

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18042555  
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**WILLIAM R. BANKS** ) Date Issued: March 19, 2019  
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**OPINION**

Representing the Parties:

For Appellant: William R. Banks

For Respondent: Jason P. Fricano, Tax Counsel III

A. VASSIGH, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19045,<sup>1</sup> William R. Banks (appellant) appeals an action by the Franchise Tax Board (FTB) proposing \$1,745 of additional tax, a late-filing penalty of \$436.25, and applicable interest, for the 2015 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 error in the proposed assessment?
2. Has appellant demonstrated that the late-filing penalty should be abated?

**FACTUAL FINDINGS**

1. Appellant did not file a California income tax return for the 2015 tax year.
2. Through its Integrated Non-Filer Compliance Program (INC), FTB obtained information indicating appellant received income in 2015 from U.S. Foodservice, Inc., sufficient to create a tax-filing obligation.

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

3. On June 15, 2017, FTB issued a Request for Tax Return, requiring appellant to file his 2015 tax return, send a copy of a previously filed return to FTB, or to explain why no return was required by July 19, 2017.
4. Because appellant did not respond to the Request for Tax Return, FTB issued a Notice of Proposed Assessment (NPA) to appellant for the 2015 tax year on August 14, 2017, proposing to assess tax of \$1,745, a late-filing penalty of \$436.25, and interest. FTB estimated appellant's income to be \$65,615, based on information received from appellant's employer, U.S. Foodservice, Inc. After allowing appellant the standard deduction of \$4,044, FTB computed a proposed tax assessment of \$3,205. FTB then applied withholding of \$1,351 (reported by U.S. Foodservice, Inc.) and one exemption credit of \$109 against the tax assessment of \$3,205, for a proposed assessment of \$1,745.
5. By letter dated September 25, 2017, appellant timely protested the NPA, disputing the proposed assessment.<sup>2</sup>
6. FTB issued a Notice of Action (NOA) dated November 9, 2017, affirming the NPA.
7. By letter dated December 3, 2017, appellant timely appealed the NOA. This letter restates much of appellant's September 25, 2017 letter,<sup>3</sup> and indicates that appellant cannot pay the liability due to appellant's other tax obligations.<sup>4</sup>

### DISCUSSION

1. Has appellant demonstrated error in the proposed assessment?

California residents are taxed upon their entire taxable income, regardless of source. (§ 17041(a).) Section 18501(a) requires every individual subject to the California Personal Income Tax Law to file a return with FTB specifically stating the items of gross income from all sources and the deductions and credits allowable. Section 19087(a) provides that if a taxpayer fails to file a return, 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."

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<sup>2</sup> Appellant's protest letter is addressed to the IRS, and states that appellant is "protesting the IRS's proposal due to inaccurate numbers."

<sup>3</sup> Appellant states again that he is "protesting the IRS's 2015 proposal due to inaccurate numbers."

<sup>4</sup> Appellant states that paying this liability would leave him no choice but to go on welfare.

When FTB proposes a tax assessment based on an estimate of income, FTB's initial burden is to show that its assessment is reasonable and rational. (*Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.)<sup>5</sup> When a taxpayer fails to file a valid 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]; *Appeal 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.)

Through its INC program, FTB obtained information that appellant received wages of \$65,615 from U.S. Foodservice, Inc. The information obtained through the INC program provided a reasonable and rational basis for FTB's proposed assessment, and appellant has not presented any evidence in support of his assertion that the liability is based on "inaccurate numbers." Appellant appears to contend that state taxes were already taken out of his paycheck. We note that the proposed assessment has already taken into account the withholding of \$1,351 reported by appellant's employer. Therefore, appellant did not establish error in FTB's proposed assessment of additional tax.

As for appellant's statement that he is unable to pay the liability, the question of ability to pay versus that of determining the correct amount of the tax liability are two separate and distinct concepts. We lack authority to make discretionary adjustments to the amount of a proposed tax assessment based on a taxpayer's inability to pay.<sup>6</sup> (*Appeal of Estate of Richard Luebbert, Deceased, and Verla Luebbert*, 71-SBE-028, Sep. 13, 1971.) In other words, we have no authority to settle or compromise an income tax liability. The OTA's jurisdiction is limited to determining the correct amount of appellant's California personal income tax liability for the

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<sup>5</sup> BOE precedential opinions are viewable at: <<http://www.boe.ca.gov/legal/legalopcont.htm>>.

<sup>6</sup> FTB has provided appellant with information regarding its offer in compromise and its installment agreement programs in its opening brief. If, after the decision in this appeal becomes final, appellant is experiencing difficulties in paying his liabilities, he may contact FTB to determine whether he is eligible to participate in the offer in compromise program or whether he can enter into an installment payment agreement with FTB.

appeal year. (*Appeal of Fred R. Dauberger, et. al.*, 82-SBE-082, Mar. 31, 1982.)<sup>7</sup> As discussed above, we find that the amount of the proposed assessment is correct.

2. Has appellant demonstrated that the late-filing penalty should be abated?

California imposes a penalty for the failure to file a return on or before the due date, unless it is shown that the late filing is due to reasonable cause and not due to willful neglect. (§ 19131.) The penalty is computed at five percent of the amount of tax required to be shown on the return for every month that the return is late, up to a maximum of 25 percent. (§ 19131(a).) For purposes of calculating this penalty, the amount of tax required to be shown on the return is reduced by any timely tax payments, and any credits against the tax which may be claimed on the return. (§ 19131(c).) To establish that a failure to timely file the return was due to reasonable cause, the taxpayer must show that the failure occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances. (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.)

Here, the due date of appellant's 2015 tax return was April 15, 2016 (§ 18566; Cal. Code Regs., tit. 18, §§ 18566, 18567(a)), and appellant has yet to file a 2015 return. Therefore, FTB assessed a late-filing penalty equal to 25 percent of the tax, after applying withholding payments, because appellant's 2015 tax return is more than five months late.<sup>8</sup>

Appellant argues that he has "tried to research a guideline for an amount to pay for a person with my statistics and found nothing." We note (mainly for future reference) that FTB's website has filing instructions and guidelines. Unsupported assertions that information could not be obtained due to difficulty in accumulating documents or other information do not establish reasonable cause. (See *Appeal of J.B. and P.R. Campbell*, 85-SBE-112, Oct. 9, 1985 [addressing reasonable cause in the context of the late payment penalty].) As such, appellant's alleged difficulties in determining his 2015 tax obligation do not constitute reasonable cause for failing to file his 2015 return.

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<sup>8</sup> Appellant has not contested FTB's calculation of the penalty.

HOLDINGS

1. Appellant has not established error in the proposed assessment.
2. Appellant has not established reasonable cause for failing to file a 2015 California tax return.

DISPOSITION

FTB's action is sustained in full.

DocuSigned by:  
*Amanda Vassigh*  
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Amanda Vassigh  
Administrative Law Judge

We concur:

DocuSigned by:  
*Jeffrey Margolis*  
5E9822FBB1BA41B...  
Jeffrey Margolis  
Administrative Law Judge

DocuSigned by:  
*Nguyen Dang*  
4D465973EB44469...  
Nguyen Dang  
Administrative Law Judge