

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19024352
FRANK S. TAORMINA)
) Date Issued: December 3, 2019
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_____)

OPINION

Representing the Parties:

For Appellant: Frank S. Taormina

For Respondent: Meghan McEvilly, Tax Counsel III

For Office of Tax Appeals: William J. Stafford, Tax Counsel III

D. BRAMHALL, Administrative Law Judge: This appeal is made pursuant to section 19045 of the Revenue and Taxation Code (R&TC) from the action of the Franchise Tax Board (FTB) on appellant’s protest of a proposed assessment in the amount of \$3,241.00 in tax, a late-filing penalty of \$810.25, plus applicable interest, for the 2014 tax year.

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

ISSUES

1. Whether appellant has demonstrated error in the proposed assessment of tax.
2. Whether appellant has shown reasonable cause for the late filing of his return.

FACTUAL FINDINGS

1. Appellant has not filed a 2014 California income tax return.
2. Through its Integrated Non-Filer Compliance Program, FTB obtained information that appellant received income in 2014 of \$66,804.60, which was enough to trigger the 2014 California filing requirement.¹

¹ For the 2014 tax year, appellant’s estimated income of \$66,804.60 is based on Employment Development Department (EDD) records, federal Form 1099s, and/or federal Forms 592/593, which show that appellant received

3. FTB issued a notice dated July 25, 2017, requesting that appellant file a return or explain why no return was required.
4. In response, appellant sent FTB correspondence, which FTB received on August 25, 2017, wherein appellant stated that he did not have a 2014 filing requirement because he had a gross income of only \$15,247.90, which appellant asserted was comprised solely of wages totaling \$14,970.02 and dividend income of \$277.88.
5. With his correspondence dated August 25, 2017, appellant provided a letter on Red Hawk Casino letterhead, which stated that for the 2014 tax year appellant had “Total Jackpot Amount(s)” of \$55,017.06 and “gaming” losses of \$71,565.74, for a net loss of \$16,548.68.
6. In response, FTB sent appellant a letter dated October 18, 2017, stating that appellant had a 2014 filing requirement because appellant had to include gambling income in his gross income.
7. Appellant later sent FTB correspondence, which FTB received on November 7, 2017, wherein appellant stated that although he did, in fact, have gambling winnings in 2014, his losses exceeded his winnings, and thus, he did not have a 2014 filing requirement.
8. With his correspondence of November 7, 2017, appellant provided a document entitled “Red Hawk Casino 2014 Annual Activity Report,” which showed 2014 payouts of \$41,897.00 and losses of \$50,209.79, for adjusted net losses of \$8,312.79.
9. After reviewing the matter, FTB issued a Notice of Proposed Assessment (NPA) based on the income information originally received from the third-party reporting sources. The NPA set forth a tax of \$3,241.00, a late-filing penalty of \$810.25, plus applicable interest.
10. Appellant filed a timely protest.
11. FTB later affirmed the NPA in a Notice of Action.
12. This timely appeal followed.

wages of \$14,970.00 from Lodi Unified School District; interest income of \$277.00 from Financial Center Credit Union; dividend income of \$28.00 from E Trade Clearing, LLC; miscellaneous income of \$51,467.00 from Shingle Springs Tribal Gaming Authority; and income of \$62.60 from E Trade Clearing, LLC. For the 2014 tax year, a single individual under age 65 years of age, with no dependents, has a California filing requirement if he or she has a California gross income of \$16,047 or a California adjusted gross income (AGI) of \$12,838. (See R&TC, § 18501; FTB Personal Income Tax Booklet 2014.)

DISCUSSION

Issue 1: Whether appellant has demonstrated error in the 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. R&TC section 18501 requires every individual subject to the 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, 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.

If 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 Michael E. Myers* (2001-SBE-001) 2001 WL 37126924.) 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.)

Once FTB has met its initial burden, the proposed assessment is presumed correct and the taxpayer has the burden of proving it to be wrong. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509.) 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.)

A taxpayer must file a return to itemize deductions. (R&TC, § 17073(a) incorporating by reference IRC, § 63(e)(1)-(2) [no itemized deduction allowed unless an election is made on the taxpayer’s return]; See *Jahn v. Commissioner* T.C. Memo. 2008-141, affd. (3d Cir. 2010) 392 Fed.Appx. 949; *Brunner v. Commissioner* T.C. Memo. 2004-187, affd. (3d Cir. 2005) 142 Fed.Appx. 53.) If a taxpayer does not file a tax return (and as a result, the government estimates income and issues a proposed assessment of tax) then the taxpayer may not claim itemized deductions until a return has been filed. (See *Jahn v. Commissioner, supra*; *Maxwell v. United States* (N.D. Ga. 1999) 80 F.Supp.2d 1352, 1354; see also IRC, § 63(e)(1)-(2).)

Appellant contends that he did not have a 2014 filing requirement because his gambling losses reduced his California income below the 2014 threshold filing requirement. Appellant also questions why FTB is still pursuing this tax matter, as appellant received an FTB letter dated January 2, 2018, which stated that based on the information appellant provided, FTB “will take no further action at this time.” In addition, appellant asserts that he is in debt and is living at poverty level. Based on the foregoing, appellant requests that proposed assessment of tax be abated.

In turn, FTB contends that appellant had a 2014 filing requirement because appellant had to include gambling income in his gross income. FTB also contends that the letter dated January 2, 2018, a copy of which appellant has provided on appeal, appears to have been altered, and in any event, does not establish that appellant did not have a 2014 filing requirement. As for appellant’s assertion that he is in debt and is living at poverty level, FTB asserts that appellant can seek to enter into an offer in compromise and/or a payment plan after the proposed assessment becomes final.

FTB’s use of income information from the EDD and third parties to estimate appellant’s taxable income, when appellant failed to file a 2014 California return, is a reasonable and rational method of estimating taxable income (see *Appeals of Walter R. Bailey* (92-SBE-016) 1992 WL 44503; *Appeals of R. and Sonja J. Tonsberg* (85-SBE-034) 1985 WL 15821) and thus, the burden of proof shifted to appellant to show error in FTB’s proposed assessment. (*Ibid.*)

For the 2014 tax year, a single individual under age 65 years of age, with no dependents, has a California filing requirement if he or she has a gross income of \$16,047 or an AGI of \$12,838. (See R&TC section 18501; FTB Personal Income Tax Booklet 2014.) Based on the information received by FTB, appellant received gross income of \$66,804.60 in the 2014 tax year and therefore was required to file a 2014 California return. In other words, appellant’s gross income triggered the filing requirement irrespective of the gambling loss deductions.

Further, as for the claimed gambling loss deductions, appellant must file a return and elect to itemize deductions to claim gaming losses. If qualified as a deduction, the losses would then reduce his gross income and potentially reduce appellant’s tax liability for the year. Here, while some of the documentation provided on appeal might have supported some of the claimed

gambling loss deductions, appellant must file a return to claim such deduction amounts.² (See *Jahn v. Commissioner, supra*; *Brunner v. Commissioner, supra*; see also IRC, § 63(e)(1)-(2).)

As for the letter dated January 2, 2018 wherein FTB states, in part, that based on the information appellant provided, FTB “will take no further action at this time,” we find that the letter does not establish that appellant did not have a 2014 filing requirement or that FTB is somehow estopped from asserting such. We note that the letter specifically stated that FTB would take “no further action at this time” but did not foreclose future action. Further, we note that the doctrine of equitable estoppel is not applicable because, among other reasons, appellant has not demonstrated that he detrimentally relied upon the representation set forth in the letter.³

Finally, as for appellant’s assertion that he is in debt and is living at poverty level, we note that we have no jurisdiction to abate tax based on an ability to pay. Appellant can seek to enter into an offer in compromise and/or a payment plan with FTB after the proposed assessment becomes final. Any decision in that regard is in FTB’s discretion.

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 burden is on the taxpayer to prove that reasonable cause prevented the taxpayer from timely filing the return. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *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.) Ignorance of a filing requirement or a misunderstanding of the law generally does not excuse a late filing. (*Appeal of Diebold, Inc.*

² Generally, nonbusiness gambling losses must be claimed as itemized deductions on a Schedule A.

³ The four elements of equitable estoppel are: (1) the government agency must be shown to have been aware of the actual facts; (2) the government agency must be shown to have made an incorrect or inaccurate representation to the relying party and intended that its incorrect or inaccurate representation would be acted upon by the relying party or have acted in such a way that the relying party had a right to believe that the representation was so intended; (3) the relying party must be shown to have been ignorant of the actual facts; and (4) the relying party must be shown to have detrimentally relied upon the representations or conduct of the government agency. (*Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720.) Where one of these elements is missing, there can be no estoppel. (*Hersch v. Citizens Savings & Loan Assn.* (1983) 146 Cal.App.3d 1002, 1011.)

(83-SBE-002) 1983 WL 15389.) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Aaron and Eloise Magidow, supra.*)

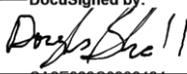
As indicated above, appellant was required to file a tax return for the 2014 tax year, but did not do so. Accordingly, the failure-to-file penalty was properly imposed and can only be abated if appellant establishes reasonable cause for his failure to timely file a return. Here, appellant has not provided any evidence to support a finding of reasonable cause for his failure to file a 2014 return, beyond his stated but mistaken belief he was not required to file—and we find no such evidence in the appeal record.

HOLDINGS

1. Appellant has not demonstrated error with the proposed assessment of tax.
2. Appellant has not shown reasonable cause for the late filing of his return.

DISPOSITION

FTB’s action is sustained.

DocuSigned by:

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 Douglas Bramhall
 Administrative Law Judge

We concur:

DocuSigned by:

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 Nguyen Dang
 Administrative Law Judge

DocuSigned by:

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 Linda C. Cheng
 Administrative Law Judge