

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

MITCHELL TSAI) OTA Case No. 19014255
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)**OPINION**

Representing the Parties:

For Appellant:

Mitchell Tsai

For Respondent:

Carolyn S. Kuduk, Tax Counsel III

A. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Mitchell Tsai (appellant) appeals an action by the respondent Franchise Tax Board (FTB) proposing \$23,873.00 of additional tax, a late-filing penalty of \$5,968.25, plus applicable interest, for the 2015 tax year.

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

ISSUES

1. Whether appellant has established error in FTB's proposed assessment of tax.
2. Whether appellant has established reasonable cause for failing to timely file a 2015 return.

FACTUAL FINDINGS

1. Appellant did not file a timely 2015 California income tax return. FTB received information that for the 2015 tax year, American Express Bank issued to appellant an Internal Revenue Service (IRS) Form 1099-Interest reporting interest income of \$276, and various casinos issued to appellant IRS Forms W-2 G reporting total gambling winnings of \$285,602. As this amount of income is sufficient to require the filing of a

- return,¹ FTB sent appellant a Request for Tax Return dated October 10, 2017, requiring that he file a 2015 return, explain why he was not required to file a return, or mail a copy of his return if he had already filed a return.
2. FTB received appellant's response on November 14, 2017. Appellant explained that his income only consisted of interest and dividends of \$508 and that he financially supported himself with his savings.
 3. FTB issued to appellant a Notice of Proposed Assessment (NPA) dated August 27, 2018, which lists an estimated income of \$285,878,² a standard deduction of \$4,044, and taxable income of \$281,834. The NPA proposed a total tax liability of \$23,873.00 and imposed a late-filing penalty of \$5,968.25, plus interest, as noted above.
 4. Appellant protested the NPA, and in an attached letter dated October 25, 2018, asserted that he suffered a net gambling loss and therefore he did not meet the filing threshold. Appellant did not attach documentation to support his position.
 5. FTB issued a Notice of Action on January 11, 2019, affirming the NPA.
 6. This timely appeal followed. On appeal, appellant provides business records and pro forma copies of his 2015 California 540 return and 2015 Federal IRS 1040 return with his reply brief submitted on April 23, 2019. On his California return, appellant reported a federal AGI of \$1,028, claimed a standard deduction of \$4,044, and computed zero California tax income and tax due. On his federal return, however, appellant claimed itemized deductions of \$6,300 but did not include a federal Schedule A reporting such deductions.

DISCUSSION

Issue 1 – Whether appellant has demonstrated error in FTB's proposed assessment of tax.

Every individual subject to the Personal Income Tax Law must 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," if certain filing thresholds are exceeded.

(R&TC, § 18501(a)(1)-(4).) R&TC section 19087, subdivision (a), provides that, if any taxpayer

¹ For the 2015 tax year, a single individual under age 65 with no dependents realizing a California gross income of \$16,256 or a California adjusted gross income (AGI) of \$13,005 was required to file a California income tax return.

² Interest income of \$276 + gambling income of \$285,602.

fails to file a return, FTB at any time “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 the FTB makes a proposed assessment of additional tax based on an estimate of income, FTB’s initial burden is to show why its proposed assessment is reasonable and rational. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.) A proposed assessment based on unreported income is presumed correct when the taxing agency introduces a minimal factual foundation to support the assessment. (*In re Olshan* (9th Cir. 2004) 356 F.3d 1078, 1084, quoting *Palmer v. Internal Revenue Service* (9th Cir. 1997) 116 F.3d 1309, 1312; see also *Appeals of Bailey* (92-SBE-001) 1992 WL 44503.)

Here, FTB’s estimation of appellant’s income based on information reflected on an IRS Form 1099-Interest and numerous IRS Forms W-2 G that show appellant received total income of \$285,878 is both reasonable and rational and supports FTB’s determination that appellant had a filing requirement for the 2015 tax year. (See *Todd v. McColgan, supra*, 89 Cal.App.2d at p. 514.)

Once FTB has met its initial burden, the burden shifts to the taxpayer to prove the proposed assessment is wrong. (*Todd v. McColgan, supra*, 89 Cal.App.2d at p. 514; *Appeal of Myers, supra*.) Unsupported assertions are insufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) In the absence of credible, competent, and relevant evidence showing error in FTB’s determinations, the proposed assessment must be upheld. (*Appeal of Seltzer* (80-SBE-154) 1980 WL 5068.) A taxpayer’s failure to produce evidence that is within his control gives rise to a presumption that such evidence is unfavorable to his case. (*Appeal of Cookston* (83-SBE-048) 1983 WL 15434.)

Generally, gambling losses are allowable as an itemized deduction, but only to the extent of gains from such transactions. (Int.Rev. Code, § 165(d);³ see also Treas. Reg. § 1.165-10.) The taxpayer bears the burden of proving the gambling losses sustained during the tax year. (*Mack v. Commissioner* (6th Cir. 1970) 429 F.2d 182, affg. T.C. Memo-1969-26.)

Appellant does not deny receiving the \$285,878 income at issue or that it was properly included in his California AGI. Rather, he contends that his gambling losses exceed his winnings and therefore, he does not owe taxes for 2015. However, appellant has not provided

³ R&TC section 17201, subdivision (a), incorporates by reference IRC section 165, except as otherwise provided.

evidence of his gambling losses, such as a personal log of daily winnings and losses, win/loss statements, or bank records. (See generally Rev. Proc. 77-29.) Appellant only provides one document, consisting of five pages, which he claims is a business record from January 1, 2015. However, this document contains no persuasive evidence to substantiate any losses. For example, one listing states “3:09 am Triple 230.17 FP 110 233.37 -25.13 (84.87 Nu) -> Maybe used \$150 (\$275 w FP).” Appellant does not explain and it is not discernable to us from the record that this entry substantiates he is entitled to alleged gambling losses.

Appellant has also failed to provide verifiable documentation to supplement any information provided in the business record. In addition, his pro forma California return shows that he is claiming a standard deduction when gambling losses are allowed only as an itemized deduction. Accordingly, appellant has failed to show error in FTB’s proposed assessment of tax.

Issue 2 – Whether appellant has established reasonable cause for failing to timely file a 2015 return.

California imposes a penalty for failing to file a return on or before the due date, unless the taxpayer shows that the failure is due to reasonable cause and not due to willful neglect. (R&TC, § 19131(a).) The late-filing penalty is calculated at 5 percent of the tax for each month or a fraction thereof that the return is late, with a maximum penalty of 25 percent of the tax. (*Ibid.*) To establish reasonable cause, “the taxpayer must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that such cause existed as would prompt an ordinary intelligent and prudent business[person] to have so acted under similar circumstances.” (*Appeal of Tons* (79-SBE-027) 1979 WL 4068.)

When FTB imposes a penalty, the law presumes that the penalty was imposed correctly. (*Appeal of Myers, supra.*) The burden is on the taxpayer to establish reasonable cause for the failure to timely file. (*Appeal of Bieneman* (82-SBE-148) 1982 WL 11825.) To overcome the presumption of correctness attached to the penalty, the taxpayer must provide credible and competent evidence supporting a claim of reasonable cause; otherwise the penalty cannot be abated. (*Appeal of Walshe* (75-SBE-073) 1975 WL 3557.)

Here, FTB did not receive appellant’s 2015 return until April 23, 2019, when he attached it to his reply brief, which is more than three years after the filing due date of April 15, 2016. Therefore, the late-filing penalty applies unless appellant can show that he had reasonable cause for filing the 2015 return late.

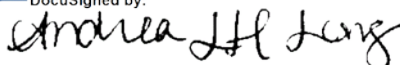
Appellant has not provided any explanation that would demonstrate reasonable cause for failing to timely file a 2015 return. As discussed above, appellant has failed to substantiate his assertions that he did not have a filing requirement because he did not meet the filing threshold for 2015. Accordingly, appellant has not satisfied his burden of proving that his failure to timely file a return was due to reasonable cause and not willful neglect.

HOLDINGS

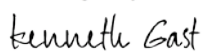
1. Appellant has not demonstrated error in FTB's proposed assessment of tax.
2. Appellant has not established reasonable cause for failing to timely file a 2015 return.

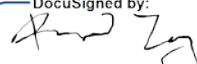
DISPOSITION

FTB's actions are sustained.

DocuSigned by:

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Andrea L.H. Long
Administrative Law Judge

We concur:

DocuSigned by:

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Kenneth Gast
Administrative Law Judge

DocuSigned by:

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Richard Tay
Administrative Law Judge

Date Issued: 1/28/2020