

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

In the Matter of the Appeal of:  
**SCOTT FOLEY**

) OTA Case No. 18083519  
)  
) Date Issued: September 4, 2019  
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)

**OPINION**

Representing the Parties:

For Appellant: Scott Foley

For Respondent: Andrew Amara, Tax Counsel III

N. DANG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Scott Foley (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying his protest of a proposed assessment of \$28,968 additional tax, plus penalties of \$14,568 and applicable interest for the 2015 tax year.

Appellant waived his right to an oral hearing, and therefore, we decide the matter based on the written record.

**ISSUE**

Whether appellant has established error in FTB’s proposed assessment for the 2015 tax year.

**FACTUAL FINDINGS**

1. Appellant did not file a California income tax return for the 2015 tax year.
2. FTB received information based on a Form 1098 issued by Wells Fargo Bank, N.A. to appellant, indicating that he paid mortgage interest of \$65,986 for the 2015 tax year.
3. Based on statistical information obtained from an analysis of tax returns filed by California residents, FTB estimated appellant’s gross income for the 2015 tax year to be six times the mortgage interest he paid for that year, or \$395,916 (\$65,986 x 6).

4. FTB issued a Notice of Proposed Assessment (NPA) to appellant for the 2015 tax year for \$28,968 tax, a late-filing penalty of \$7,242, a notice and demand penalty of \$7,242 and applicable interest.<sup>1</sup>
5. Appellant protested the NPA, asserting that he had no income for the 2015 tax year and that he paid the \$65,986 in mortgage interest from a personal loan.
6. FTB requested that appellant provide documentation supporting that he received a personal loan.
7. When appellant did not respond to FTB's request, FTB issued a Notice of Action denying appellant's protest. This timely appeal followed.

### DISCUSSION

So long as they are reasonable and rational, FTB's proposed assessments are entitled to a presumption of correctness, and the taxpayer has the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514.) The burden of proof is by a "preponderance of the evidence." (Cal. Code Regs., tit. 18, § 30219(c).) A preponderance of the evidence means that the taxpayer must establish by documentation or other evidence that the circumstances he or she asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

We determine first whether FTB's proposed assessment is reasonable and rational. "Where the government's deficiency determination rests on the reasonable inference that the taxpayers must have had sufficient income to support themselves for years when no income was reported, and statistics are used to reconstruct income, the evidentiary foundation necessary for the presumption of correctness to attach is minimal." (*Palmer v. I.R.S.* (1997 9th Cir.) 116 F.3d 1309, 1313.)

The record contains no explanation of why FTB believes a 6:1 income-to-interest ratio is justified, or the details of how this ratio was specifically computed. Nevertheless, it makes sense that in addition to paying mortgage interest, at the least, appellant would have required sufficient

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<sup>1</sup> FTB imposed the notice and demand penalty upon appellant because: (1) FTB previously issued requests and/or demands for tax return to appellant for the 2011, 2012, and 2013 tax years on May 20, 2014, January 14, 2014, and April 21, 2015, respectively; and (2) appellant also failed to respond to these requests and/or demands, and FTB issued to appellant a Notice of Proposed Assessment for each of these prior years.

income to pay other property related expenses such as the principal on his mortgage, property taxes, insurance and utilities, in addition to the typical necessities of living. Given that mortgage interest is only one of the many expenses appellant would have reasonably incurred, a 6:1 ratio does not appear to be an excessive or arbitrary estimate. Accordingly, we find that FTB has met its initial evidentiary burden of production.

Appellant contends that he did not receive income for the 2015 tax year and that he obtained the funds used to pay his \$65,986 mortgage interest expense via a personal loan. In support, appellant provided a Promissory Note dated January 1, 2015, issued to the Sherry J. Foley Living Trust for \$275,000 with an annual interest rate of 1.7 percent and a maturity date of January 2024.

The record is devoid of any evidence, such as deposit slips, wire confirmations, canceled checks, or bank statements, indicating that appellant received \$275,000 from the Sherry J. Foley Living Trust. A taxpayer's failure to produce evidence within his or her control gives rise to a presumption that such evidence, if provided, would be unfavorable to the taxpayer's case. (*Appeal of Cookston*, (83-SBE-048) 1983 WL 15434.) In addition, the Promissory Note was not notarized, making it impossible to verify whether it was executed during 2015, or created after the fact for purposes of supporting appellant's position. For these reasons, we find that the Promissory Note is insufficient to establish that appellant received a personal loan of \$275,000, and thus, that appellant has not met his burden of establishing that he did not receive any income for the 2015 tax year.<sup>2</sup>

#### HOLDING

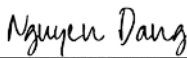
Appellant has failed to establish error in FTB's proposed assessment for the 2015 tax year.

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<sup>2</sup> Because we find that appellant has not established he received any funds from the Sherry J. Foley Living Trust, we do not discuss whether there was a bona fide loan from this trust to appellant.


DISPOSITION

FTB's action is sustained in full.

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Nguyen Dang  
Administrative Law Judge

We concur:

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Linda C. Cheng  
Administrative Law Judge

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Richard Tay  
Administrative Law Judge