

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

In the Matter of the Appeal of:  
**R. BRISCOE III**

) OTA Case No. 19034431  
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**OPINION**

Representing the Parties:

For Appellant:

R. Briscoe III

For Respondent:

Gi Nam, Tax Counsel

For Office of Tax Appeals:

Carissa Eclarin, Graduate Student Assistant

J. JOHNSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, appellant R. Briscoe III appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$2,617, a late filing penalty of \$654.25, and applicable interest for the 2016 tax year.

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

**ISSUES**

1. Whether appellant has demonstrated error in the proposed assessment for the 2016 tax year.
2. Whether appellant has established reasonable cause for the failure to file a timely return.

**FACTUAL FINDINGS**

1. Appellant did not file a 2016 California income tax return.
2. FTB received information from the Employment Development Department (EDD) that appellant received income from three sources totaling \$76,987.

3. FTB sent a Request for Tax Return (Request) to appellant requesting that appellant file a 2016 return, provide evidence that a 2016 return had already been filed, or provide information that he did not have a 2016 filing requirement.
4. Appellant responded to the Request by stating that he was “opting out – no income to report,” without any supporting documents.
5. FTB sent appellant a Notice of Proposed Assessment (NPA) for the 2016 taxable year, proposing to assess a tax liability of \$2,617, a late filing penalty of \$654.25, and interest of \$193.34. FTB provided an Income Reference Sheet that showed a breakdown of the estimated income. FTB estimated that appellant’s income was \$76,987.
6. Appellant filed a protest asking FTB to “Close this Account” and asserting that “this Property is Exempt from Levy/Lien.”
7. FTB issued appellant a Notice of Action, affirming the NPA.
8. This timely appeal followed.

### DISCUSSION

Issue 1 – Whether appellant has demonstrated error in the proposed assessment for the 2016 tax year.

When 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.) An 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; *Appeals of Bailey* (92-SBE-001) 1992 WL 44503.)

It is well settled that once FTB shows that its assessment was reasonable and rational, its determination is presumed to be correct, and a taxpayer has the burden of proving error. (*Todd v. McColgan, supra*, 89 Cal.App.2d at p.514; *Appeal of Myers, supra*.) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) A taxpayer’s failure to produce evidence that is within his or her control gives rise to a presumption that such evidence, if provided, would be unfavorable to the taxpayer’s case. (*Appeal of Cookston* (83-SBE-048) 1983 WL 15434.)

R&TC section 19087 authorizes FTB to “make an estimate of the net income, from any available information” when a taxpayer either fails to file a return or files a false or fraudulent return with intent to evade tax. Here, FTB obtained information from the EDD regarding income appellant received in 2016. FTB’s use of information provided by the EDD as a basis for its estimate of appellant’s income in 2016 is both reasonable and rational. The burden is squarely on appellant to prove that FTB’s estimate of income and the resulting calculation of tax is incorrect. FTB provided appellant an opportunity to demonstrate that FTB’s estimate of appellant’s 2016 income was incorrect. Appellant initially told FTB that he had no income to report for 2016. At appeal, appellant contends that he does not believe he owes as much tax as FTB estimated. Appellant has yet to offer any evidence or explanation as to why the third-party reported income of \$76,987 is incorrect or to show any additional reasons that the proposed assessment should otherwise be reduced or abated.

In the appeal letter, appellant indicates that he would like to be relieved from his tax liabilities through a settlement. However, the Office of Tax Appeals has no authority to settle or compromise an income tax appeal. The Office of Tax Appeals’ jurisdiction is limited to determining the correct amount of appellant’s California personal income tax liability. (*Appeals of Dauberger, et al.* (82-SBE-082) 1982 WL 11759.)<sup>1</sup>

Issue 2 – Whether appellant established reasonable cause for the failure to file a timely return.

California imposes a penalty for the failure to file a valid return on or before the due date, unless it is shown that the failure was due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) The burden is on the taxpayer to establish reasonable cause for the failure to timely file a return. (*Appeal of Scott* (82-SBE-249) 1982 WL 11906.) To establish reasonable cause, the taxpayer “must show that [the] failure to file occurred notwithstanding the exercise of ordinary business care and prudence,” or that cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Bieneman* (82-SBE-148) 1982 WL 11825; *Appeal of Tons* (79-SBE-027) 1979 WL 4068.) To

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<sup>1</sup> We note that FTB offers an Offer in Compromise program pursuant to R&TC section 19433, under which FTB may consider a taxpayer’s ability to pay in determining how much to collect on certain liabilities once they have gone final. (<https://www.ftb.ca.gov/pay/if-you-cant-pay/offer-in-compromise.html>.) Taxpayers also may apply to enter into an installment payment agreement with FTB. (<https://www.ftb.ca.gov/online/eIA/index.asp>.) Additionally, FTB offers a settlement program pursuant to R&TC section 19442, under which FTB can evaluate the costs and risks associated with the appeal. (<https://www.ftb.ca.gov/tax-pros/law/ftb-notice/2007-2.pdf>.) Appellant can contact FTB for further information about these programs.

establish reasonable cause for relief of a penalty, a taxpayer must provide credible and competent evidence supporting a claim of reasonable cause; otherwise, a penalty cannot be abated. (*Appeal of Xie*, 2018-OTA-076P.)

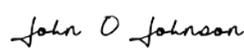
Appellant has failed to produce any evidence of reasonable cause for not filing a return by the due date. Therefore, appellant has failed to establish reasonable cause to abate the late filing penalty.

HOLDINGS

1. Appellant has not demonstrated error in the proposed assessment for the 2016 tax year.
2. Appellant has not established reasonable cause for the failure to file a timely return.

DISPOSITION

FTB’s action is sustained in full.

DocuSigned by:  
  
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 John O. Johnson  
 Administrative Law Judge

We concur:

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

DocuSigned by:  
  
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 Elliot Scott Ewing  
 Administrative Law Judge

Date Issued: 3/19/2020