

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
R. EISENBERG

) OTA Case No. 20096674
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OPINION

Representing the Parties:

For Appellant:

R. Eisenberg

For Respondent:

Phillip C. Kleam, Tax Counsel III

For Office of Tax Appeals:

David Kowalczyk, Tax Counsel

S. HOSEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, R. Eisenberg (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$11,336 and a late filing penalty of \$2,834, plus applicable interest, for the 2017 tax year.

Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUES

1. Whether appellant has established error in FTB’s proposed assessment for the 2017 tax year.
2. Whether appellant has established reasonable cause to abate the late filing penalty for the 2017 tax year.

FACTUAL FINDINGSAppellant's Income for the 2017 Tax Year

1. California College of the Arts reported on Form W-2 that appellant received \$21,475 of wages during the 2017 tax year.¹
2. Ariel Appreciation Fund Investor Class (CAAPX) reported on Form 1099-B that appellant received \$399,998 from the sale or redemption of securities and had a basis of \$154,663 in the securities.² CAAPX reported that appellant acquired some of these shares on September 7, 2016, and November 17, 2016.³
3. CAAPX reported on Form 1099-DIV that appellant received \$689 of capital gains and \$93 of dividends.
4. Parnassus Fund reported on Form 1099-DIV that appellant received \$11,844 of capital gains and \$1,956 of ordinary dividends.
5. Fixed Income Fund reported on Form 1099-DIV that appellant received \$423 of ordinary dividends.
6. Cooperative Centers FCU reported on Form 1099-DIV that appellant received \$72 of interest.
7. Wescom Central CU reported on Form 1099-DIV that appellant received \$36 of interest.
8. Appellant did not file a 2017 tax return by the due date of the 2017 tax year return.

¹ Appellant's federal Wage and Income Transcript shows that appellant received a total of \$281,923 of taxable income for the 2017 tax year, which includes the \$21,475 as reported on appellant's Form W-2 received from California College of the Arts.

² The market symbol for the Ariel Appreciation Fund Investor Class is CAAPX.

³ Appellant argues that she inherited the shares in CAAPX on September 7, 2016, which is the date her father passed away. Appellant's federal Wage and Income Transcript shows that she inherited only a few of these shares on September 7, 2016. Appellant received net proceeds of \$52,565 and \$76,131 for the shares acquired on September 7, 2016. Appellant also received net proceeds of \$23,868 for shares acquired on November 17, 2016. CAAPX did not report when appellant acquired the remaining shares.

FTB's Filing Enforcement Action and Appeal

9. On April 23, 2019, FTB issued appellant a Request for Tax Return (Request) for the 2017 tax year because FTB did not have a record of appellant filing a tax return and FTB had information showing she earned sufficient income from CAAPX, California College of the Arts and the Elfun Income Fund to prompt a 2017 filing requirement.⁴
10. On December 2, 2019, FTB issued a Notice of Proposed Assessment (NPA) because FTB did not receive appellant's 2017 tax return or information showing that appellant did not have a filing requirement by the deadline provided in the Request. FTB proposed to assess additional tax of \$11,336 and a late filing penalty of \$2,834, plus interest. FTB estimated appellant's income as \$169,642 based on third-party information showing she received \$147,435 of income from the sale of securities in CAAPX, \$782 of dividend income from the Elfun Income Fund,⁵ and \$21,425 of wages from the California College of the Arts.
11. On February 3, 2020, appellant timely protested the NPA.
12. On April 7, 2020, FTB requested additional information from appellant, but appellant did not provide this information.⁶
13. On August 10, 2020, FTB issued a Notice of Action affirming the NPA.
14. Thereafter, appellant filed a timely appeal.
15. On September 14, 2020, appellant submitted a 2017 California tax return reporting \$400,000 in proceeds from the sale of CAAPX, a cost basis of \$409,846, and a capital loss of \$9,846.⁷
16. On February 24, 2021, FTB requested that appellant substantiate her claimed basis in CAAPX, but appellant did not respond.

⁴ FTB has not provided any income information from the Elfun Income Fund. However, appellant received approximately \$112,281 more taxable income than what FTB proposed to assess, according to appellant's federal Wage and Income Transcript. It is not clear why FTB did not include the other sources of income in the NPA, but as this is in appellant's favor, it will not be considered further.

⁵ Appellant's federal Wage and Income Transcript does not show a Form 1099-DIV issued by Elfun Income Group.

⁶ FTB did not provide the April 7, 2020 letter.

⁷ As of September 17, 2021, appellant has not filed a 2017 federal tax return.

DISCUSSION

Issue 1: Whether appellant has established error in FTB's proposed assessment for the 2017 tax year.

If a taxpayer fails to file a return, then FTB, 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).) FTB may estimate income when a taxpayer fails to file a return or provide the information necessary to ascertain their tax liability. (*Appeal of Bindley*, 2019-OTA-179P.) If FTB proposes a tax assessment based on an estimate of income, then FTB's initial burden is to show that its proposed assessment is reasonable and rational. (*Ibid.*) An assessment based on unreported income is presumed correct when the taxing agency introduces a minimal factual foundation to support the assessment. (*Ibid.*) Once FTB has met its initial burden, FTB's proposed assessment is presumed correct, and the taxpayer has the burden of proving that the assessment is incorrect. (*Ibid.*) FTB's determination must be upheld in the absence of credible, competent, and relevant evidence showing error in its determination. (*Ibid.*)

Here, FTB estimated appellant's income to be \$169,642 based on third-party income information when appellant did not file a 2017 tax return. Appellant's federal Wage and Income Transcript for tax year 2017 shows that appellant received approximately \$281,923 of taxable income. Every individual who has gross income or adjusted gross income that exceeds the minimum income thresholds must file a tax return. (R&TC, § 18501(a)-(c).)⁸ For the 2017 tax year, the minimum gross income threshold for a single filer with no dependents and under the age of 65 was more than \$17,209 and the adjusted gross income threshold for a similar taxpayer was more than \$13,623. FTB introduced reliable evidence into the record to show appellant received sufficient gross income to trigger a filing requirement. As appellant did not file a return, FTB used the IRS information to estimate appellant's California-derived net income and timely issued the NPA. The Office of Tax Appeals finds that FTB has introduced a minimal factual foundation supporting its proposed assessment and shown why it is reasonable and rational. Accordingly, FTB has met its initial burden of proof and appellant has the burden of proving FTB's proposed assessment is incorrect.

⁸ FTB annually recomputes the filing threshold amounts to account for, among other things, inflation. (R&TC, § 18501(d).)

Appellant argues that FTB's proposed assessment is not correct because FTB did not consider that appellant received a step-up in basis when she inherited the shares of CAAPX from her father, who passed away on September 7, 2016. (R&TC, § 18031; Internal Revenue Code, §§ 1011(a), 1014(a)(1).) Appellant provided a tax return purporting to show she received \$400,000 from the sale of securities, she had a \$409,846 basis in the securities, and a loss of \$9,846. However, tax returns are not proof of the statements made on the tax return. (*Bruno v. Commissioner*, T.C. Memo. 1990-109.) Appellant has not provided any evidence to support her assertion that she inherited the shares in CAAPX on September 7, 2016, or the fair market value of the inherited shares on September 7, 2016.

Therefore, appellant has not established error in FTB's proposed assessment.

Issue 2: Whether appellant has established reasonable cause to abate the late filing penalty for the 2017 tax year.

California imposes a penalty for failing to file a required return on or before the due date, unless the taxpayer shows that the failure is due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) Tax returns for calendar year taxpayers are due on or before April 15 following the close of the calendar year. (R&TC, § 18566.) FTB automatically grants a six-month extension to file a tax return if the tax return is filed within six months from the original due date. (Cal. Code Regs., tit. 18, § 18567.) The late filing penalty is calculated at five percent of the tax for each month or fraction of each month the return is late (determined without regard to any extension of time for filing), with a maximum penalty of 25 percent of the tax due. (R&TC, § 19131(a).) To establish reasonable cause for the late filing penalty, the taxpayer must show that the failure to file a timely return occurred despite the exercise of ordinary business care and prudence or that such cause existed as would prompt an ordinarily prudent businessperson to have acted under similar circumstances. (*Appeal of Head and Feliciano*, 2020-OTA-127P.)

Here, appellant was required to file a 2017 tax return by April 15, 2018, because appellant earned gross income above the minimum filing threshold. However, appellant did not file a tax return until September 14, 2020. As a result, FTB imposed and calculated the late filing penalty as \$2,834 (\$11,336 x 25 percent) because FTB proposed to assess \$11,336 of tax and the maximum 25 percent penalty applies. Accordingly, FTB properly imposed and

calculated the late filing penalty. Appellant has not explained why she did not timely file a tax return.

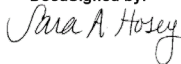
Therefore, appellant has not established reasonable cause to abate the late filing penalty.

HOLDINGS

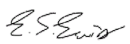
1. Appellant has not established error in FTB’s proposed assessment for the 2017 tax year.
2. Appellant has not established reasonable cause to abate the late filing penalty for the 2017 tax year.


DISPOSITION

FTB’s action is sustained in full.

DocuSigned by:

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 Sara A. Hosey
 Administrative Law Judge

We concur:

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 Elliott Scott Ewing
 Administrative Law Judge

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 Kenneth Gast
 Administrative Law Judge

Date Issued: 6/28/2022