

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18063340
HAYTHAM KAFOUF)
) Date Issued: December 5, 2019
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)
_____)

OPINION

Representing the Parties:

For Appellant: Haytham Kafouf
For Respondent: Gregory W. Heninger,
Program Specialist III

S. HOSEY, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19045, appellant Haytham Kafouf (appellant) appeals from the action of respondent Franchise Tax Board (FTB) proposing additional tax in the amount of \$7,425.00, a late filing penalty of \$1,856.25, a notice and demand (demand) penalty of \$1,856.25, and a filing enforcement cost recovery (filing enforcement) fee of \$84.00, plus applicable interest, for the 2015 tax year.

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

ISSUES

1. Whether appellant has demonstrated error in FTB’s proposed assessment of tax.
2. Whether appellant has shown reasonable cause for the late filing of his return.
3. Whether appellant has demonstrated reasonable cause for his failure to respond to FTB’s demand.
4. Whether appellant has demonstrated that he is entitled to relief from the filing enforcement fee.
5. Whether appellant has shown that he is entitled to relief of interest.

FACTUAL FINDINGS

1. Appellant had not filed a 2015 California income tax return until he filed an unsigned zero income return with his appeal on June 5, 2018.¹
2. Through its Integrated Non-Filer Compliance (INC) Program, FTB obtained computer information from the Internal Revenue Service (IRS), as set forth on a federal Form 1098 from BayView Loan Servicing, LLC (BayView Loan Servicing), that appellant paid mortgage interest for the 2015 tax year in the amount of \$21,630, which indicated income sufficient to trigger the 2015 filing requirement.²
3. For the 2015 tax year, FTB estimated appellant's income to be \$129,780 by multiplying the amount of reported mortgage interest paid (\$21,630) by six. FTB states that it calculated this ratio based on a study of millions of tax returns.
4. FTB issued a notice dated October 10, 2017, demanding that by November 15, 2017, appellant file a return or explain why no return was required.
5. When appellant neither filed a return, nor supplied information showing that there was no filing requirement, FTB issued a Notice of Proposed Assessment (NPA), based on the information received from BayView Loan Servicing and appellant's estimated income from the reported mortgage interest paid.
6. The NPA set forth a tax of \$7,425.00, a late filing penalty of \$1,856.25, a demand penalty of \$1,856.25, and a filing enforcement fee of \$84.00, plus applicable interest.
7. Appellant filed a timely protest, asserting that there was no filing requirement for the 2015 tax year, as his income was zero during the applicable tax year and he "did not engage in any business activity that resulted in any earned income."
8. In response, FTB sent appellant a letter dated March 9, 2018, requesting that appellant provide documentation to verify the sources of income appellant used to pay his mortgage during the 2015 tax year or that appellant file a valid 2015 California income tax return within 30 days from the date of the letter.

¹ We note that an unsigned return is not a valid return. (*Appeal of R. and Sonja J. Tonsberg* (85-SBE-034) 1985 WL 15812).

² For the 2015 tax year, the minimum California adjusted gross income (AGI) threshold amount for a joint filer with no dependents and both spouses under 65 years of age was \$26,012.

9. When appellant neither filed a return nor otherwise responded to FTB’s March 9, 2018 letter, FTB issued a Notice of Action (NOA), which affirmed the NPA.
10. In response, appellant filed this timely appeal.

DISCUSSION

Issue 1: Whether appellant has demonstrated error in FTB’s proposed assessment of tax.

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.³ 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(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.

When FTB makes a proposed tax assessment based on an estimate of income, FTB’s initial burden is to show why its proposed tax assessment is reasonable and rational. (*Appeal of 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. (*Appeal of Bailey* (92-SBE-001) 1976 WL 44503 [estimate based on third-party information reporting]; *Appeal of Tonsberg* (85-SBE-034) 1985 WL 15812 [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.” (*Appeal of 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*, the Ninth Circuit Court of Appeals stated, “[o]nce the Government

³ It appears undisputed that appellant resided in California during the 2015 tax year, and appellant has not argued otherwise.

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 Cookston* (83-SBE-048) 1983 WL 15434.) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

With his appeal letter dated June 5, 2018, appellant submitted a purported joint 2015 California return, along with an attached joint 2015 federal return, both of which were unsigned and set forth that appellant and his wife had zero income and owed zero tax for the 2015 tax year.

In a subsequent letter dated March 24, 2019, appellant asserted that during the 2015 tax year he was a real estate investor who rehabilitated and sold properties but that he did not sell any properties during the applicable tax year and had to rely on his father for financial support and to make mortgage payments. Further, appellant asserted that his wife was a stay-at-home mother in the 2015 tax year and did not earn any income that year. With his March 24, 2019 letter, appellant provided bank statements covering the months of January through March of 2015. The bank statements indicate that appellant made the following cash deposits (totaling \$34,457.62) during the first three months of 2015: \$6,000.00 on January 14; \$1,600.00 on February 2; \$3,500.00 on February 5; \$900.00 on February 11; \$10,000.00 on February 17; \$228.72 on February 18; \$228.90 and \$7,000.00 on March 3; and \$5,000.00 on March 23. There is no indication on the bank statements, however, as to the source of those deposits.

Here, FTB reconstructed appellant’s income based on the information reported on IRS Forms 1098 regarding appellant’s mortgage interest for the tax year at issue. This qualifies as “some” evidence linking appellant with an income-producing activity (generating funds to pay mortgage installments), particularly considering that FTB is entitled to “great latitude” in estimating income. While appellant provides an explanation for how he was paying his mortgage interest payments and other costs of living, he does not provide any evidence

supporting those assertions. Appellant's failure to provide evidence that is within his control gives rise to a presumption that such evidence is unfavorable to his case. Appellant has not provided testimony of his friends or family as to the financial support they have provided. FTB's use of information from the IRS Form 1098 from BayView Loan Servicing to estimate appellant's taxable income is both reasonable and rational (see *Appeal of Bailey, supra*; *Appeal of Tonsberg, supra*), and appellant's unsupported assertions that he received gifts and/or loans from his father to cover his family's living and/or mortgage payments for the 2015 tax year 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 courts have rejected similar unsupported arguments that an individual supported him/herself with nontaxable sources. For example, in *Kindred v. Commissioner*, T.C. Memo. 1979-457, affd. 669 F.2d 400, the taxpayer argued that he supported himself with gifts, savings, and subsistence farming but refused to provide supporting evidence. The court rejected the taxpayer's argument that the IRS had the burden of proof, and found that, as the taxpayer had refused to demonstrate his sources of support, the IRS had "great latitude" in estimating the taxpayer's income.⁴ (*Id.*, at pp. 11, 15.) Like the taxpayer in *Kindred*, appellant asserts that he supported himself and/or his family with nontaxable sources, but appellant has not provided evidence demonstrating such. While appellant has provided copies of bank statements for the first three months of the 2015 tax year, appellant has not demonstrated that the deposits identified in those bank statements were derived from nontaxable sources. Further, appellant has not provided bank statements subsequent to March of 2015. In summary, appellant had the burden of proving error in FTB's proposed assessment of additional tax, but he failed to do so.

Issue 2: Whether appellant has shown reasonable cause for the late filing of his return.

California imposes a penalty for failure to file a return by its due date, unless the failure to file was due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) The late filing penalty is computed at 5 percent of the tax due, after allowing for timely payments, for

⁴ 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."

every month elapsing from the due date of the return (without regard to any extension) to the filing date, up to a maximum of 25 percent. (R&TC, § 19131.)

The burden is on the taxpayer to prove that reasonable cause prevented the taxpayer from timely filing the return. (*Todd v. McColgan, supra; Appeal of David A. and Barbara L. Beadling* (77-SBE-021) 1977 WL 3831.) 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 ordinary intelligent and prudent businessman to have so acted under similar circumstances.” (*Appeal of Howard G. and Mary Tons* (79-SBE-027) 1979 WL 4068.) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Aaron and Eloise Magidow, supra.*)

Appellant’s 2015 return was due on April 15, 2016, but appellant’s purported joint 2015 California return (listing zero income and zero tax due) was not received by FTB until June 11, 2018. Similar to the argument appellant made above in relation to the proposed assessment of additional tax, appellant contends that for the 2015 tax year he earned no income and did not have a filing requirement. Appellant does not provide any specific arguments for relief due to reasonable cause.

As indicated above, appellant has not substantiated his argument that he and his wife had zero income during the 2015 tax year and, therefore, did not have a California filing requirement. Further, appellant has not asserted any other argument to support the late filing of the purported joint 2015 California return—and we find no such evidence in the appeal record.

Issue 3: Whether appellant has shown reasonable cause for his failure to respond to FTB’s demand.

California imposes a penalty for the failure to file a return or provide information upon FTB’s demand to do so, unless reasonable cause prevented the taxpayer from responding to the demand. (R&TC, § 19133.) The demand penalty is computed at 25 percent of the amount of the taxpayer’s total tax liability, which is determined without regard to payments or credits. (*Appeal of Elmer R. and Barbara Malakoff* (83-SBE-140) 1983 WL 15525.)

The burden is on the taxpayer to prove that reasonable cause prevented the taxpayer from responding to a demand. (*Appeal of Kerry and Cheryl James* (83-SBE-009) 1983 WL 15396.) Unsupported assertions are not sufficient to carry a taxpayer’s burden of proof. (*Appeal of Aaron and Eloise Magidow, supra.*)

For individuals, FTB can only impose a demand penalty (under R&TC section 19133) if the taxpayer fails to timely respond to a current demand and FTB issued an NPA under the authority of R&TC section 19087(a) after the taxpayer failed to timely respond to a request for tax return or a demand at any time during the four-taxable-years preceding the year for which the current demand is being issued. (See Cal. Code Regs., tit. 18, § 19133(b); operative Dec. 23, 2004.)

FTB's demand for the 2015 tax year complies with the requirements of California Code of Regulations, title 18, section 19133(b), in that FTB previously issued a request for the 2011 tax year and the NPA for the 2011 tax year was issued on March 11, 2013, which was during the four-taxable-year period preceding 2015.

Here, appellant has not asserted any argument (or provided any evidence) showing why he did not respond FTB's demand. Accordingly, appellant has not shown reasonable cause for his failure to respond to FTB's demand.

Issue 4: Whether appellant has demonstrated that he is entitled to relief from the filing enforcement fee.

If FTB mails a demand for a tax return to a taxpayer, a filing enforcement fee is required to be imposed when the taxpayer fails or refuses to file the return within a 25-day period. (R&TC, § 19254.) Once properly imposed, there is no provision in the R&TC that would excuse FTB from imposing the filing enforcement fee for any circumstances, including reasonable cause. Here, the filing enforcement fee was properly imposed. Accordingly, appellant is not entitled to relief from the fee.

Issue 5: Whether appellant has shown that he is entitled to relief of interest.

Imposition of interest is mandatory; it is not a penalty but is compensation for appellant's use of money after it should have been paid to the state. (*Appeal of Amy M. Yamachi* (77-SBE-095) 1977 WL 3905.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Audrey C. Jaegle* (76-SBE-070) 1976 WL 4086.)

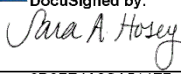
To obtain relief from interest, appellant must qualify under one of three statutes: R&TC sections 19104, 19112 or 21012. Appellant offered no arguments other than that the entire NOA should be reconsidered. Therefore, no grounds for abatement of interest have been established.

HOLDINGS


1. Appellant has not demonstrated error in FTB’s proposed assessment of tax.
2. Appellant has not shown reasonable cause for the late filing of his return.
3. Appellant has not demonstrated reasonable cause for his failure to respond to FTB’s demand.
4. Appellant has not demonstrated that he is entitled to relief from the filing enforcement fee.
5. Appellant has not shown that he is entitled to relief of interest.

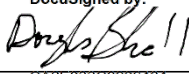
DISPOSITION

FTB’s action is sustained.

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 Sara A. Hosey
 Administrative Law Judge

We concur:

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 Suzanne B. Brown
 Administrative Law Judge

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 Douglas Bramhall
 Administrative Law Judge