

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18042591
JESUS ORTIZ)
) Date Issued: May 10, 2019
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OPINION

Representing the Parties:

For Appellant: Jesus Ortiz
For Respondent: Mira Patel, Tax Counsel

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Jesus Ortiz (appellant) appeals an action by respondent Franchise Tax Board (FTB) on appellant’s protest against a proposed assessment of additional tax of \$1,669, and a late-filing penalty of \$417.25, plus 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. Whether appellant has shown error in FTB’s proposed tax assessment.
2. Whether appellant established that his failure to timely file a tax return for the 2015 tax year was due to reasonable cause.

FACTUAL FINDINGS

1. Appellant failed to file a 2015 California personal income tax return. FTB obtained information from the Internal Revenue Service (IRS), indicating that during the 2015 tax year, appellant paid mortgage interest to Bank of America on a California property in the amount of \$9,088. FTB also received information that showed that appellant earned wages of \$1,375 from DP Electric, Inc. Thereafter, FTB issued a Demand for Tax Return

- dated April 18, 2017 to appellant, and allowed appellant until May 24, 2017, to timely respond. Appellant did not respond.
2. On June 26, 2017, FTB issued a Notice of Proposed Assessment (NPA) to appellant. The NPA estimated that appellant's gross income was \$54,528, based on an application of a 6:1 ratio of income to mortgage interest paid. FTB then allowed a deduction for the mortgage interest appellant paid, and computed taxable income of \$45,440 (\$54,528 - \$9,088). The NPA proposed total tax of \$1,669 and a late-filing penalty of \$417.25, plus applicable interest.
 3. By response letter dated August 21, 2017, appellant protested the NPA arguing that he did not have a filing requirement because he did not make any income. Appellant asserted that he used savings and personal loans from family members to pay his mortgage.
 4. FTB requested additional information that would verify the sources and amounts of the funds that enabled appellant to pay his mortgage, such as copies of wire transfers or cancelled checks. When appellant did not reply to FTB's request, FTB issued a Notice of Action on February 27, 2018 that affirmed the NPA. This appeal followed.
 5. In his reply brief, appellant provided a personal log of his checking account and bank statements from his checking account for the 2015 tax year. The personal log and bank statements indicate deposits and withdrawals from appellant's checking account but they do not indicate where the deposits are from or the nature of the deposits.

DISCUSSION

Issue 1 – Whether appellant demonstrated error in the proposed tax assessment.

R&TC section 17041 imposes a tax upon the entire taxable income of every resident of this state. R&TC section 18501 requires every individual subject to the Personal Income Tax Law to make and file a return with FTB “stating specifically the items of the individual's gross income from all sources and the deductions and credits allowable”

R&TC section 19087, subdivision (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.

If 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 Myers* (2001-SBE-001) 2019 WL 1187160.) FTB's use of information from various sources to estimate a taxpayer's taxable income, when that taxpayer failed to file his own return, is a reasonable and rational method of determining taxable income. (See *Palmer v. Internal Revenue Service* (9th Cir. 1997) 116 F.3d 1309, 1313; *Appeals of Bailey* (92-SBE-001) 1992 WL 100118.)

FTB's determination is presumed to be correct, and a taxpayer has the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Myers, supra.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

Here, FTB's estimation of appellant's income based upon federal Form 1098 information showing that appellant paid mortgage interest for the tax year at issue, in the amount listed above, is both reasonable and rational. (See *Appeals of Bailey, supra.*) Appellant contends that he paid the mortgage with his savings, as well as loans from family members; however, in support of his assertion appellant has only provided a personal log of his checking account, and bank statements for the 2015 tax year, neither of which indicate where the deposits are from or the nature of the deposits. FTB requested additional information from appellant in order to verify the sources and amounts of funds that appellant used to pay his mortgage. Appellant has not provided any evidence, during the protest period or at appeal, to establish the sources and amounts of funds he received that allowed him to pay his mortgage. Accordingly, appellant has not shown error in FTB's assessment. Thus, the assessment must be upheld.

Issue 2 - Whether appellant established that his failure to timely file a 2015 tax return was due to reasonable cause.

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 willful neglect. (R&TC, § 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. (R&TC, § 19131(a).)

A taxpayer has the burden of establishing reasonable cause. (*Todd v. McColgan, supra.*) As a general matter, in order for a taxpayer to establish that a failure to act 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 Tons (79-SBE-027) 2005 WL 1041882.*)

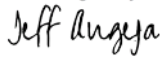
Here, appellant has not made any specific arguments regarding his failure to file a 2015 tax return, other than his assertion above that he had no income and thus no filing obligation. We have considered and rejected that assertion above, and appellant submits no additional evidence or argument to establish reasonable cause for his failure to file a 2015 tax return. Therefore, appellant has not established reasonable cause to abate the penalty.

HOLDINGS

1. Appellant has failed to demonstrate error in FTB's proposed assessment for the 2015 tax year.
2. Appellant failed to establish that his failure to timely file a personal income tax return for the 2015 tax year was due to reasonable cause.

DISPOSITION

FTB's action is sustained.

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Jeffrey G. Angeja
Administrative Law Judge

We concur:

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Amanda Vassigh

Administrative Law Judge

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Daniel K. Cho

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Daniel K. Cho

Administrative Law Judge