



3. For the 2015 tax year, FTB estimated appellant's income to be \$42,018, by multiplying the amount of reported mortgage interest she paid by six (\$7,003 x 6).
4. FTB issued a notice demanding that appellant file a return or explain why no return was required. When appellant neither filed a return, nor supplied information showing that she did not have a filing requirement, FTB issued a Notice of Proposed Assessment (NPA), showing an estimated total income of \$42,018 and, after allowing a deduction for mortgage interest paid of \$7,003, estimated taxable income of \$35,015. The NPA proposed tax of \$953 and a late-filing penalty of \$238.25, plus interest.
5. Appellant filed a timely protest with FTB, asserting that she did not receive sufficient income in 2015 to trigger the tax return filing requirement.
6. On March 9, 2018, FTB sent appellant a letter requesting additional information to verify whether appellant had a filing requirement for the 2015 tax year. Specifically, FTB requested that appellant provide: (1) copies of credit card statements and savings account statements for January, June, and December 2015; and (2) copies of social security/disability documents. The letter indicated that if FTB did not receive the requested documentation within 30 days of the letter, it would issue a Notice of Action (NOA) affirming the NPA.
7. In June 2018, appellant untimely responded by letter asserting that she supported herself through monetary gifts from friends.<sup>1</sup>
8. As FTB's records showed that appellant failed to provide the requested documentation, FTB issued an NOA dated June 11, 2018, affirming the NPA. This timely appeal followed.

### DISCUSSION

#### Issue 1 – Whether appellant has established error in the proposed assessment.

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.<sup>2</sup> R&TC section 18501 requires every individual subject to the

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<sup>1</sup> We note that this letter is not in the record.

<sup>2</sup> It appears undisputed that appellant resided in California during the 2015 tax year, and appellant has not argued otherwise.

Personal Income Tax 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 sections 17071 and 17072 define “gross income” and “adjusted gross income” by referring to and incorporating into California law Internal Revenue Code (IRC) sections 61 and 62, respectively. IRC section 61 provides that unless otherwise provided “gross income means all income from whatever source derived,” including compensation for services, gross income derived from business, gains derived from dealings with property, interest, dividends, annuities, and pensions. R&TC 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. [Emphasis added.]

When 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. (*Appeal of Michael E. Myers* (2001-SBE-001) 2001 WL 37126924.) 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]; *Appeals of R. and Sonja J. Tonsberg* (85-SBE-034) 1985 WL 15812 [use of third-party information reporting]; see also *Andrews v. Commissioner*, T.C. Memo. 1998-316 [noting at page 11 that information including interest payments by the taxpayer and statistics can provide the “minimal factual predicate” for an assessment].) “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.)

Federal courts have held that the taxing agency need only introduce some evidence linking the taxpayer with the unreported income. (See *Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932, 935.) In *Rapp v. Commissioner, supra*, 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/her control gives rise to a presumption that such evidence is unfavorable to his/her case. (*Appeal of Don A. Cookston* (83-SBE-048) 1983 WL 15434.)

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 Walter R. Bailey, supra*, 1992 WL 44503; *Appeals of R. and Sonja J. Tonsberg, supra*.) Appellant asserts that she did not receive taxable income in 2015, and that she paid the mortgage with monetary gifts from friends. In support, appellant provides her 2015 federal Wage and Income Transcript, which has entries only for "Form 5498 Individual Retirement Arrangement Contribution Information" and "Form 1098 Mortgage Interest Statement." We find appellant's statements, without any supporting documentation, do not overcome the presumption of correctness that applies to FTB's deficiency. (*Welch v. Helvering* (1933) 290 U.S. 111, 115.) We note that the courts have rejected unsupported arguments that an individual supported himself with nontaxable sources of income. For example, in *Kindred v. Commissioner*, T.C. Memo. 1979-457, affd. (6th Cir. 1982) 669 F.2d 400 (*Kindred*), the taxpayer, a tax protestor, argued that he supported himself with gifts, savings, and subsistence farming but refused to provide supporting evidence.<sup>3</sup> The court rejected the taxpayer's argument that the Internal Revenue Service (IRS) had the burden of proof, and found that, because the taxpayer had refused to substantiate his sources of support, the IRS had "great latitude" in estimating the taxpayer's income based on Bureau of Labor statistics. Like the taxpayer in *Kindred*, appellant asserts that she supported herself with nontaxable sources of income, but refuses to provide supporting evidence. FTB reconstructed the taxpayer's income based on the Form 1098 it received for the tax year at issue.

Appellant has not provided a credible explanation as to how she was making the Chase Bank payments, or paying for the cost of living, during the 2015 tax year. While appellant contends that she paid the mortgage with monetary gifts, appellant has provided no evidence to

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<sup>3</sup> See also *Shih-Hsieh v. Commissioner*, T.C. Memo. 1986-525 [finding that taxpayer had the burden of showing her sources of income where her expenditures suggested she had some means of support]. The court explained, at page seven of its opinion, that "[i]t is well established that where the taxpayer fails to maintain adequate records, the Commissioner may prove the existence and amount of unreported income by any method that will, in his opinion, clearly reflect the taxpayer's income."

support this contention. Furthermore, appellant has not provided the additional information FTB requested to verify whether she had a filing requirement for the 2015 tax year. While appellant provides a copy of her 2015 federal Wage and Income Transcript, the transcript merely shows income that is reported. As such, it is possible that appellant received taxable income in 2015 that was not reported and, therefore, not indicated on the transcript. Further, FTB has provided documentation indicating that appellant is a real estate agent who, for real estate transactions that closed in 2015, represented the buyer in at least two real estate transactions totaling approximately \$531,000, and represented the seller in at least four real estate transactions totaling approximately \$2,427,000.<sup>4</sup> Appellant was provided an opportunity to address the documentation, but appellant has not done so, nor has she explained how the transactions do not demonstrate that appellant received taxable income in 2015. If documentation showing appellant's actual sources of support would have eliminated or reduced her tax obligation, it seems likely that she would have provided it.

FTB's use of Form 1098 information from Chase Bank to estimate appellant's taxable income is both reasonable and rational. We hold that the presumption of correctness properly applies to FTB's determination and appellant has not met the burden of demonstrating that FTB's determination is erroneous.

Issue 2 – Whether appellant has established 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 failure is due to reasonable cause and not due to willful neglect. (Rev. & Tax. Code, § 19131.) To establish reasonable cause, a 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 [ordinarily] intelligent and prudent businessman to have so acted under similar circumstances.” (*Appeal of Howard G. and Mary Tons* (79-SBE-027) 1979 WL 4068.) As discussed above, appellant contends, without providing supporting documentation, that she had no filing requirement for the 2015 tax year. Furthermore, appellant did not specifically address the late-filing penalty issue. However, appellant did have a filing requirement, based on the evidence provided by FTB, and she has not separately shown

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<sup>4</sup> We note that based on the transactions, if appellant received a low-end commission of 2.5 percent on each transaction, then appellant would have earned approximately \$73,950 in commissions during 2015.

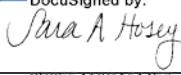
reasonable cause to abate the penalty for filing late. Therefore, appellant has not met her burden of showing that her failure to file was due to reasonable cause and not due to willful neglect.

HOLDINGS

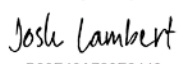
1. Appellant has failed to demonstrate any error in the proposed assessment of additional tax.
2. Appellant has failed to establish that the late-filing penalty should be abated.

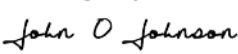
DISPOSITION

FTB's action is sustained.

DocuSigned by:  
  
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Sara A. Hosey  
Administrative Law Judge

We concur:

DocuSigned by:  
  
B90E40A720E3440...  
Josh Lambert  
Administrative Law Judge

DocuSigned by:  
  
873D8797B9E64E1...  
John O. Johnson  
Administrative Law Judge