

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 21067914
R. SANTOS)
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OPINION

Representing the Parties:

For Appellant: R. Santos
For Respondent: Di T. Nguyen, Graduate Student Assistant

E. S. EWING, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, R. Santos (appellant) appeals an action by the Franchise Tax Board (respondent) proposing additional tax of \$1,499.00, a late filing penalty of \$374.75, and applicable interest, for the 2017 tax year. Appellant waived the right to an oral hearing; therefore, the matter is decided based on the written record.

ISSUES

1. Whether appellant has shown error in respondent’s proposed assessment.
2. Whether the late filing penalty should be abated.¹

FACTUAL FINDINGS

1. Appellant, a California resident, did not file a California tax return for the 2017 tax year.
2. Based on information showing appellant received income from several sources and may have had a filing requirement in California for the 2017 tax year, respondent sent appellant a Request for Tax Return (Request).

¹ Respondent’s brief states that the late payment penalty was imposed; however, a review of the Notice of Proposed Assessment (NPA) and the Notice of Action shows that respondent actually imposed the “delinquent filing” or late filing penalty, not the late payment penalty. Thus, we will analyze whether the late filing penalty should be abated.

3. Appellant did not file a tax return after receiving the Request and respondent issued a Notice of Proposed Assessment (NPA), proposing to assess tax of \$1,499, a late filing penalty of \$374.75, and applicable interest. The NPA was primarily based on information respondent obtained showing that appellant had received wages from the California Academy of Science, The GAP, Inc., and Macys Inc.; interest income from Bank of the West; and other income from Pershing LLC and Share, Ave, Inc., all during the 2017 tax year.
4. Appellant responded to the NPA by completing a Quick Resolution Worksheet (Response). In the Response, appellant protested the NPA and also indicated that appellant was experiencing unemployment, financial hardship, and health issues.
5. Respondent issued a Notice of Action, affirming the NPA.
6. Appellant filed this timely appeal.

DISCUSSION

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

California residents are taxed upon their entire taxable income (regardless of source). (R&TC, § 17041(a).) R&TC section 18501 requires that every individual subject to the Personal Income Tax Law, whose gross income from all sources exceeds certain filing thresholds, 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(a)(1)-(4).) 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.”

If respondent proposes a tax assessment based on an estimate of income, its initial burden is to show why its assessment is reasonable and rational. (*Appeal of Bindley*, 2019-OTA-179P.) The taxing agency need only introduce some minimal factual foundation to support the assessment. (*Ibid.*) When a taxpayer fails to file a valid return, respondent’s use of income information from various sources is a reasonable and rational method of estimating taxable income. (See *Palmer v. Internal Revenue Service* (9th Cir. 1997) 116 F.3d 1309, 1313.) Once respondent has met its initial burden, its determination is presumed correct, and the taxpayer has the burden of proving it is wrong. (*Appeal of Bindley, supra.*) In the absence of credible,

competent, and relevant evidence showing error in respondent's determination, the determination must be upheld. (*Ibid.*)

Here, appellant did not file a California income tax return for the 2017 tax year. Respondent received information that appellant received wage and other income during the 2017 tax year that indicated appellant was required to file a California tax return. Respondent cites the specific sources and amounts of the information, and estimated appellant's income and tax based on that information. Respondent's use of this income information is a reasonable and rational method of estimating taxable income, and we therefore find that respondent has met its minimal factual foundation to support the proposed assessment of tax. (See *Palmer v. Internal Revenue Service, supra.*) Since respondent has met its initial burden, its determination is presumed correct, and appellant has the burden of proving it is wrong. (See *Appeal of Bindley, supra.*) Appellant appears to concede the assessment and provides no credible, competent, and relevant evidence showing error in respondent's determination. Therefore, the determination is upheld.

Appellant does not dispute that appellant had a tax filing obligation for the 2017 tax year, nor does appellant dispute the amount of income that respondent asserts appellant received during 2017. Instead, appellant makes reasonable cause type statements in his protest and appeal, citing unemployment, financial difficulties, and several health problems. While we recognize appellant's difficulties, there is simply no reasonable cause exception for us to abate or otherwise reduce *tax* owed by appellant. Moreover, the Office of Tax Appeals lacks authority to make discretionary adjustments to the amount of a tax assessment based on a taxpayer's ability to pay.² (*Appeal of Robinson, 2018-OTA-059P.*) Our function in the appeals process is to determine the correct amount of the taxpayer's California income tax liability. (*Ibid.*) Because we have found that respondent has met its initial burden of proof with respect to the additional tax owed and appellant has not rebutted the presumption thereby created, we do not find error in respondent's action in assessing tax for the 2017 tax year.

Issue 2: Whether the late filing penalty should be abated.

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

² After the Opinion in this appeal becomes final, appellant may wish to contact respondent to determine eligibility for its Offer in Compromise Program or whether an installment payment agreement is appropriate. (See, e.g., <https://www.ftb.ca.gov/pay/payment-plans/index.asp> for information on respondent's installment payment program.)

neglect. (R&TC, § 19131(a).) When respondent imposes this penalty, the law presumes that it is correct. (*Appeal of Xie*, 2018-OTA-076P.) A taxpayer has the burden of establishing reasonable cause. (*Appeal of Scott* (82-SBE-249) 1982 WL 11906.) The applicable standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).)

Here, it is undisputed that appellant did not timely file a return for the 2017 tax year, and that the late filing penalty was properly imposed. However, appellant makes reasonable cause type statements and implies that there is reasonable cause to abate the penalty based on these statements. We have previously held that a taxpayer must provide credible and competent evidence supporting a claim of reasonable cause to overcome this presumption of correctness. (*Appeal of Xie, supra.*) To establish reasonable cause, a taxpayer must show that the failure to file a timely return 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 Auburn Old Town Gallery, LLC*, 2019-OTA-319P.)

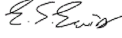
Appellant indicates that he was unable to timely file the return and pay the amounts due, citing unemployment, financial difficulties, and several health problems. Appellant implies that his inability to pay the tax as a result of these hardships was the primary reason he did not timely file a return. However, appellant does not provide us with a basis to find that the failure to file a timely return 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 Auburn Old Town Gallery, LLC, supra.*) Therefore, we cannot find reasonable cause to abate the late filing penalty.

HOLDINGS


1. Appellant has not shown error in respondent’s proposed assessment.
2. The late filing penalty should not be abated.


DISPOSITION

Respondent’s actions are sustained.

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 Elliott Scott Ewing
 Administrative Law Judge

We concur:

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 Cheryl L. Akin
 Administrative Law Judge

DocuSigned by:

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 Sheriene Anne Ridenour
 Administrative Law Judge

Date Issued: 4/27/2022