OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 21088355
L. ORTEGA	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant: Paulino Olguin, Representative

For Respondent: Eric Yadao, Tax Counsel IV

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

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, L. Ortega (appellant) appeals an action by the Franchise Tax Board (respondent) proposing additional tax of $358.00, a late filing penalty of $135.00, a notice and demand (demand) penalty of $110.75, a filing enforcement cost recovery fee of $97.00, and applicable interest, for the 2018 tax year.

Appellant elected to have this appeal determined pursuant to the procedures of the Small Case Program and without an oral hearing.[1]

ISSUE

Does the evidence show that respondent erroneously issued the proposed assessment to appellant?[2]

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[1] The provisions of the Small Case Program are found at California Code of Regulations, Title 18, section 30209.1, effective March 1, 2021.

[2] We note that respondent identifies several abatement issues pertaining to the penalties and fee that are not raised by appellant. The filing enforcement cost recovery fee is not subject to abatement, and abatement of the penalties require proof that the offending conduct (failing to timely file a return or respond to a Demand for Tax Return) were due to reasonable cause and not due to willful neglect. Here, appellant has not argued for abatement or provided evidence to show he is entitled to abatement. Appellant chose a single argument: that respondent erroneously issued the proposed assessment to appellant. That is the only argument we will address further in this Opinion.

FACTUAL FINDINGS

1. Appellant is a Mexican citizen who has illegally entered the United States on more than one occasion.
2. After illegally entering the United States, appellant was deported to Mexico on or about November 25, 2013.
3. After again entering the United States illegally on or about February 15, 2014, appellant was again deported to Mexico on or about October 30, 2017. The order stated that if appellant entered or attempted to enter the United States illegally during the next 20 years, he would be subject to criminal prosecution and penalties.
4. Appellant worked in California during 2016 and 2017, earning income in the construction trades as an employee of various companies, including six companies for which appellant worked during both years.[3]
5. On April 10, 2018, respondent issued to appellant a Demand for Tax Return (Demand) for the 2016 tax year, which instructed appellant to respond by January 20, 2021, by filing a 2016 tax return, providing a copy of appellant's 2016 tax return if already filed, or explaining why appellant was not required to file a 2016 return. After appellant failed to respond to the Demand, respondent issued a Notice of Proposed Assessment (NPA) to appellant for the 2016 tax year.
6. Employment Development Department (EDD) records indicate a person named L. Ortega[4] worked in California during 2018, earning income in the construction trades from multiple employers, including at least three of the companies for which appellant had worked in both 2016 and 2017.
7. Appellant did not file a 2018 California income tax return.
8. On December 15, 2020, respondent issued to appellant a Demand for the 2018 tax year.
9. Appellant did not respond to the Demand.
10. On March 19, 2021, respondent issued an NPA to appellant for the 2018 tax year. The NPA proposed additional tax of $358.00, a late-filing penalty of $135.00, a demand

[3] This finding is based on EDD wage and withholding reports filed by the employers.

[4] We do not refer to appellant by his full name to protect his privacy. The name on the EDD record is the same as appellant's full name.

penalty of $110.75, a filing enforcement cost recovery fee of $97.00, and applicable interest.

11. Appellant filed a timely protest.

12. On July 9, 2021, respondent issued to appellant a Notice of Action (NOA) affirming the NPA. This timely appeal followed.

DISCUSSION

R&TC section 17041 imposes a tax on the entire taxable income of every resident of this state and on the entire taxable income of every nonresident or part-year resident which is derived from sources in this state. Every individual subject to the Personal Income Tax Law is required to file a return with respondent if their gross income from all sources exceeds certain filing thresholds.[5] (R&TC, § 18501.) When a taxpayer fails to file a return, respondent may base a proposed assessment on an estimate of taxpayer's net income. (R&TC, § 19087(a).)

If respondent makes a proposed assessment based on an estimate of income, its initial burden is to show that the proposed tax assessment is reasonable and rational. (*Appeal of Bindley*, 2019-OTA-179P.) An assessment based on unreported income is presumed correct when the taxing agency introduces a minimal factual foundation to support the assessment. (*Ibid*.) When respondent provides the required minimal proof, the proposed assessment is presumed correct, and the taxpayer has the burden of proving the proposed assessment is wrong. (*Ibid*.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid*.) Proof must be by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(a) & (c).) A preponderance of the evidence means that the taxpayer must prove that it is more likely than not that the facts the taxpayer asserts are true. (*Concrete Pipe and Products of California, Inc., v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.)

Appellant argues that he had no filing requirement for the 2018 tax year because he did not earn income in California or from any California source during 2018. By way of explanation, appellant states that he left the United States to return to Mexico on or about October 30, 2017, pursuant to a deportation order and that he did not return to the United States at any time during 2018. The evidence, in addition to the wage information referred to above, includes the following: (1) a copy of a May 4, 2021 written statement from appellant's wife,

[5] It is undisputed that the income attributed to appellant exceeds the applicable threshold.

which indicates that appellant was deported from the United States on March 19, 2021, and had not returned to the United States since that time; (2) what appears to be an October 9, 2021 proof of residence signed by a municipal employee of the place where appellant claims to have resided during 2018, stating that appellant has resided in that community for four years; (3) an October 30, 2017 Warning to Alien Ordered Removed or Deported (Warning), which states that appellant is prohibited from entering the United States for a period of 20 years and could be subject to criminal prosecution if he should renter (or attempt to renter) the United States illegally; (4) an October 30, 2017 Notice of Intent/Decision to Reinstate Prior Order (Notice of Intent) issued by the Department of Homeland Security, which states that appellant was removed from the United States on November 25, 2013, but illegally reentered the United States on or about February 15, 2014; (5) an October 17, 2017 Certificate of Reinstatement issued by the Department of Homeland Security to certify that the Warning and the Notice of Intent are official records; (6) a copy of appellant's Mexican voting credentials, which includes his name, address (in Jerecuaro, Guanajuato, Mexico), signature and photograph; and (7) what appears to be a statement dated October 13, 2021,[6] from a priest of appellant's Mexican parish, which states that Mr. L. Ortega[7] has attended mass "every eight days" and had not left that parish since November 1, 2017. In addition to this evidence, appellant admits that he returned to the United States illegally after the 2013 deportation and that he was again deported in 2017 and warned that he would go to jail if he again attempted to enter this country illegally. On September 29, 2021, appellant informed respondent that his efforts to immigrate to the United States legally continue, with a then pending appointment in Ciudad Juarez, Mexico, on October 5, 2021, to consider his visa application.

To summarize, appellant has not argued that respondent incorrectly calculated the proposed tax, penalties, or fees. He has not argued for abatement of the penalties of fees. He simply denies that the income was his, in essence arguing that respondent issued the NPA and NOA to the wrong person.

The EDD information is reliable evidence that several California employers reported that appellant received income from them during 2016, 2017, and 2018. The wage and withholding

[6] The document is written in Spanish. Appellant's representative provided what purports to be an English translation. Respondent has not disputed the accuracy of the translation provided by appellant's representative.

[7] The statement uses appellant's full name.

data is maintained by EDD under the employee's name and, in this case, an individual taxpayer identification number (ITIN).[8] It was reasonable for respondent to base its estimate of appellant's 2018 California income on that evidence. Consequently, respondent has met its initial burden of proof, and the presumption that respondent correctly proposed the assessment applies unless appellant proves otherwise. Thus, the sole factual issue is whether respondent incorrectly attributed the income to appellant, and this is an issue on which appellant has the burden of proof.

The evidence, which is described above, does not prove that it is more likely than not that the estimated 2018 income has been erroneously attributed to appellant. There is no clear statement by appellant or other evidence to show that the ITIN referred to in the EDD report is not his. There are no statements or other evidence from the reporting employers to even suggest – much less prove – that appellant was not the person that worked for them during any of the years in question. The statement of appellant's wife refers to a deportation that apparently occurred on March 19, 2021, which would mean that appellant was in the United States for some period of time before that date. A March 19, 2021 deportation is consistent with the attribution of 2018 income to appellant. The proof of residency signed by the municipal employee is of limited evidentiary value to appellant because the document does not indicate upon what facts the statement was based or to what it actually attests. There is no evidence to show how the municipal employee would know where appellant was at any relevant time. The various immigration documents show that appellant has been deported at least twice,[9] which means that appellant has entered the United States illegally at least twice, and at least once after being previously deported. This evidence at least shows that appellant had a history of returning to the United States after a deportation; and therefore the 2017 deportation is not persuasive evidence that he remained in Mexico afterward. The voting credential does not contain any information tending to show that appellant was not in California in 2018. In summary, none of this evidence proves that appellant was not in California for a sufficient period of time in 2018 to earn the income that respondent attributes to him.

[8] Generally, an individual required to furnish a taxpayer identifying number but who is not eligible to obtain a social security number must use an IRS ITIN. (Treas. Reg. § 301.6109-1.) ITINs are issued to individuals who are not citizens or nationals of the U.S. (Treas. Reg. § 301.6109-1(d)(3).)

[9] The wife's statement appears to refer to a third deportation.

The parish priest states two facts in his statement that appear to support appellant's argument: (1) that appellant attended Mass every eight days, and (2) that appellant had not left the community since November 1, 2017. The facts are separately stated. The priest does not clearly state, for example, that appellant has attended Mass at the parish church every eight days since November 1, 2017. The first statement could describe what was happening during the weeks or months preceding the statement date in October 2021. The second statement lacks foundation because it cannot be determined from the statement how the priest would know whether appellant left the parish; and it is inconsistent with other evidence, including the wife's statement that appellant was deported from the United States on March 19, 2021, and the evidence that appellant should have been in Ciudad Juarez for his visa appointment on October 5, 2021, just eight days before the priest signed the statement. This statement, too, is simply not sufficient to rebut the presumption that respondent correctly attributed the income to appellant.

HOLDING

The evidence does not show that respondent erroneously issued the proposed assessment to appellant.

DISPOSITION

FTB's action is sustained.

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Michael F. Geary
Administrative Law Judge

Date Issued: 4/19/2022