

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

In the Matter of the Appeal of: ) OTA Case No. 18053082  
**AMY L. ULMER** )  
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**OPINION**

Representing the Parties:

For Appellant: Amy L. Ulmer

For Respondent: Gi Nam, Tax Counsel

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

S. HOSEY, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19045(a), Amy L. Ulmer<sup>1</sup> (appellant) appeals the action of respondent Franchise Tax Board (FTB) proposing tax of \$3,943 and a late-filing penalty of \$985.75, plus applicable interest, for the 2015 tax year.

Appellant waived her right to an oral hearing and 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 her 2015 California tax return.
3. Whether appellant has demonstrated that interest should be abated.

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<sup>1</sup> Although appellant and her spouse, Joseph C. Ulmer, filed a joint return for the 2015 tax year, appellant’s spouse did not sign the appeal letter. Accordingly, this appeal is in appellant’s name only.

FACTUAL FINDINGS

1. Appellant, a nonresident of California, did not file a timely 2015 California income tax return.
2. Through its Integrated Non-Filer Compliance Program, FTB obtained computer information from the Internal Revenue Service (IRS), as set forth on a federal Form 1098 from Ocwen Loan Servicing LLC (Ocwen Loan Servicing), that appellant paid mortgage interest for the 2015 tax year in the amount of \$14,140 for a property located in Glendora, California (the Glendora Property).
3. For the 2015 tax year, FTB estimated appellant's income to be \$84,840 by multiplying the amount of reported mortgage interest (\$14,140) by six (i.e.,  $\$14,140 \times 6 = \$84,840$ ).
4. FTB issued a notice dated April 4, 2017, requesting that appellant file a return or explain why no return was required.
5. On May 15, 2017, FTB received appellant's reply, wherein appellant simply stated, "I do not work in California."
6. When appellant did not supply further information, FTB issued a Notice of Proposed Assessment (NPA) based on the information received from Ocwen Loan Servicing. The NPA set forth a proposed tax due of \$3,943 and a late-filing penalty of \$985.75, plus applicable interest. The proposed tax was based upon FTB's estimate of appellant's income as \$84,840 (six times the reported mortgage interest on the Glendale property).
7. Appellant filed a timely protest, asserting that she did not have a California filing requirement for the 2015 tax year, as she was an Arizona resident with no California income for all of 2015. She also asserted that although she did pay mortgage interest for the Glendora Property, it was not a rental property and she did not live there.
8. In response, FTB sent appellant a letter dated January 26, 2018, asserting that appellant was required to file a valid 2015 California return in order for FTB to withdraw its NPA.
9. When appellant neither filed a return nor otherwise responded to FTB's letter dated January 26, 2018, FTB issued a Notice of Action (NOA) affirming the NPA.
10. In response, appellant filed this timely appeal.
11. Along with her appeal letter, appellant submitted a copy of a 2015 California Nonresident or Part-Year Resident Income Tax Return (California nonresident return), reporting that

- appellant and her spouse: (a) were nonresidents of California; (b) were domiciled in Arizona; and (c) maintained an address in “Lake Havasu City,” Arizona.
12. The California nonresident return set forth a California adjusted gross income of \$190, a California taxable income of \$102, and indicated that appellant and her spouse owed \$0 in California taxes. The California nonresident return did not include a California Schedule E worksheet under which appellant and her spouse might have reported California rental income.
  13. Appellant also provided a copy of a 2015 Form W-2, which indicated that appellant maintained an address in Lake Havasu City, Arizona, and was employed by the Lake Havasu Unified School District during the 2015 tax year.
  14. Along with her appeal letter, appellant also attached an unsigned copy of her 2015 joint federal return, which indicated that appellant and her spouse maintained their home address in Lake Havasu, Arizona. The federal return listed three dependent children and reported federal total income of \$54,914 and federal adjusted gross income of \$52,772. A Schedule C attached to the federal return indicated that appellant’s spouse, Joseph C. Ulmer, operated a construction business out of their Lake Havasu, Arizona home address. No Schedule E was attached to appellant’s federal tax return for 2015, and no rental income or loss from the Glendale property was reported on that return.
  15. Subsequently, FTB contacted a Mr. Jones and a Ms. Felibinger (tenants of the Glendora property) who claimed a renter’s credit for the Glendora Property. The tenants provided FTB with a copy of an executed two-year rental agreement (commencing July 1, 2014 and terminating June 30, 2016) between them and appellant and her spouse. The rental agreement was signed by appellant and her spouse in June 2014. The rental agreement indicated that the Glendora Property was leased for a monthly rental of \$1,700.
  16. The rental agreement for the Glendora property continued in effect throughout the 2015 tax year. A letter dated October 1, 2016, indicates that appellants would be raising the rent due from the tenants of the Glendora property from \$1,700 to \$2,000 per month, starting on January 1, 2017.
  17. On May 22, 2019, the Office of Tax Appeals (OTA) issued a letter asking appellant to explain and provide evidence of any expenses incurred with respect to the Glendora rental property in 2015 and to clarify the mortgage interest paid was for the Glendora

rental property. OTA also asked FTB to explain whether the proposed adjustment should reflect total income from the rental property of \$20,400 (i.e., \$1,700 monthly rental income x 12 months) and whether appellant had a filing requirement. FTB responded, stating that the proposed assessment should not be adjusted until appellant shows that the assessment is erroneous and that appellant met the filing requirement thresholds. Appellant failed to respond.

### 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 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 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:

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 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 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.) A taxpayer’s failure to produce evidence that is within his/her control gives rise to a presumption that such evidence is unfavorable to his/her case. (*Appeal of Cookston* (83-SBE-048) 1983 WL 15434.)

Appellant contends that for the 2015 tax year she was an Arizona resident and had no California income. Therefore, appellant requests that the proposed tax assessment be abated.

FTB has not asserted that appellant and her spouse were residents or part-year residents of California for the 2015 tax year. Nevertheless, FTB asserts that appellant's California late-filed nonresident return is inaccurate because: (1) it does not report the California source rental income from the Glendora Property; and (2) appellant and her spouse may have had other California source income. FTB asserts that it does not have the burden of "producing all of appellant's unreported California source income." Based on the foregoing, FTB contends that the proposed tax assessment should be sustained.

As indicated above, FTB estimated appellant and her spouse's California income to be \$84,840 by multiplying the amount of reported mortgage interest (\$14,140) for the Glendora Property by six (i.e.,  $\$14,140 \times 6 = \$84,840$ ). FTB's use of reported mortgage interest payments to estimate a taxpayer's income might provide a rational basis for determining appellant and her spouse's total income in a situation where a taxpayer has failed to file a return. (See R&TC, § 19087.) Here, however, appellant filed a timely federal return for the year at issue, and that return reports a considerable amount of gross income (albeit approximately \$20,000 less than the amount of FTB's estimate). FTB's utter rejection of the amount reported as income on appellant's timely filed federal return in favor of its six-times-mortgage-interest-paid formula seems arbitrary given the facts of this case. Furthermore, there is no reason to believe that, as determined in the Notice of Action, all of appellant's income was California source income, since it is undisputed that they resided in Arizona during the year at issue. The only evidence of a source of California income for appellant is her ownership of the Glendora property, and we know the amount of gross rental income she received from that property during 2015: \$20,400 (i.e., \$1,700 monthly rental income x 12 months). We also know that she paid \$14,140 of interest expense related to that property, leaving a net amount of California source income of \$6,260.<sup>2</sup>

FTB does not claim that appellant and her spouse were full- or part-year California residents or were working in California during the 2015 tax year—and we find no evidence in the appeal record suggesting that they were. Accordingly, FTB's proposed assessment of tax must be based on appellant and her spouse's California source income for the 2015 tax year of \$6,260, and that appellant's total income for purposes of computing her California tax on this

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<sup>2</sup> Although appellant may have had additional deductible expenses related to the Glendora property, she failed to produce evidence of any such expenses in response to our offer to consider such evidence.

income is the amount reported on her federal return, plus the \$6,260 of net rental income from the Glendora property that was omitted from her federal return.

Issue 2: Whether appellant has shown reasonable cause for the late filing of her 2015 California return.

California imposes a penalty for the 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 late-filing penalty is computed at five percent of the tax due, after allowing for timely payments, for every month elapsing from the due date of the return (without regard to any extension) to the filing date, up to a maximum of 25 percent. (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, supra; Appeal of 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 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. (83-SBE-002) 1983 WL 15389.*) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Magidow, supra.*)

R&TC section 18501 requires every individual to “make a return to the Franchise Tax Board, stating specifically the items of the individual’s gross income from *all sources* and the deductions and credits allowable” if the individual has gross income or adjusted gross income in excess of specified amounts, indexed annually for inflation. (Emphasis supplied.) R&TC section 17041 imposes a tax on the entire taxable income of every resident and nonresident individual at specified rates, indexed annually for inflation.

Appellant and her spouse filed a 2015 federal return, listing three dependent children and a gross income of \$54,914. As we determined above, appellant and her spouse received California source income (rents) totaling \$20,400 for the 2015 tax year. FTB Publication 1031 (2015) states that nonresidents must file a California return if they have any income from California sources and their gross income (from all sources) is more than \$52,172 for the 2015 tax year. Accordingly, appellant and her spouse were required to file a 2015 California

nonresident return. (See R&TC, §§ 18501 & 17041; 2015 CA Form 540NR, p. 3; 2015 FTB Publication 1031, p. 2.)

Appellant and her spouse's 2015 California nonresident return was due on April 15, 2016, but the return was not received by FTB until April 26, 2018. Here, appellant has not provided any evidence (or argument) to support a finding of reasonable cause for the late-filing of the 2015 California nonresident return—and we find no such evidence in the appeal record.

Issue 3: Whether appellant has demonstrated that interest should be abated.

Imposition of interest is mandatory; it is not a penalty, but is compensation for appellant's use of money after it should have been paid to the state. (*Appeal of Yamachi* (77-SBE-095) 1977 WL 3905.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Jaegle* (76-SBE-070) 1976 WL 4086.)

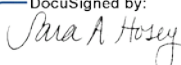
To obtain relief from interest, appellant must qualify under one of three statutes: R&TC sections 19104, 19112 or 21012. However, appellant has not alleged that she qualifies under any of these provisions. Thus, we find no basis for abatement of interest.

HOLDINGS

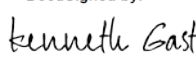
1. The proposed assessment of tax is modified to reflect that appellant and her spouse had California source income for the 2015 tax year consisting solely of net rental income of \$6,260 and that their total from all sources during 2015 is the amount reported on their 2015 federal return (taking into account any applicable federal-state differences) plus the unreported net rental income from the Glendora property of \$6,260.
2. Appellant has not shown reasonable cause for the late filing of her 2015 California return.
3. Appellant has not demonstrated that interest should be abated.

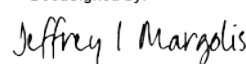
DISPOSITION

FTB’s proposed assessment is modified in accordance with the holdings above.

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**Sara A. Hosey**  
 Administrative Law Judge

We concur:

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**Kenneth Gast**  
 Administrative Law Judge

DocuSigned by:  
  
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**Jeffrey I. Margolis**  
 Administrative Law Judge

Date Issued: 1/17/2020