

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 19034483
S. REDWARD)
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OPINION

Representing the Parties:

For Appellant: Levin Harison, Tax Appeals Assistance Program (TAAP)¹
For Respondent: Mira Coutinho, Tax Counsel
For Office of Tax Appeals: Tom Hudson, Tax Counsel III

H. LE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, S. Redward (appellant) appeals an action by Franchise Tax Board (respondent) proposing an assessment of tax of \$609 and a late-filing penalty of \$152.25, plus applicable interest, for the 2016 tax year.

Appellant waived the right to an oral hearing; therefore, we decide the matter based on the written record.

ISSUES

1. Whether appellant has proven error in respondent’s proposed assessment.
2. Whether appellant is liable for the late-filing penalty.

¹ Appellant filed his opening brief and first reply brief. Linda Nelte of TAAP filed appellant’s second reply brief, Rachel Geagea of TAAP filed appellant’s supplemental brief, Linda Nelte filed appellant’s additional brief, and Marissa Lebert filed appellant’s second additional brief.

FACTUAL FINDINGS

1. Appellant suffered an arm injury on January 31, 2016, had his arm in a cast for seven weeks, and underwent numerous physical therapy sessions from May 2016 through August 2016. Appellant also did not operate a business and had no rental income in 2016.
2. Appellant did not file a California income tax return for the 2016 tax year.
3. Respondent received information on Internal Revenue Service (IRS) Form 1098, indicating that appellant paid \$5,903 in mortgage interest on a California residence in 2016. On this basis, respondent issued a Request for Tax Return.
4. After several correspondences between appellant and respondent, respondent issued a Notice of Proposed Assessment (NPA) that estimated appellant's total income to be six times the mortgage interest paid of \$5,903, or \$35,418. Based on this income, and after a deduction and credit, the NPA proposed tax liability of \$609 and a late-filing penalty of \$152.25, plus applicable interest.
5. Appellant protested the NPA, which respondent denied by issuing a Notice of Action. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has proven error in respondent's proposed assessment.

Every individual subject to the Personal Income Tax Law must make and file a return with respondent "stating specifically the items of the individual's gross income from all sources and the deductions and credits allowable," so long as the gross income exceeds certain filing thresholds. (R&TC, § 18501(a)(1)-(4).) For the 2016 tax year, the filing threshold for an individual under 65 with a single filing status with no dependents was gross income of more than \$16,596. (R&TC, § 18501(d); see also California 2016 Personal Income Tax Booklet, https://www.ftb.ca.gov/forms/2016/16_540bk.pdf.) R&TC section 19087(a) provides that if any taxpayer fails to file a return, respondent 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 respondent makes a proposed assessment of additional tax based on an estimate of income, respondent's initial burden is to show why its proposed assessment is

reasonable and rational. (*Appeal of Bindley*, 2019-OTA-179P.) A proposed assessment based on unreported income is presumed correct when the taxing agency introduces a minimal factual foundation to support the assessment. (*Ibid.*)

Here, respondent received information reported on IRS Form 1098, indicating that appellant paid \$5,903 in mortgage interest on a California residence in 2016. Based on this information, respondent estimated appellant's California income to be \$35,418 by multiplying the reported mortgage interest of \$5,903 by six (i.e., $\$5,903 \times 6 = \$35,418$). This 6:1 ratio of income to mortgage interest paid is based on respondent's study of tax returns filed by California residents. The study works on the premise that if a nonfiler had enough income to make mortgage payments, it infers that the taxpayer may have received sufficient income to have a filing requirement. On appeal, respondent also obtained information from a 2019 LexisNexis report that showed appellant maintained two businesses, Falcon Electric and Auto Redward USA. Respondent further noted that another taxpayer claimed a renter's credit while residing at appellant's address in 2016, which implied appellant might have received rental income. Based on these facts, we conclude that respondent met its initial burden of establishing that its proposed assessment is reasonable and rational.

Once respondent has met this initial burden, the burden then shifts to the taxpayer to prove the proposed assessment is wrong. (*Appeal of Bindley, supra.*) The burden of proof requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) A preponderance of evidence means that the taxpayer must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Appeal of Gillespie*, 2018-OTA-052P.) In the absence of credible, competent, and relevant evidence showing error in respondent's determination, the proposed assessment must be upheld. (*Appeal of Bindley, supra.*)

Here, appellant argues that he did not exceed the 2016 income filing threshold because of an injury, lack of business income, and no receipt of rental income.

As to his injury, appellant submitted patient charts and ledgers from his physical therapist that show appellant suffered a "left distal radial fracture" on January 31, 2016, had his arm in a cast for seven weeks, and underwent numerous physical therapy sessions from May 2016 through August 2016. Appellant also submitted images of himself and

the cast on his left arm dated February 2016. Appellant further submitted an affidavit describing his injury and inability to work in 2016. Appellant's lack of earned income is also corroborated by his 2016 bank statements, deposit slips and check images for his noncash deposits, and a list explaining his noncash deposits.² These bank statements and related documents provide no indication that appellant earned income in 2016. Appellant noted that he paid for his mortgage using loans from relatives and an inheritance from his mother, and he supported these statements with his affidavit and affidavits from four of his relatives. One relative stated she delivered money to appellant between 2013-2018 from overseas and corroborated her affidavit with passport documentation showing her travels to the United States across various years. Accordingly, we believe the sum of this evidence is sufficient to rebut, by the preponderance of the evidence, respondent's estimate of income based on its mortgage interest study.³

Appellant also adequately rebutted respondent's allegation that he operated the two businesses, Falcon Electric and Auto Redward USA, in 2016. Appellant submitted proof that he was issued a license for Falcon Electric in 2018 (after the tax year at issue) and stated in his affidavit that the Auto Redward USA business had not operated since 2010. This statement is consistent with respondent's LexisNexis report, which shows the 2008 business filing date, long before the 2016 tax year at issue. In addition, we note that the LexisNexis report was generated in 2019 and provides no indication that the two businesses were active in 2016. As to the rental income, appellant submitted the above-mentioned bank account documents and stated in his affidavit that he did not collect rent from his former girlfriend who lived with him for part of 2016. In addition, it does not appear that evidence to disprove an item claimed on this other taxpayer's return would be within appellant's control. Thus, we find that appellant has shown by the preponderance

² Appellant also submitted a declaration from P. P., a third-party individual, stating that \$5,500 of the noncash deposits were repayment of a personal loan.

³ We note that after appellant submitted numerous documents, including patient charts and ledgers, a list explaining his noncash deposits, and a declaration from P. P., respondent declined the opportunity to address these documents in a reply brief and did not mail or deliver to appellant written questions for the declarant or affiant or a request for documentation relating to the declarant or affiant statements as allowed under California Code of Regulations, title 18, section 30214(b).

of the evidence that he did not operate any businesses in 2016 and did not have rental income.

Accordingly, we find that appellant has proven by the preponderance of the evidence that he did not have gross income exceeding the 2016 filing threshold; thus, respondent’s proposed assessment is erroneous.

Issue 2: Whether appellant is liable for the late-filing penalty.

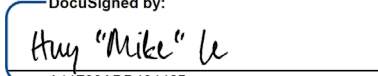
Since we determined that appellant was not required to file a California return for that year, appellant is not liable for the late-filing penalty.

HOLDINGS

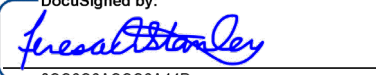
1. Appellant has proven error in respondent’s proposed assessment.
2. Appellant is not liable for the late-filing penalty.

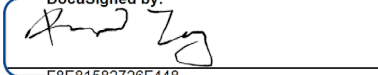
DISPOSITION

We reverse respondent’s action in full.

DocuSigned by:

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 Huy "Mike" Le
 Administrative Law Judge

We concur:

DocuSigned by:

 0CC6C6ACC6A44D...
 Teresa A. Stanley
 Administrative Law Judge

DocuSigned by:

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 Richard Tay
 Administrative Law Judge

Date Issued: 8/12/2021