

3. FTB sent appellant a Notice of Proposed Assessment (NPA) for the 2017 tax year, which proposed to assess tax of \$820, a late-filing penalty of \$205, plus applicable interest.
4. Appellant submitted a Quick Resolution Worksheet protesting the NPA and stating that she did not have a filing requirement for 2017 because she was injured and did not work.
5. In response to the protest, FTB requested additional information.
6. FTB sent appellant a Notice of Action, which denied appellant's protest because she did not respond to FTB's request for additional information.
7. Appellant timely appealed to the Office of Tax Appeals.
8. On November 16, 2021, FTB sent appellant a request for additional information (e.g., copy of non-taxable income benefits for disability such as SSA-1099 statement of benefits and other information). Appellant did not respond.
9. On March 25, 2022, FTB re-sent the request for supporting documentation. Appellant did not respond.

DISCUSSION

Issue 1: Whether appellant has demonstrated error in FTB's proposed assessment.

R&TC section 18501 requires every individual subject to the Personal Income Tax Law to make and file a return with FTB when their gross income exceeds certain thresholds. (R&TC, § 18501(a)(1)-(4).) If a 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. (R&TC, § 19087(a).) When FTB makes a proposed assessment of tax based on an estimate of income, FTB has the initial burden to show that its 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. (*In re Olshan* (9th Cir. 2004) 356 F.3d 1078, 1084; *Appeal of Bindley*, *supra*.) Federal courts have held that the taxing agency need only introduce some evidence linking the taxpayer with the unreported income. (*Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932, 935.) When a taxpayer fails to file a valid return, FTB's use of information from various sources to estimate a taxpayer's taxable income is a reasonable and rational method of estimating taxable income. (See *Palmer v. Internal Revenue Service*, (9th Cir. 1997) 116 F.3d 1309, 1312.) Once FTB has met its initial burden, the assessment is presumed correct, and the taxpayer has the

burden of proving error in the assessment. (*Todd v. McColgan*, (1949) 89 Cal.App.2d 509, 514; *Appeal of Bindley, supra.*)

Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Chen and Chi*, 2020-OTA-021P.) In the absence of credible, competent, and relevant evidence showing that FTB's determination is incorrect, it must be upheld. (*Ibid.*) A taxpayer's failure to introduce evidence that is within her control gives rise to the presumption that the evidence, if provided, would be unfavorable to the taxpayer's position. (*Appeal of Bindley, supra.*)

In the instant appeal, appellant did not file a California income tax return for the 2017 tax year. FTB based its NPA on the third-party information it received, which showed that appellant made mortgage payments during 2017. Since appellant did not file a return or otherwise respond to FTB's requests for additional information, it was reasonable and rational for FTB to make its proposed assessment based on third-party information. Accordingly, the burden of proof shifts to appellant.

Appellant argues that she did not work in 2017 due to a surgery and her only income was state disability. If appellant had received state disability income during 2017, as claimed, it is likely that she received documentation that could be furnished as support (e.g., SSA-1099). (See *Appeal of Bindley, supra.*) Appellant also has not provided evidence such as a declaration to show that someone other than appellant paid the mortgage payments. No such documentation or other support has been provided by appellant. In conclusion, appellant has not established error in FTB's proposed assessment.

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

R&TC section 19131 imposes a penalty for the failure to file a return on or before the due date, unless it is shown that the late filing is due to reasonable cause and not due to willful neglect. To establish reasonable cause, the taxpayer must show that the failure to file a timely tax 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 GEF Operating, Inc.*, 2020-OTA-057P.) A late-filing penalty imposed by FTB is presumed to be correct, and the burden of proof is on the taxpayer to establish that reasonable cause exists to support an abatement of the penalty. (*Appeal of Xie*, 2018-OTA-076P.)

A taxpayer may reasonably rely on an accountant or attorney for substantive advice on a matter of tax law. (*U.S. v. Boyle* (1985) 469 U.S. 241, 251 (*Boyle*)). In *Boyle*, the court held that reliance upon counsel constitutes reasonable cause when the taxpayer is unfamiliar with the law; the taxpayer makes full disclosure of the relevant facts; and the taxpayer has otherwise exercised ordinary business care and prudence. (*Ibid.*)

With respect to appellant's income, appellant argues that she did not have a filing obligation because she did not earn taxable income during 2017. However, as discussed above, appellant has not provided any evidence to support her argument or refute the third-party information that FTB relied upon. Appellant also asserts that she was told by her tax preparer that she did not need to file a return since she did not work. Appellant, however, has not provided any evidence to support that assertion. (See *Appeal of Bindley, supra*; *Boyle, supra*.) Appellant also has not provided evidence to demonstrate the facts or information that she shared with her tax preparer. Accordingly, appellant has not demonstrated that the late-filing penalty should be abated for reasonable cause.

HOLDINGS

1. Appellant has not established error in FTB’s assessment.
2. Appellant is not entitled to abatement of the late-filing penalty.

DISPOSITION

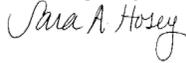
FTB’s action is sustained.

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Josh Aldrich
 Administrative Law Judge

We concur:

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Sara A. Hosey
 Administrative Law Judge

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Asaf Kletter
 Administrative Law Judge

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