

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18011322  
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**GARY R. LOHSE** ) Date Issued: December 20, 2018  
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**OPINION**

Representing the Parties:

For Appellant: Gary R. Lohse  
For Respondent: Mira Patel, Tax Counsel

S. HOSEY, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19045,<sup>1</sup> Gary R. Lohse (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in determining a deficiency in tax and penalties with respect to appellant’s 2014 tax year.

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

**ISSUES**

1. Has appellant demonstrated any error in FTB’s proposed assessment?
2. Is appellant liable for the late-filing penalty?

**FACTUAL FINDINGS**

1. Appellant did not file a California income tax return for the 2014 tax year.
2. FTB received information from the Employment Development Department indicating that appellant received sufficient income in 2014 to create a tax-filing obligation. FTB’s information showed that appellant received wages of \$115,698 from Delaware Resource

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

- Group of OK, LLC, miscellaneous income of \$24,248 from Fidelity Investments, miscellaneous income of \$21,420 from Defense Finance and Accounting Service, and miscellaneous income of \$4,000 from Delaware Charter Guarantee and Trust Co.
3. FTB issued a Request for Tax Return (Request), requiring appellant to file a tax return by January 20, 2016, provide evidence that a return already had been filed, or explain why no tax return was required.
  4. Appellant did not respond, and FTB issued a Notice of Proposed Assessment (NPA) dated February 16, 2016, that proposed tax of \$3,741.00, a late-filing penalty of \$935.25, and applicable interest. The NPA explained that appellant's income was estimated on the basis of the aforementioned income information.
  5. On April 15, 2016, appellant protested the NPA. FTB acknowledged appellant's protest by letter dated October 10, 2016. FTB then sent a follow-up letter on November 30, 2016, requesting a response. Appellant responded by letter December 5, 2016 stating he would not be able to attend a protest hearing and FTB did not have evidence to support its NPA.
  6. On January 11, 2017, FTB issued a Notice of Action affirming the NPA.
  7. Appellant then filed this timely appeal. In his appeal, appellant contends, among other things, that: FTB did not provide evidence to support its NPA; FTB violated his due process rights, he is a "nonresident alien" under the Internal Revenue Code; he does not earn wages; he has no income; "the Identifying number FTB is using for me is WRONG"; and he is "NOT a 'taxpayer.'" "

### DISCUSSION

#### Issue 1 - Has appellant demonstrated any error in FTB's proposed assessment?

Section 19087(a) provides:

If any taxpayer fails to file a return, or files a false or fraudulent return with intent to evade the tax, for any taxable year, the Franchise Tax Board, at any time, may require a return or an amended return under penalties of perjury or 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.

When FTB makes a tax assessment based on an estimate of income, FTB's initial burden is to show why its assessment is reasonable and rational. (*Appeal of Michael E. Myers*, 2001-

SBE-001, May 31, 2001.)<sup>2</sup> When a taxpayer fails to file a return, and refuses to cooperate in the ascertainment of his or her income, FTB is given “great latitude” in estimating income. (*Appeals of Walter R. Bailey*, 92-SBE-001, Feb. 20, 1992 [estimate based on third-party information reporting]; *Appeals of R. and Sonja J. Tonsberg*, 85-SBE-034, Apr. 9, 1985 [use of third-party information reporting].) “A taxpayer is not in a good position to criticize respondent’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 Fred R. Dauberger et al.*, 82-SBE-082, Mar. 31, 1982.)

Federal courts have held that a taxing agency need only introduce “some evidence” linking the taxpayer with the unreported income. (*Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932, 935.) In *Rapp*, the Ninth Circuit Court of Appeals stated, “[o]nce the Government has carried its initial burden of introducing some evidence linking the taxpayer with income-producing activity, the burden shifts to the taxpayer to rebut the presumption by establishing by a preponderance of the evidence that the deficiency determination is arbitrary or erroneous.” (*Ibid.*, internal citations omitted.) Essentially, after FTB satisfies its initial burden, its determination is presumed correct and the taxpayer has the burden of proving it wrong. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509.) A taxpayer’s failure to produce evidence that is within his control gives rise to a presumption that such evidence is unfavorable to his case. (*Appeal of Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.)

FTB’s estimation of appellant’s income is both reasonable and rational. (See *Appeals of Bailey, supra*; *Appeals of Tonsberg, supra*). FTB reconstructed appellant’s income based on information from the Employment Development Department (wage and salary income information reported by California employers and payment information reported on federal information returns by the payors and distributors of the payments) regarding appellant’s wages and miscellaneous income for the tax year at issue. Appellant has neither explained nor provided any supporting evidence showing that FTB’s reconstruction is incorrect. Appellant had the burden of proving error in FTB’s proposed assessments of additional tax, and he failed to meet that burden of proof.

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<sup>2</sup> Published 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>>.

Appellant raises questions about the definition of income and argues that his income was not taxable. However, appellant has neither identified the specific nature of his income nor has he demonstrated that the payments he received from Delaware Resource Group of OK, LLC, Fidelity Investments, Defense Finance and Accounting Service, and Delaware Charter Guarantee and Trust Co. were exempt from taxation. Significantly, the entities that paid those amounts to appellant treated those payments as taxable income. Therefore, appellant has not met his burden of proving an error in FTB's proposed tax assessment.

Additionally, although appellant lived and worked in California during 2014, appellant argues that he was not a resident of California but rather a "nonresident alien." Appellant also argues he is not a "taxpayer" as defined by statute. These have been determined to be frivolous arguments and they will not be considered by this panel. (See *Appeals of Fred R. Dauberger, et al., supra*; *Appeal of Alfons Castillo*, 92-SBE-020, July 30, 1992.)

Furthermore, appellant's arguments regarding him, and his income, not being subject to California tax are without merit. Section 17071 incorporates Internal Revenue Code (IRC) section 61, which defines gross income generally as "all income from whatever source derived . . . subject only to the exclusions specifically enumerated elsewhere in the Code." (*United States v. Burke* (1992) 504 U.S. 229, 233.) The sweeping definition of income in IRC section 61 specifically includes, among other things, compensation for services, gross income derived from business, gains derived from dealings in property, interest, rents, royalties, dividends, annuities, and pensions. Income includes any "accessions to wealth." (*Commissioner v. Glenshaw Glass Co.* (1955) 348 U.S. 426, 431; *Appeal of Robert E. Wesley et al.*, 2005-SBE-002, Nov. 15, 2005.) A taxpayer recognizes income if he or she realizes an economic gain, and that gain primarily benefits him or her personally. (*United States v. Gotcher* (5th Cir. 1968) 401 F.2d 118.)

Lastly, Appellant argues his due process rights have been violated by FTB, in principal part based on his allegation that FTB has not provided him with "evidence of facts upon which it bases its assessment." Contrary to appellant's allegation, however, the FTB has identified the evidence upon which it bases its proposed assessment in its notices to appellant and in its appeal brief. In any event, our regulations prohibit us from considering whether "a California statute is invalid or unenforceable under the Federal or California Constitutions, unless a federal or California appellate court has already made such a determination," or from determining "[w]hether the appellant is entitled to a remedy for the Franchise Tax Board's actual or alleged

violation of any substantive or procedural right, unless the violation affects the adequacy of a notice, the validity of an action from which a timely appeal was made, or the amount at issue in the appeal.” (Cal. Code Regs., tit. 18, § 30102(b)(1) & (5).) We find FTB’s notices were adequate. Accordingly, we reject appellant’s due process claims.

Issue 2 - Is appellant liable for the late-filing penalty?

California imposes a penalty for the failure to file a valid return on or before the due date, unless it is shown that the failure was due to reasonable cause and not due to willful neglect. (§ 19131.) The penalty is computed at five (5) percent of the tax due, after allowing for timely payments, for every month that the return is late, up to a maximum of 25 percent. (§ 19131(a).) Here, the late-filing penalty appears to have been correctly calculated and appellant has not shown any error in the computation method.

The burden is on the taxpayer to establish reasonable cause for the failure to timely file. (*Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982.) To establish reasonable cause, the taxpayer must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinary intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982; *Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) Each taxpayer has a personal, non-delegable obligation to file a tax return by the due date. (*United States v. Boyle* (1985) 469 U.S. 241.) Ignorance of the law 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.)

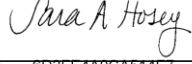
In this appeal, appellant has not demonstrated any sort of reasonable cause for his failure to file a tax return by the deadline. Appellant’s purported beliefs that he is a nonresident alien, is not subject to California tax, and has no taxable income are without a reasonable basis in fact or law. They do not constitute “reasonable cause” that would excuse appellant’s failure to file his tax return. Therefore, appellant is liable for the late-filing penalty.

HOLDINGS<sup>3</sup>

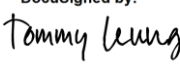
1. Appellant failed to demonstrate any error in FTB's proposed assessment.
2. Appellant is liable for the late-filing penalty as determined by FTB.


DISPOSITION

Respondent's action is sustained in full.

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Sara A. Hosey  
Administrative Law Judge

We concur:

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Tommy Leung  
Administrative Law Judge

DocuSigned by:  
  
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Kenneth Gast  
Administrative Law Judge

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<sup>3</sup> In reaching our holdings herein, we have considered all arguments made by appellant, and to the extent not mentioned above, we find them to be moot, irrelevant, or without merit.