

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: )  
T. MCQUIGGIN ) OTA Case No. 220410081  
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**OPINION**

Representing the Parties:

For Appellant: T. McQuiggin  
For Respondent: Eric R. Brown, Tax Counsel III

A. KLETTER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, T. McQuiggin (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$481.00, a late-filing penalty of \$135.00, a notice and demand penalty (demand penalty) of \$120.25, a filing enforcement fee of \$97.00, and applicable interest, for the 2018 tax year.

Appellant waived the right to an oral hearing; therefore, Office of Tax Appeals (OTA) decides this matter based on the written record.

**ISSUES**

1. Whether appellant has demonstrated error in FTB’s proposed assessment of tax.
2. Whether appellant has shown reasonable cause for the late filing of his 2018 California tax return.
3. Whether appellant has established grounds to abate the demand penalty.
4. Whether appellant has established grounds to abate the filing enforcement fee.

**FACTUAL FINDINGS**

1. Appellant did not file (and based on the record, still has not filed) a California income tax return for the 2018 tax year.

2. FTB received information from Robinson Rancheria Resort Casino, a third-party source, reporting appellant's collective gambling winnings of \$33,989<sup>1</sup> and miscellaneous income of \$600. FTB also received information reporting appellant's social security benefit income, and information reporting distribution income on federal Form 1099-R, Distributions from Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc. (Form 1099-R income).<sup>2</sup> FTB determined that appellant earned sufficient income for the 2018 tax year to prompt a filing requirement, but had not filed a return.
3. On July 13, 2021, FTB issued appellant a Demand for Tax Return (Demand), which required that, by August 18, 2021, he file or provide evidence that he already filed his 2018 California tax return, or respond with a completed questionnaire form showing that he had no filing requirement for the 2018 tax year. The Demand notified appellant that if he did not timely respond to the Demand in the prescribed manner, FTB would assess a demand penalty, a late-filing penalty, a filing enforcement fee, and interest.
4. When FTB did not receive a response to the Demand, FTB issued appellant a Notice of Proposed Assessment (NPA) for the 2018 tax year. The NPA estimated appellant's income to exceed the 2018 filing threshold based on the third-party income information, and proposed to assess tax, a late-filing penalty, a demand penalty, and a filing enforcement fee, plus applicable interest.
5. Appellant timely protested the NPA.
6. On February 22, 2022, FTB issued a Notice of Action affirming the NPA.
7. This timely appeal followed.
8. As relevant to this appeal, FTB previously issued appellant an NPA for the 2017 tax year following appellant's failure to respond to a Request for Tax Return (Request) for that tax year.

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<sup>1</sup> Per FTB, the Form W-2G gambling winnings total \$33,989. However, FTB's table lists gambling winnings of \$1,281 only once. The IRS Wage and Income Transcript reports gambling winnings of \$1,281 twice, on February 9, 2018, and on March 6, 2018. Thus, total gambling winnings reported to appellant and the IRS on Forms W-2G is \$35,270, which is \$1,281 higher than as proposed by FTB. This Opinion reviews FTB's proposed assessment based on its lower income estimate which includes gambling winnings of \$1,281 only once.

<sup>2</sup> The Form 1099-R income was reported as a taxable distribution of income (distribution code 7).

## DISCUSSION

### Issue 1: Whether appellant has demonstrated error in FTB’s proposed assessment of tax.

R&TC section 18501 requires every individual subject to the Personal Income Tax Law to make and file a return with FTB “stating specifically the items of the individual’s gross income from all sources and the deductions and credits allowable,” if an individual has gross income or adjusted gross income exceeding certain filing thresholds. (R&TC, § 18501(a)(1)-(4).) R&TC section 19087(a) provides that if any taxpayer fails to file a return, 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.” FTB’s initial burden is to show that its proposed assessment is reasonable and rational. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Bindley*, 2019-OTA-179P (*Bindley*).) An assessment based on unreported income is presumed correct when the taxing agency introduces a minimal factual foundation to support the assessment. (*Bindley, supra.*)

Here, FTB determined that third-party information on an IRS Wage and Income Transcript reported gross income which exceeded the filing threshold for the 2018 tax year. OTA finds that FTB’s use of the third-party information to estimate appellant’s income is reasonable and rational. Further, OTA finds, based on a review of the record, that FTB correctly determined that appellant received income in excess of the 2018 California filing thresholds and has a 2018 California filing requirement.

Once FTB has met its initial burden, the proposed assessment of tax is presumed correct and the taxpayer has the burden of proving it to be wrong. (*Todd v. McColgan, supra; Bindley, supra.*) Unsupported assertions are insufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Gorin*, 2020-OTA-018P.) In the absence of credible, competent, and relevant evidence showing error in FTB’s determination, the determination must be upheld. (*Bindley, supra.*) A taxpayer’s failure to produce evidence that is within his or her control gives rise to a presumption that such evidence is unfavorable to his or her case. (*Bindley, supra.*)

On appeal, appellant’s sole contention is that FTB improperly assessed taxes based on his nontaxable social security and/or disability income. However, FTB has provided an IRS Wage and Income Transcript which shows gambling winnings of \$33,989<sup>3</sup> and miscellaneous income

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<sup>3</sup> See footnote 1, above.

of \$600. The NPA estimates taxable income at \$34,589, which is the total of these two figures. The IRS Wage and Income Transcript includes income reported on a Social Security benefits form, and Form 1099-R income. These income amounts are not included in the sum of the taxable income estimated on the NPA. Thus, FTB has shown, based on the IRS Wage and Income Transcript, that it only proposed to assess appellant for the gambling income and miscellaneous income. As such, the social security income and the Form 1099-R income are not at issue in this appeal.<sup>4</sup> Appellant provides no evidence to support his assertion that FTB proposed to assess tax based on tax exempt income, that he does not have a 2018 California filing requirement, or that FTB's calculation of the tax liability was otherwise incorrect. In the absence of credible, competent, and relevant evidence showing error in FTB's determination, the determination must be upheld. (*Bindley, supra.*) Accordingly, appellant has not shown error in FTB's proposed assessment of tax.

Issue 2: Whether appellant has shown reasonable cause for the late filing of his 2018 California tax return.

Absent an extension, a taxpayer who files on a calendar year basis is generally required to file their income tax return by April 15 of the following year. (R&TC, § 18566.) R&TC section 19131 requires FTB to impose a late-filing penalty when a taxpayer does not file their return on or before its due date, unless the taxpayer shows that the late filing was due to reasonable cause, and not due to willful neglect. When FTB imposes a late-filing penalty, the law presumes that it is correct, and the burden of proof is on the taxpayer to show that reasonable cause exists to abate the penalty. (*Appeal of Cremel and Koepfel*, 2021-OTA-222P.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Appeal of Gorin*, 2020-OTA-018P.) Appellant raises no argument that the penalty was imposed in error, and OTA finds that FTB correctly imposed the penalty.

The standard of reasonable cause requires the taxpayer to establish that the failure to timely file occurred despite the exercise of ordinary business care and prudence. (*U.S. v. Boyle* (1985) 469 U.S. 241, 246; see also *Appeal of Cremel and Koepfel, supra.*) Even if the taxpayer is unaware of a filing requirement, ignorance of the law is not an excuse for failing to file a

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<sup>4</sup> Although FTB showed that the Form 1099-R income was not included in the proposed assessment, nothing in the record indicates that the Form 1099-R income was disability income or otherwise tax exempt. See footnote 2, above.

timely return. (*Appeal of Cremel and Koepfel, supra.*) The record indicates that appellant has still not filed a 2018 California tax return. Appellant provides no specific argument establishing reasonable cause, and the record does not show any facts and circumstances that warrant a finding of reasonable cause. Thus, FTB properly imposed the late-filing penalty and OTA has no basis to abate it.

Issue 3: Whether appellant has established grounds to abate the demand penalty.

R&TC section 19133 imposes a penalty when a taxpayer fails to file a return or provide information upon FTB's notice and demand to do so, unless it is shown that the failure was due to reasonable cause and not willful neglect. A demand penalty is properly imposed if two criteria are met: (1) the taxpayer fails to respond to a current Demand in the manner prescribed; and (2), FTB has proposed an assessment of tax under the authority of R&TC section 19087(a), after the taxpayer failed to timely respond to a Request or Demand in the manner prescribed, for any taxable year within the four-taxable-year period immediately preceding the taxable year for which the current Demand is issued. (Cal. Code Regs, tit. 18, § 19133(b)(1)-(2).)

The first requirement is met because FTB issued a Demand for the 2018 tax year and did not receive a timely response from appellant. The second requirement is also met because FTB issued an NPA under the authority of R&TC 19087(a) following the taxpayer's failure to timely respond to a prior Request for the 2017 tax year, which is within the four-taxable-year period immediately preceding the 2018 Demand. Appellant provides no specific argument establishing reasonable cause for his failure to timely respond to the Demand. Thus, FTB properly imposed the demand penalty and OTA has no basis to abate it.

Issue 4: Whether appellant has established grounds to abate the filing enforcement fee.

R&TC section 19254(a)(2) provides that if a person fails or refuses to make and file a tax return within 25 days after a formal legal demand to file the tax return is mailed to that person, FTB must impose a filing enforcement fee (currently set at \$97 for individuals).<sup>5</sup> Once properly imposed, the statute provides no grounds upon which the fee may be abated. (R&TC, § 19254; see *Appeal of Jones*, 2021-OTA-144P.)

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<sup>5</sup> FTB annually adjusts the filing enforcement fee to reflect actual costs as reflected in the annual Budget Act.


Here, FTB informed appellant in the 2018 Demand that he may be subject to the filing enforcement fee if he did not file a tax return. Appellant did not file his return within the time period prescribed in the 2018 Demand. Therefore, FTB properly imposed the filing enforcement fee and OTA has no basis to abate it.

HOLDINGS


1. Appellant has not demonstrated error in FTB’s proposed assessment of tax.
2. Appellant has not shown reasonable cause for the late filing of his 2018 California tax return.
3. Appellant has not established grounds to abate the demand penalty.
4. Appellant has not established grounds to abate the filing enforcement fee.

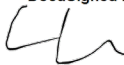
DISPOSITION

FTB’s action is sustained.

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 Asaf Kletter  
 Administrative Law Judge

We concur:

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 Josh Lambert  
 Administrative Law Judge

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 Andrew J. Kwee  
 Administrative Law Judge

Date Issued: 10/27/2022