the time his 2011 return was due, he had lost all of his investments, and he erroneously believed that loss was sufficient to completely offset any income he received for that year. Appellant's ignorance of the California filing requirements does not establish reasonable cause that would allow us to abate the late filing penalty.

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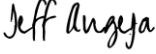
<sup>7</sup> Precedential decisions of the Board of Equalization, designated by "SBE" in the citation, are available on that Board's website at: <<http://www.boe.ca.gov/legal/legalopcont.htm>>.

HOLDINGS


1. Appellant has failed to establish that respondent erred in reducing appellant's claimed loss deduction of \$71,244 to \$3,000 for the 2011 tax year.
2. Appellant failed to establish reasonable cause for the late filing of his 2011 return.

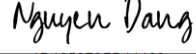
DISPOSITION

The FTB's action is modified, as agreed by the FTB on appeal, such that the additional tax is reduced to \$27,036 and the late-filing penalty is reduced to \$6,759. Otherwise, respondent's action is sustained.

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Jeffrey G. Angeja  
Administrative Law Judge

We concur:

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Michael F. Geary  
Administrative Law Judge

DocuSigned by:  
  
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Nguyen Dang  
Administrative Law Judge