

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

In the Matter of the Appeal of: ) OTA Case No. 18042766  
DEBORAH L. MANES )  
 ) Date Issued: June 25, 2019  
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**OPINION**

Representing the Parties:

For Appellant: Deborah L. Manes

For Respondent: David Kowalczyk

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

R. TAY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Deborah L. Manes (“appellant”) appeals an action by the Franchise Tax Board (“FTB” or “respondent”) proposing \$2,345.00 of additional tax, a late-filing penalty of \$586.25, and applicable interest for the 2014 tax year.

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

**ISSUES**

1. Whether appellant has shown error in respondent’s proposed assessment of additional tax for the 2014 tax year.
2. Whether appellant has shown that respondent should abate the late-filing penalty proposed for the 2014 tax year.

**FACTUAL FINDINGS**

1. Appellant was a California resident in 2014, but did not file a timely California 2014 income tax return.
2. Respondent received information from appellant’s 2014 federal Wage and Income Transcript that showed appellant received income from Massachusetts Mutual Life

Insurance Company, Contra Costa County Employees Retirement Association (CCCERA), Contra Costa County, and Teampersona, Inc. in 2014.

3. On June 29, 2017, respondent issued a Request for Tax Return (the “Request”) because respondent did not have a record of appellant’s 2014 income tax return. The Request stated that appellant must respond on or before August 2, 2017, by filing her 2014 income tax return, providing evidence that she already filed her income tax return, or providing information that she was not required to file an income tax return. Appellant did not respond to the Request.
4. On August 28, 2017, respondent issued a Notice of Proposed Assessment (NPA) because respondent did not receive appellant’s 2014 income tax return. Respondent based the NPA on \$4,642 of wages reported by Contra Costa County, \$1,604 of wages reported by Teampersona, Inc., \$41,242 of retirement income reported by Massachusetts Mutual Life Insurance Company, and \$10,266 of retirement income reported by CCCERA. The NPA proposed \$2,512.00 of tax, which was reduced to \$2,345.00 after applying exemptions and withholding, and a \$586.25 late-filing penalty, plus applicable interest.
5. On September 20, 2017, respondent received appellant’s protest of the NPA. Appellant completed the Quick Resolution Worksheet and handwrote on the Income Reference Sheet that the \$41,242 of income reported by Massachusetts Mutual Life Insurance Company was from appellant’s Individual Retirement Account (IRA), and the \$10,266 of the income reported by CCCERA “was kept and given as paid taxes.”
6. On December 8, 2017, respondent issued a Notice of Action (NOA) affirming the NPA because appellant did not show that she did not have a filing requirement.
7. This timely appeal followed.

### DISCUSSION

#### Issue 1 - Whether appellant has shown error in respondent’s proposed assessment of additional tax for the 2014 tax year.

R&TC section 17041 imposes a tax “upon the entire taxable income of every resident of this state” and upon the entire taxable income of every nonresident or part-year resident, which is derived from sources in this state. R&TC section 18501 requires every individual subject to the Personal Income Tax Law (R&TC, § 17001, et seq.) to make and file a return with the FTB

“stating specifically the items of the individual’s gross income from all sources and the deductions and credits allowable.” Here, appellant does not dispute that she has a filing requirement for the 2014 tax year. Appellant also does not dispute that she received wages in 2014, as reported by various sources. Although appellant wrote in her appeal that she would file her 2014 income tax return, she has not filed her return to date.

If a taxpayer fails to file a return, FTB may make an estimate of their net income, from any available information, and may propose to assess the amount of tax, interest, and penalties due. (R&TC, § 19087(a).) If FTB proposes a tax assessment based on an estimate of income, FTB’s initial burden is to show why its proposed assessment is reasonable and rational. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers* (2001-SBE-001) 2019 WL 1187160.) 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) 1992 WL 44503 [estimate based on 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) 1982 WL 11759.)

Furthermore, when a taxpayer fails to file a valid return, FTB’s use of income information from various sources to estimate a taxpayer’s taxable income is a reasonable and rational method of estimating taxable income. (*Palmer v. Internal Revenue Service* (9th Cir. 1997) 116 F.3d 1309, 1313.) Indeed, federal courts have held that the 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.)

Once FTB has met its initial burden, its proposed assessment is presumed correct, and the taxpayer has the burden of proving it to be wrong. (*Todd v. McColgan, supra*; *Appeal of Michael E. Myers, supra*.) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Aaron and Eloise Magidow* (82-SBE-274) 1982 WL 11930.) In the absence of credible, competent, and relevant evidence showing error in FTB’s determination, FTB’s proposed assessment must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer* (80-SBE-154) 1980 WL 5068.) 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) 1983 WL 15434.)

Here, when appellant failed to file a 2014 tax return, respondent used appellant's federal Wage and Income Transcript to estimate appellant's income. According to the transcript, Teampersona, Inc., reported appellant earned wages of \$1,604, Contra Costa County reported wages of \$4,642, Massachusetts Mutual Life Insurance Company reported appellant received a retirement distribution of \$41,242, and CCCERA reported appellant received a retirement distribution of \$10,266. In total, appellant received income of \$57,754 for the 2014 tax year. We find that FTB's estimate based on the reporting from various sources as indicated on appellant's 2014 federal Wage and Income Transcript is reasonable and rational, and thus, FTB has met its initial burden. Consequently, the burden shifts to appellant to show respondent erred.

Appellant disputes respondent's income estimate, but has not provided evidence or law to support her position that respondent erred. Appellant claims that the \$41,242 of retirement income from Massachusetts Mutual Life Insurance Company was from Appellant's IRA and that the \$10,266 from CCCERA was used to pay taxes. However, appellant has not pointed to an applicable statute or presented evidence to show these amounts are not taxable, and we are aware of no law to support such a conclusion. Rather, appellant's federal Wage and Income Transcript shows Massachusetts Mutual Life Insurance Company reported the entire \$42,242 distribution as taxable income and withheld \$8,248 for federal withholding. CCCERA also reported the entire \$10,266 distribution as taxable income but did not report any federal withholding. Although appellant argues that the \$10,266 "was kept and given as paid taxes," respondent received no state withholding from Massachusetts Mutual Life Insurance Company.<sup>1</sup> As such, in the absence of any evidence to rebut respondent's proposed assessment, appellant has not met her burden of proof of showing that respondent erred in its proposed assessment of tax. Consequently, respondent's proposed assessment of additional tax is sustained.

Issue 2 - Whether appellant has shown that respondent should abate the late-filing penalty proposed for the 2014 tax year.

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 is due to reasonable cause and not due to willful neglect.

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<sup>1</sup> Appellant had \$51.00 of withholding from CCCERA and \$8.10 of withholding from Teampersona, Inc., for state income tax purposes.

(R&TC, § 19131.) 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 of 25 percent. (R&TC, § 19131(a).) Here, appellant was required to file her 2014 income tax return by April 15, 2015, but has not filed a valid return to date. Respondent correctly calculated the late-filing penalty based on its estimate of appellant's income for 2014, and appellant has not disputed respondent's assessment of the penalty.

Since respondent's assessment of the late-filing penalty was proper, the burden is on the taxpayer to establish reasonable cause for the failure to timely file her return. (*Appeal of Howard G. and Mary Tons* (79-SBE-027) 1979 WL 4068.) To establish reasonable cause, the taxpayer must show that he or she acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Quality Tax & Financial Services, Inc.*, 2018-OTA-130P, Sept. 14, 2018.)


Appellant has not provided evidence or information demonstrating any reasonable cause for failing to file her California income tax return in a timely manner. Thus, appellant has not shown that respondent erred in its proposed assessment of the late-filing penalty, nor has she provided evidence of reasonable cause to support penalty abatement. As such, respondent's proposed assessment of the late-filing penalty is sustained.

#### HOLDINGS


1. Appellant has failed to demonstrate error in respondent's proposed assessment of additional tax for the 2014 tax year.
2. Appellant has failed to show respondent should abate the late-filing penalty proposed for the 2014 tax year


DISPOSITION

Respondent's action is hereby sustained.

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Richard I. Tay  
Administrative Law Judge

We concur:

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Teresa A. Stanley  
Administrative Law Judge

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Linda C. Cheng  
Administrative Law Judge