

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

In the Matter of the Appeal of:  
**B. DONAHUE**

) OTA Case No. 18011785  
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**OPINION**

Representing the Parties:

For Appellant: B. Donahue

For Respondent: Joel Smith, Tax Counsel  
Maria Brosterhous, Tax Counsel IV

D. CHO, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, B. Donahue (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing \$651 of additional tax, a late-filing penalty of \$162.75, and applicable interest, for the 2015 taxable year.

Office of Tax Appeals Administrative Law Judges Daniel K. Cho, Sara A. Hosey, and Richard Tay held an oral hearing for this matter in Cerritos, California, on December 17, 2019. At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

**ISSUES**

1. Whether appellant has demonstrated error in FTB’s proposed assessment for the 2015 taxable year.
2. Whether appellant has demonstrated that her failure to timely file a return for the 2015 taxable year was due to reasonable cause and not willful neglect.

**FACTUAL FINDINGS**

1. Appellant did not file a California personal income tax return for the 2015 taxable year.
2. Through a Filing Enforcement Program, FTB received wage information indicating that

appellant received sufficient income to require the filing of a 2015 tax return. Based on this information, FTB sent appellant a Request for Tax Return dated April 18, 2017, requesting that appellant file a 2015 income tax return, provide FTB with a copy of her return if already filed, or provide an explanation as to why she was not required to file a 2015 income tax return.

3. Appellant responded by stating that she did not earn enough income in the 2015 taxable year to file a return. Appellant further stated that she supported herself through parental contributions of less than \$10,000.
4. FTB did not accept appellant's response as an accurate representation of appellant's income for the 2015 taxable year, and FTB issued a Notice of Proposed Assessment (NPA), which proposed to assess additional tax of \$651, a late-filing penalty of \$162.75, and applicable interest. The NPA also explained that the following employers reported that appellant earned California sourced income totaling \$32,943: Fox Payroll Services, Inc; JRUATL, LLC; Superior Staffing Services, Inc.; Pettigrew Crewing, Inc.; and New C.A.P.S., LLC. The NPA also stated that appellant received taxable income of \$3,800 from Belmonte Productions Inc.
5. Appellant protested the NPA, repeating her argument that she did not earn enough income to have a filing requirement for the 2015 taxable year.
6. FTB requested that appellant explain why she did not have an obligation to file a return, and FTB provided appellant an itemized list of the different income amounts and the respective sources that were reported from the third parties.
7. Appellant did not respond to FTB's communication, and FTB issued a Notice of Action affirming the NPA.
8. This timely appeal followed.
9. After filing her appeal, in September 2017, appellant filed a 2015 California Nonresident or Part-Year Resident Income Tax Return, which reported tax due of \$0. FTB did not accept this return as a valid return.

## DISCUSSION

### Issue 1. Whether appellant has demonstrated error in FTB’s proposed assessment for the 2015 taxable year.

R&TC section 17041 imposes a tax “upon the entire taxable income of every resident of this state” and upon the taxable income of every nonresident or part-year resident that is derived from sources in this state. “Resident” is defined as every individual who is in this state for other than a temporary or transitory purpose. (R&TC, § 17014(a)(1).) 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 that FTB 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. (*Appeals of Bailey* (92-SBE-001) 1976 WL 44503 [estimate based on third-party information reporting]; *Appeals of Tonsberg* (85-SBE-034) 1985 WL 15812 [use of third-party information reporting].) “A taxpayer is not in a good position to criticize [FTB’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 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, “Once the Government 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.*, citations omitted.) Thus, after FTB satisfies its initial burden, FTB’s determination is presumed correct, and the taxpayer has the burden of proving it 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 Magidow* (82-SBE-274) 1982 WL 11930.)

Here, FTB's proposed assessment is based on information received from third parties, which reported that appellant received California source income. Thus, FTB's proposed assessment is both reasonable and rational, and the burden of proof shifts to appellant to show that the proposed assessment is arbitrary or erroneous.

Appellant's primary contention on appeal is that she was not a California resident during the taxable year at issue. In support of this argument, appellant provided some court documents from a civil action that was filed in the Superior Court of California, County of Los Angeles. Appellant testified that the superior court judge in that civil suit made a ruling or a finding that appellant was not a resident of California. As a result, appellant believes that she is not liable for any income taxes to California for the 2015 taxable year.

Although appellant stated that the superior court judge ruled that she was not a California resident, the documentation that appellant provided does not corroborate her testimony. In fact, it appears that appellant may be confusing jurisdiction with California residency. According to a letter from appellant to FTB dated September 14, 2017, appellant stated, "I was in California only approximately 80 days in 2015 and have been found by the Los Angeles Superior Court NOT to have California jurisdiction aka California residency." California jurisdiction and California residency are not synonymous, and a superior court's ruling that it lacks jurisdiction does not mean that appellant is not a California resident. Nonetheless, we note that none of the court documents state that appellant was not a resident of California. For example, one of the court documents states: "The Court reviews previous orders made in this case. The Court finds the Petitioner has not shown any new or different facts, circumstances or law for reconsideration under Code of Civil Procedure Section 1008. Petitioner's motion for reconsideration is denied." The superior court judge did not make a ruling as to appellant's residency in this document or any of the other submitted documents. Thus, we reject appellant's assertion that a superior court judge concluded that appellant was not a resident of California.

As stated above, a California resident is one that is in this state for other than a temporary or transient purpose. (R&TC, § 17014(a)(1).) According to public records from Lexis-Nexis,<sup>1</sup> appellant moved to California in 1999 and has remained in the state since that time. Although

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<sup>1</sup> This document was submitted into the evidentiary record by FTB.

appellant stated that she was only in California for 80 days in the 2015 taxable year, she has not provided any supporting documentation to establish where she resided for the majority of the 2015 taxable year, if it was outside of California. In addition, appellant has not provided any evidence to establish that she was in California for only a temporary or transitory purpose in the 2015 taxable year. Therefore, we find that appellant was a resident of California for the 2015 taxable year, and as a resident of California, all of appellant's income is subject to tax. (See R&TC, § 17041(a).)

Based on the foregoing, appellant has not established error in the proposed assessment.

Issue 2. Whether appellant has demonstrated that her failure to timely file a return for the 2015 taxable year was due to reasonable cause and not willful neglect.

R&TC section 19131 provides that FTB shall impose a late-filing penalty when a taxpayer fails to file a tax return on or before the due date, unless the taxpayer establishes that the late filing was due to reasonable cause and not willful neglect. The penalty is computed at five percent of the tax due, after allowing for timely payments, for every month that the return is late, up to a maximum of 25 percent. (R&TC, § 19131(a), (c).) Appellant does not dispute the calculation of the penalty; therefore, the only issue is whether she has shown reasonable cause for abatement.

A taxpayer has the burden of establishing reasonable cause. (*Appeal of Myers, supra.*) 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 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.) Ignorance of the law does not excuse the failure to file a timely return. (*Appeal of Diebold, Inc.* (83-SBE-002) 1983 WL 15389.) In addition, the United States Supreme Court has found that each taxpayer has a personal, non-delegable obligation to file a tax return by the due date. (*United States v. Boyle* (1985) 469 U.S. 241, 252.)

Appellant did not file a timely California income tax return for the 2015 taxable year. Accordingly, FTB included a late-filing penalty in its proposed assessment. Appellant's only argument regarding reasonable cause was that she was not a California resident and did not have

a filing obligation, which we concluded above that appellant failed to establish. Therefore, we find that appellant has not demonstrated reasonable cause to abate the late-filing penalty.

HOLDINGS

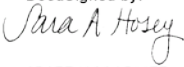
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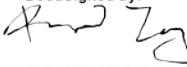
DISPOSITION

FTB’s action is sustained.

DocuSigned by:  
  
 Daniel K. Cho  
 Administrative Law Judge

We concur:

DocuSigned by:  
  
 Sara A. Hosey  
 Administrative Law Judge

DocuSigned by:  
  
 Richard Tay  
 Administrative Law Judge

Date Issued: 3/16/2020