

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

In the Matter of the Appeal of: ) OTA Case No. 18010865  
RICKY T. BURNINGHAM )  
 ) Date Issued: July 18, 2019  
 )  
 )  
 )  
\_\_\_\_\_ )

**OPINION**

Representing the Parties:

For Appellant: Ricky T. Burningham

For Respondent: David Kowalczyk, Tax Counsel  
Natasha Page, Tax Counsel IV

For the Office of Tax Appeals: Andrew Jacobson, Tax Counsel III

A. ROSAS, Administrative Law Judge: Under Revenue and Taxation Code (R&TC) section 19045, appellant Ricky T. Burningham (Burningham) appeals respondent Franchise Tax Board's (FTB) action proposing an assessment of \$1,071.00 in additional tax, a late-filing penalty of \$267.75, and a filing enforcement fee of \$81.00,<sup>1</sup> plus interest, for the 2013 tax year.

Office of Tax Appeals (OTA) Administrative Law Judges Tommy Leung, Jeffrey G. Angeja, and Alberto T. Rosas held an oral hearing for this matter in Sacramento, California, on April 30, 2019. At the conclusion of the hearing, the record was closed and this matter was submitted for decision.

**ISSUES**

1. Did Burningham demonstrate error in FTB's proposed assessment?
2. Did Burningham establish that his failure to timely file a return was due to reasonable cause and not due to willful neglect?

---

<sup>1</sup> In its opening brief, FTB stated that it will remove the filing enforcement fee.

FACTUAL FINDINGS

1. Burningham did not file a California income tax return for 2013. FTB received information showing that Burningham earned sufficient income to prompt a return-filing requirement. FTB then initiated a filing enforcement action by issuing a Demand for Tax Return on February 11, 2015, requiring Burningham to respond by March 18, 2015, either by filing a 2013 return, providing a copy of a previously filed 2013 return, or explaining why he did not need to file a 2013 return.
2. Burningham timely responded to the Demand for Tax Return; his response included 67 pages of exhibits and a purported criminal complaint against FTB. Subsequently, FTB determined that Burningham had failed to respond in the manner prescribed.
3. FTB issued a Notice of Proposed Assessment (NPA), which estimated that in 2013 Burningham received income of \$60,302.<sup>2</sup> FTB based its estimated income on wages of \$53,466 reported by Redwood Electric Group, Inc. (Redwood), as well as wages of \$6,836 reported by Sprig Electric Co. Inc. (Sprig). Based on these amounts, FTB proposed an additional tax of \$1,071.00 and imposed a late-filing penalty of \$267.75, a demand penalty of \$675.50, and a filing enforcement fee of \$81.00, plus applicable interest.
4. Burningham timely protested the NPA. In his protest, Burningham asserted that his wages did not constitute “income” and that he did not owe any income taxes to California. Burningham asserted that his wages were exempt from gross income under Internal Revenue Code (IRC) section 83(a) as property transferred in connection with the performance of services.
5. FTB issued to Burningham a Frivolous Submission Penalty Notice dated March 10, 2017, stating that Burningham’s protest of the 2013 proposed assessment was based on a frivolous position. The Frivolous Submission Penalty Notice also stated that FTB imposed a frivolous submission penalty of \$5,000 pursuant to R&TC section 19179.
6. On March 22, 2017, FTB issued a Notice of Action (NOA) that removed the demand penalty of \$675.50, but otherwise affirmed the NPA.

---

<sup>2</sup> For the 2013 tax year, a single individual under age 65 with no dependents realizing a California gross income of \$17,693 or a California adjusted gross income of \$14,154 was required to file a California return, while a single individual age 65 or older with no dependents realizing a California gross income of \$23,593 or a California adjusted gross income of \$20,054 was required to file a California return.

7. Burningham timely filed the instant appeal.
8. In a letter dated July 13, 2018, OTA requested that Burningham state whether he had reasonable cause for his failure to file a timely 2013 return and to provide evidence in support of his contentions. Burningham filed a supplemental brief repeating his earlier arguments related to his interpretation of Internal Revenue Code (IRC) section 83.
9. In OTA's July 13, 2018 letter, OTA also requested that FTB provide evidence showing on what basis it had computed estimated income of \$60,302. In response, FTB provided a copy of Burningham's 2013 federal wage and income transcript, which showed that Burningham had received wages of \$53,466 reported by Redwood on a Form W-2 and wages of \$6,836 reported by Sprig on a separate Form W-2.

### DISCUSSION

#### Issue 1 - Did Burningham demonstrate error in FTB's proposed assessment?

Every individual subject to the California Personal Income Tax Law is required 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, § 18501.) Relevant California law defines "gross income" by referring to and incorporating IRC section 61, which provides that unless otherwise provided "gross income means all income from whatever source derived," including compensation for services. (R&TC, § 17071.) Courts consistently hold that wages and compensation for services are gross income within the meaning of IRC section 61. (*United States v. Koliboski* (7th Cir. 1984) 732 F.2d 1328, 1330, fn. 1; *United States v. Romero* (9th Cir. 1981) 640 F.2d 1014, 1016.)

If a taxpayer 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." (R&TC, § 19087(a), emphasis added.) If FTB proposes a tax assessment based on an estimate of income, FTB's initial burden is to show that its proposed assessment is reasonable and rational. (*Appeal of Michael E. Myers* (2001-SBE-001) 2001 WL 37126924.) A proposed assessment based on unreported income is presumed to be 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 Walter R. Bailey* (92-SBE-001) 1992 WL 44503.) 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 R. and Sonja J. Tonsberg* (85-SBE-034) 1985 WL 15812.) “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.)

Once FTB has met its initial burden by linking the taxpayer with a California income-producing activity, the taxpayer has the burden of proving that the assessment is arbitrary or erroneous. (*Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932, 935; *Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514.) Unsupported assertions are not sufficient to satisfy the taxpayer’s burden of proof. (*Appeal of Aaron and Eloise Magidow* (82-SBE-274) 1982 WL 11930.)

It is undisputed that Burningham failed to file a 2013 return. To estimate Burningham’s 2013 taxable income, FTB used information from Burningham’s 2013 Forms W-2, as reflected in Burningham’s 2013 federal wage and income transcript. This transcript indicated that Burningham received total wages of over \$60,000 from Redwood and Sprig. Based on this information, FTB determined that Burningham was required to file a 2013 return. FTB’s use of income information on Burningham’s Forms W-2 to estimate Burningham’s California taxable income is both reasonable and rational. (See *Appeals of Walter R. Bailey, supra*, 1992 WL 44503; *Appeals of R. and Sonja J. Tonsberg, supra*, 1985 WL 15812.)

Burningham does not deny receiving the Redwood and Sprig wages. Instead, Burningham contends that his income is excludible from gross income under IRC section 83(a).<sup>3</sup> But IRC section 83(a) is inapplicable. The NPA calculated Burningham’s estimated income based on wages of \$60,302 earned in California. (See IRC, § 61(a)(1).)

Courts consistently find that the argument Burningham makes concerning IRC section 83(a) is a frivolous, tax-protestor argument. (*Talmage v. Commissioner*, T.C. Memo. 1996- 114, *affd.* (4th Cir. 1996) 101 F.3d 695; *Gammon v. Commissioner*, T.C. Memo. 1996- 4; *Santangelo v. Commissioner*, T.C. Memo. 1995-468.) With regard to another taxpayer who

---

<sup>3</sup> IRC section 83(a) states that when property is transferred in connection with the performance of services by the taxpayer, the excess of the fair market value of the property less the amount paid for the property shall be included in the gross income of the person who performed such services in the first tax year in which the rights of the person with the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture. Burningham argues that his income corresponds to his “labor,” whose fair market value should be subtracted from his cost basis for the property under IRC section 1012.

similarly argued that his “labor” was property that needed to be subtracted from his cost basis under IRC section 1012, the Tax Court stated that “[p]etitioner’s argument fails for the same reason that other protesters’ arguments fail; the worker’s cost for his services—and thus his basis—is zero, not their fair market value.” (*Talmage v. Commissioner, supra*, T.C. Memo. 1996-114.)

Neither Burningham’s testimony at the oral hearing nor the exhibits admitted as evidence rebut FTB’s determination. Instead, he relies on arguments that the courts describe as baseless and frivolous. Therefore, because Burningham provided no evidence to show error in FTB’s estimate of his taxable income, we sustain FTB’s proposed assessment.

Issue 2 – Did Burningham establish that his failure to timely file a return for the 2013 tax year was due to reasonable cause and not due to willful neglect?

FTB shall impose a late-filing penalty when a taxpayer fails to timely file a return, unless it is shown that the late filing is due to reasonable cause and not due to willful neglect. (R&TC, § 19131.)

A taxpayer has the burden of establishing reasonable cause. (*Todd v. McColgan, supra*, 89 Cal.App.2d at p. 514; *Appeal of M.B. and G.M. Scott* (82-SBE-249) 1982 WL 11906.) As a general matter, for a taxpayer to establish that a failure to act was due to reasonable cause, the taxpayer must show that the failure 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 Stephen C. Bieneman* (82-SBE-148) 1982 WL 11825; *Appeal of Howard G. and Mary Tons* (79-SBE-027) 1979 WL 4068.) Ignorance of the law does not excuse filing of a late return. (*Appeal of Diebold, Inc.* (83-SBE-002) 1983 WL 15389; *Appeal of J. Morris and Leila G. Forbes* (67-SBE-042) 1967 WL 1384.)

As previously discussed, Burningham never filed a 2013 return. He does not dispute the computation of the late-filing penalty. Instead, he contends that he did not file a 2013 return because he believed that he did not have a filing obligation. However, ignorance of the law does not excuse the failure to file a timely return. (*Appeal of Diebold, Inc., supra*; *Appeal of J. Morris and Leila G. Forbes, supra*, 1967 WL 1384.) In OTA’s July 13, 2018 letter, OTA offered Burningham another opportunity to raise reasonable cause arguments and to provide documentation relating to his failure to file a 2013 return. And as part of the oral hearing, he had

yet another opportunity to raise reasonable cause arguments and to provide exhibits relating to his failure to file a 2013 return.

However, in both his supplemental brief and his oral hearing, Burningham continued to raise non-persuasive arguments without providing any evidence indicating that his failure to timely file his 2013 return 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.


Therefore, we find that Burningham failed to establish that his failure to timely file a 2013 return was due to reasonable cause.

### HOLDINGS

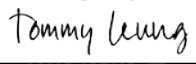
1. Burningham failed to demonstrate error in FTB's proposed assessment.
2. Burningham failed to establish that his failure to timely file a tax return for the 2013 tax year was due to reasonable cause and not due to willful neglect.

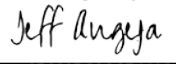
### DISPOSITION

We modify FTB's action, per FTB's concession, to allow for the removal of the filing enforcement fee of \$81. In all other respects, we sustain FTB's action.<sup>4</sup>

DocuSigned by:  
  
2281E8D466014D1...  
Alberto T. Rosas  
Administrative Law Judge

We concur:

DocuSigned by:  
  
0C90542BE88D4E7...  
Tommy Leung  
Administrative Law Judge

DocuSigned by:  
  
0D390BC3CCB14A9...  
Jeffrey G. Angeja  
Administrative Law Judge

---

<sup>4</sup> OTA has the statutory authority to impose a penalty of up to \$5,000 if it finds that an appeal before it has been instituted or maintained primarily for delay or that a taxpayer's position in the appeal is frivolous or groundless. (R&TC, § 19714; see also Cal. Code Regs., tit. 18, § 30217(a).) Although we do not impose that penalty in this proceeding, Burningham's positions and conduct in this appeal suggest that such a penalty may be warranted in the future should he file another appeal with OTA raising the same or similar issues.