OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 21027196
K. WILLIAMS	)
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	)
	)
	)

OPINION

Representing the Parties:

For Appellant: K. Williams, Appellant

For Respondent: Ashita Mohandas, Graduate Student Asst.

A. ROSAS, Administrative Law Judge: Under Revenue and Taxation Code (R&TC) section 19045, appellant K. Williams appeals respondent Franchise Tax Board's action proposing an assessment of $1,389 in tax and a late-filing penalty of $347.25, plus interest, for tax year 2017. Appellant waived the right to an oral hearing, and therefore we decide this matter based on the written record.

ISSUES

1. Whether respondent established that the proposed assessment based on estimated income was reasonable and rational, and, if so, whether appellant established that the proposed assessment was erroneous.
2. Whether appellant established reasonable cause to abate the late-filing penalty.

FACTUAL FINDINGS

1. Appellant did not file a California income tax return for tax year 2017.
2. Respondent received wage and income information indicating that appellant earned wages from three separate sources in tax year 2017: Dukes Trucking, LLC (Dukes); Transforce, Inc. (Transforce); and Bickley V Schneider National Fund (Schneider Fund). Based on W-2 information, respondent attributed W-2 wages to appellant from these

three sources in the amounts of $42,376, $5,072, and $171, respectively, for total W-2 wages of $47,619. The information showed that Schneider Fund also paid to appellant $599 in 1099-MISC income.

3. The information received from these three sources included appellant's name, appellant's social security number,[1] and an address in Stockton, California (Stockton Address).[2]

4. Respondent issued a Request for Tax Return (Request) to appellant at the Stockton Address. The Request indicated that respondent's records showed appellant received income from Dukes, Transforce, and Schneider Fund. The Request indicated that appellant may have a California filing requirement for tax year 2017. The Request included a 2017 California Filing Requirement Guidelines Chart, which indicated that the minimum gross income threshold amount for tax year 2017 for a single filer with no dependents and who is under 65 years old was $17,029. Per the Request, appellant was required to respond by filing a 2017 tax return, sending respondent a copy of the tax return if one was already filed, or explaining why appellant was not required to file a 2017 tax return. The Request stated that if appellant did not respond by November 6, 2019, respondent would assess tax, a late-filing penalty, and applicable interest based on available information.

5. Appellant responded timely and requested additional information from respondent.[3] Respondent provided appellant with the specific W-2 wage amounts and 1099-MISC income amount that was reported as being paid to appellant in tax year 2017. Appellant replied and expressed concerns of identity theft.[4]

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[1] Although the first five digits of the social security number have been redacted from the information provided at appeal, we note that the last four digits are a match.

[2] Although appellant raises some questions regarding his address and ability to receive mail, we note that this same Stockton Address was written as the return address on the envelope in which appellant submitted his appeal to the Office of Tax Appeals.

[3] Respondent's exhibits include an undated, unsigned letter that reads in most part as follows: "I do not recognize the corporations, businesses and other entities that you identified, please show valid documentation of your claim because I am confused about what you're referring to in these documents." Appellant's name does not appear anywhere on this letter, in either typed or signature form.

[4] Respondent's exhibits include another undated letter in which appellant's name does not appear anywhere on this letter, in either typed or signature form. The letter reads in part as follows: "I do not recognize any of the corporations, businesses and entities that have been listed and have no record of ever being affiliated or receiving income as you claimed."

6. Appellant did not file a return by the November 6, 2019 response deadline. On July 17, 2020, respondent issued a Notice of Proposed Assessment (NPA) to appellant at the Stockton Address. The NPA indicated that respondent estimated appellant's income to be $48,218 (the sum of the total W-2 wages of $47,619 plus the $599 in 1099-MISC income). Respondent proposed a tax liability of $1,389 and a late-filing penalty of $347.25.
7. At protest, to investigate possible identity theft, respondent gave appellant 30 days to provide a corrected "Earnings Record Statement" from the Social Security Administration (SSA) showing employment history for the impacted tax year, and any additional records that may show identity theft activity.
8. When appellant did not respond within 30 days to the request for materials to investigate identity theft, respondent issued a Notice of Action on December 11, 2020. Appellant filed this timely appeal.

DISCUSSION

Issue 1 - Whether respondent established that the proposed assessment based on estimated income was reasonable and rational, and, if so, whether appellant established that the proposed assessment was erroneous.

Every individual subject to the California Personal Income Tax Law is required to 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 . . . ." (R&TC, § 18501.) If a 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." (R&TC, § 19087(a).) If respondent proposes a tax assessment based on an estimate of income, respondent's initial burden is to show that its proposed assessment was reasonable and rational. (*Appeal of Bindley*, 2019-OTA-179P.)

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. (See *In re Olshan* (9th Cir. 2004) 356 F.3d 1078, 1084, citing *Palmer v. IRS* (9th Cir. 1997) 116 F.3d 1309, 1312; see also *Appeal of Bindley*, *supra*.) When a taxpayer fails to file a valid return and refuses

to cooperate in the ascertainment of his or her income, respondent is given "great latitude" in estimating income. (*Appeals of Tonsberg* (85-SBE-034) 1985 WL 15812.)

Here, respondent introduced a minimal factual foundation to support its assessment: respondent received wage and income information indicating that appellant earned W-2 wages from three separate sources in tax year 2017: $42,376 earned from Dukes, $5,072 earned from Transforce, and $171 earned from Schneider Fund. The information also showed that Schneider Fund paid to appellant $599 in 1099-MISC income.

Respondent's Request indicated that appellant may have a California filing requirement for tax year 2017. The Request included a 2017 California Filing Requirement Guidelines Chart, which indicated that the minimum gross income threshold amount for tax year 2017 for a single filer with no dependents and who is under 65 years old was $17,029. Based on the miscellaneous wage and income information, it seemed that appellant had a filing requirement because the information showed that appellant received income totaling $48,218 (the sum of the total W-2 wages of $47,619 plus the $599 in 1099-MISC income). When appellant did not file a return by the November 6, 2019 response deadline, respondent issued an NPA to appellant at the Stockton Address. The NPA indicted that respondent estimated appellant's income to be $48,218.

Because respondent has great latitude in estimating income, we conclude that respondent's use of the W-2 and 1099-MISC information was reasonable. Accordingly, we conclude that respondent met its initial burden of establishing that its proposed assessment was reasonable and rational.

Once respondent has met its initial burden of showing a reasonable and rational basis for its determination, the taxpayer has the burden of proving that the determination 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.) The applicable standard is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) That is, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of Cal., Inc. v. Construction Laborers Pension Trust for So. Cal.* (1993) 508 U.S. 602, 622.) In other words, the preponderance of the evidence standard means more than 50 percent. (*Union Pacific Railroad Co. v. State Bd. of Equalization* (1991) 231 Cal.App.3d 983,

1000.) Unsupported assertions are insufficient to satisfy the taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

In the appeal letter, appellant does not argue that respondent's determination is arbitrary or erroneous. Instead, appellant indicates that he disagrees with the proposed assessment and that he has "not received valid proof that this proposed assessment is accurate."

It is undisputed that appellant failed to file a 2017 return. As to tax year 2017, the evidence shows that appellant received W-2 wages of $47,619 plus an additional $599 in 1099-MISC income.[5] Appellant has not submitted any evidence to the contrary, nor any evidence showing or tending to show that respondent's determination is arbitrary or erroneous.

At appeal, appellant does not make any specific arguments about respondent's determination being arbitrary or erroneous. At protest, however, appellant expressed concerns of identity theft. We would like to address this claim. In an attempt to investigate the allegations of possible identity theft, respondent gave appellant 30 days to provide a corrected "Earnings Record Statement" from the SSA showing employment history for the impacted tax year, and any additional records that may show identity theft activity. But appellant did not respond to the request for materials to investigate identity theft. Although this argument was raised at protest, not at appeal, it is well established that argument is not evidence. (*People v. Cash* (2002) 28 Cal.4th 703, 734; *Hoffman v. Brandt* (1966) 65 Cal.2d 549, 552; *Mel Williamson, Inc. v. U.S.* (1982) 229 Ct. Cl. 846, 848 [indicating that "[a]rgument is not fact"]; and Evid. Code, § 140 [" 'Evidence' means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."].) To meet their evidentiary burden of proof, taxpayers cannot simply make unsupported allegations of identity theft; rather, taxpayers must meet their burden to establish identity theft.[6]

Here, appellant expressed concerns of identity theft but did not support these concerns with evidence. In addition, appellant did not respond to respondent's request for materials to

[5] Respondent's evidence included evidence related to tax year 2016, but we give no weight to such evidence because we do not consider it to be relevant.

[6] For example, in *Strautins v. Trustwave Holdings, Inc.* (N.D. Ill. 2014) 27 F.Supp.3d 871, 877, the federal district court indicated that it was not enough that certain taxpayers were at greater risk of identity theft; the taxpayers had to meet their burden to establish identity theft. Similarly, in *Szanto v. Szanto* (D. Or. 2020) 2020 WL 7419215, at p. *8, the federal district court stated that the appellant in that case "had the burden of showing some evidence to support his identity theft claim that had been pending for years, that evidence, if it existed, would have been available to him, and he did not provide any evidence to support his claim."

investigate the claimed identity theft. In summary, appellant failed to produce any evidence tending to support his argument about identity theft. (See *Austin v. U.S. Dept. of Ed*. (N.D. Ill. 2010) 2010 WL 1172569, at p. *4 [granting summary judgment in favor of the department based on plaintiff's failure to either "provide credible evidence to support her claims of identity theft . . . [or] . . . comply with the Department's requests for further proof of identity theft"].)

In reviewing the exhibits, we conclude that appellant has not presented any evidence to prove that he was the victim of identity theft. In other words, appellant did not establish by documentation or other evidence that the circumstances he asserts (i.e., circumstances regarding identity theft) are more likely than not to be correct. Accordingly, appellant has failed to prove that respondent's determination is erroneous. To the contrary, the evidence shows that appellant had a filing requirement because he received income totaling $48,218.

Issue 2 - Whether appellant established reasonable cause to abate the late-filing penalty.

Because appellant failed to file a 2017 California tax return by April 17, 2018,[7] or by the automatic six-month extension, respondent imposed a late-filing penalty of $347.25.

Respondent imposes a late-filing penalty when a taxpayer does not timely file a return, unless it is shown that the failure to timely file was due to reasonable cause and not due to willful neglect. (R&TC, § 19131(a).) When respondent imposes this penalty, the law presumes that it is correct. (*Appeal of Xie*, 2018-OTA-076P.)

Appellant does not contest the specific calculation; rather, as indicated in Issue 1, appellant expressed concerns of identity theft. Thus, our focus is on whether appellant's failure to timely file was due to reasonable cause.

A taxpayer has the burden of establishing reasonable cause. (*Appeal of Xie*, *supra*.) The applicable standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) Taxpayers must provide credible and competent evidence to support the claim of reasonable cause; otherwise, the penalty will not be abated. (*Appeal of Xie*, *supra*.)

For Issue 1, we concluded that appellant has not presented any evidence to prove that he was the victim of identity theft, and, accordingly, that appellant has failed to prove that respondent's determination is erroneous. For Issue 2, we reach a similar conclusion: because

[7] For tax year 2017, the deadline to file was April 17, 2018. Because April 15 fell on a Sunday and April 16 was the District of Columbia's Emancipation Day, federal tax returns were due on the next business day. Although Emancipation Day is not a California holiday, respondent extended the filing deadline to April 17.

appellant has not presented any evidence to prove that he was the victim of identity theft, appellant has failed to prove that the failure to file was due to reasonable cause and not due to willful neglect.

HOLDINGS

1. Respondent established that the proposed assessment based on estimated income was reasonable and rational. After the burden of proof shifted, appellant did not establish that the proposed assessment was erroneous.
2. Appellant did not establish reasonable cause to abate the late-filing penalty.

DISPOSITION

We sustain respondent's action in full.

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

We concur:

DocuSigned by:
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Andrew Wong
Administrative Law Judge

DocuSigned by:
Cheryl Akin
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Cheryl L. Akin
Administrative Law Judge

Date Issued: 9/7/2021