

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

In the Matter of the Appeal of:  
**L. POLLACK**

) OTA Case Number 22039841  
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**OPINION**

Representing the Parties:

For Appellant: Richard A. Patterson, CPA

For Respondent: Natasha S. Page, Tax Counsel IV

For Office of Tax Appeals: Tom Hudson, Tax Counsel III

S. HOSEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, L. Pollack (appellant) appeals from the action of respondent Franchise Tax Board (FTB) in proposing to assess tax of \$8,919.00, a late-filing penalty of \$2,229.75, and applicable interest for the 2018 tax year.

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

**ISSUES**

1. Whether appellant has shown error in FTB’s proposed assessment.
2. Whether appellant has established reasonable cause to abate the late-filing penalty.

**FACTUAL FINDINGS**

1. Appellant has not filed an income tax return for the 2018 tax year.
2. FTB received information reported on IRS Form 1098 indicating that appellant paid mortgage interest of \$25,342 for a residence in 2018. Based on this information, FTB issued a Request for Tax Return to appellant on May 25, 2021, demanding that appellant file a tax return or show that he had no filing requirement.

3. When appellant failed to respond, FTB issued appellant a Notice of Proposed Assessment (NPA) on July 23, 2021, proposing to assess tax of \$8,919.00, a late-filing penalty of \$2,229.75, plus applicable interest, for the 2018 tax year. The NPA explained that FTB estimated appellant's income to be \$152,052 by multiplying the mortgage interest paid by six (i.e.,  $\$25,342 \times 6 = \$152,052$ ).<sup>1</sup>
4. FTB indicates that appellant protested the NPA.<sup>2</sup> After review, FTB issued a Notice of Action dated January 27, 2022 that affirmed the NPA. This timely appeal followed.
5. On appeal, FTB submits appellant's 2018 Wage and Income Transcript from the IRS, dated April 28, 2022, which shows a net loss of \$11,283 that was reported to the IRS on Schedule K-1 from Ignite Venture Partners LLC. This transcript also shows the mortgage interest of \$25,342 paid by appellant to Newrez LLC dba Shellpoint Mortgage Serv.
6. On appeal, appellant argues that he does not have a filing requirement because he did not earn income in 2018. Appellant asserts that he lived on his savings. Appellant notes that no third parties reported paying him income. Appellant asserts that he does not have access to his bank statements from 2018 because the account has been closed. Appellant claims that FTB should be able to subpoena his bank statements for 2018. Appellant further asserts that, since he did not have a filing requirement, the late-filing penalty should not have been applied.

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<sup>1</sup> On appeal, FTB submits a document entitled, "1098 Mortgage Interest Trends," which summarizes several broad-based FTB studies showing that a six-to-one ratio between income and mortgage interest is reasonable. For example, the 2019 study considered 17,109,053 income tax returns with mortgage interest greater than \$1,999 and less than \$100,000 from 2013 to 2016; the income to mortgage interest ratio in that study was \$14.14 to \$1.00.

<sup>2</sup> The record does not include appellant's protest letter or any documentation concerning the protest.

## DISCUSSION

### Issue 1: Whether appellant has shown error in FTB’s proposed assessment.

R&TC section 18501 requires every individual subject to the Personal Income Tax Law to 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).) For the 2018 tax year, the filing threshold for a single individual under 65 years of age with no dependents was gross income of at least \$17,693 or adjusted gross income of at least \$14,154.

R&TC section 19087(a) provides that if any taxpayer fails to file a return, FTB “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.” When a taxpayer fails to file a valid return and refuses to cooperate in the ascertainment of his or her income, FTB is given “great latitude” in estimating that income. (*Appeals of Bailey* (92-SBE-001) 1992 WL 44503.)

Federal courts have held that the taxing agency need only introduce some evidence linking the taxpayer with income-producing activity. (*Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932, 935; see also *Andrews v. Commissioner*, T.C. Memo. 1998-316 [information including interest payments by the taxpayer and statistics can provide the “minimal factual predicate” for an assessment].) When FTB makes a proposed assessment based on an estimate of income, its initial burden is to show why its proposed assessment is reasonable and rational. (*Appeal of Bindley*, 2019-OTA-179P (*Bindley*)).

Appellant has not filed a 2018 tax return. FTB’s estimate of appellant’s income, based on his mortgage interest payments, is both reasonable and rational. (See *Andrews v. Commissioner, supra*.) This evidence sufficiently links appellant with income-producing activity, and FTB’s initial burden has been satisfied.

When FTB has met its initial burden, the taxpayer has the burden of proving the proposed assessment is incorrect. (*Bindley, supra*.) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Ibid.*) In absence of credible, competent, and relevant evidence showing error in FTB’s determination, the determination must be upheld. (*Ibid.*) Proof must be by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) To meet this evidentiary standard, a party must establish by documentation or other evidence that the

circumstances it asserts are more likely than not to be correct. (*Appeal of Belcher*, 2021-OTA-284P.)

Appellant contends that he did not have sufficient income to be required to file a tax return. However, appellant has not shown that his income in 2018 was below the threshold amount that would have required him to file a tax return. Appellant's assertion that he paid his mortgage with funds from a savings account alone is insufficient to satisfy his burden of proving that he did not have a filing requirement. Appellant has not provided any evidence that he had a savings account in 2018 and he has not shown how the mortgage interest payments were made. He has not provided any evidence to corroborate his assertions, such as witnesses, affidavits, bank statements, canceled checks, household budgets, or financial records of any kind. Appellant's failure to produce such evidence within his or her control gives rise to a presumption that such evidence is unfavorable to his case. (*Bindley, supra.*)

Appellant argues that FTB should be able to subpoena his bank statements for 2018. As discussed above, it is appellant's burden of proof to show error in FTB's proposed assessment. Appellant has shown no evidence that he attempted to retrieve the documents, such as emails to the bank or phone records. Furthermore, OTA has no authority to force FTB to subpoena third parties to support either party's arguments on appeal. Even if appellant has difficulties in obtaining bank records from an account that has been closed, that does not excuse appellant from demonstrating error in the proposed assessment.

Since appellant has not provided any evidence showing that FTB's income estimate was incorrect, there is no basis to overturn the proposed assessment.

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

California imposes a penalty for failing to file a 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(a).) When FTB imposes a late-filing penalty, it is presumed to have been correctly imposed, and the burden of proof is on the taxpayer to show that reasonable cause exists to abate the penalty. (*Appeal of Xie*, 2018-OTA-076P.) To overcome the presumption of correctness, the taxpayer must provide credible and competent evidence supporting a claim of reasonable cause. (*Ibid.*) To establish reasonable cause, the taxpayer must show the failure to timely file a return occurred despite the exercise of ordinary business care and prudence. (See *Appeal of Friedman*, 2018-OTA-077P.)

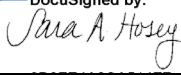
Appellant does not argue, and the record does not establish, reasonable cause for appellant's failure to file a timely tax return. Appellant's position is that he had no filing requirement, so there can be no penalty for the failure to file. Unfortunately, as discussed above, appellant has not provided any evidence showing that he had no income and no filing requirement, so he has not met his burden of proof. Therefore, appellant has not shown that the late-filing penalty should be abated.

#### HOLDINGS

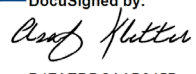
1. Appellant has not shown error in FTB's proposed assessment.
2. Appellant has not established reasonable cause to abate the late-filing penalty.


#### DISPOSITION

FTB's action is sustained.

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Sara A. Hosey  
Administrative Law Judge

We concur:

DocuSigned by:  
  
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Asaf Kletter  
Administrative Law Judge

DocuSigned by:  
  
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Sheriene Anne Ridenour  
Administrative Law Judge

Date Issued: 10/24/2022