

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:)
M. HEPTNER) OTA Case No. 230212582
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OPINION

Representing the Parties:

For Appellant: M. Heptner

For Respondent: Noel Garcia-Rosenblum, Attorney

V. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, M. Heptner (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$16,994, a late-filing penalty of \$4,248.50, and applicable interest for the 2019 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 demonstrated error in FTB’s determination that appellant has a filing requirement and owes tax.
2. Whether appellant has shown reasonable cause to abate the late-filing penalty.

FACTUAL FINDINGS

1. Appellant did not file a California income tax return for the 2019 tax year. As of the date briefing closed for this appeal, based on the record, appellant still has not filed a 2019 return.
2. FTB received information from third parties that appellant received interest income of \$64, dividend income of \$3,689, Schedule K-1 income of \$48,393, miscellaneous income of \$774, and Form 1099-B from Wells Fargo Clearing Service, LLC reporting income of

\$166,393, for a total income of \$219,313. FTB determined that appellant earned sufficient income for the 2019 tax year to prompt a filing requirement but had not filed a California income tax return.¹

3. FTB issued appellant a Request for Tax Return (Request), which requested that, by August 4, 2021, appellant file or provide evidence that he already filed a 2019 California income tax return, or explain why he had no filing requirement for the 2019 tax year.
4. When FTB did not receive a response to the Request, FTB issued appellant a Notice of Proposed Assessment (NPA) for the 2019 tax year. The NPA estimated appellant's income at \$219,313 and proposed to assess tax of \$16,994 and a late-filing penalty of \$4,248.50, plus applicable interest.
5. Appellant timely protested the NPA.
6. On February 1, 2023, FTB issued a Notice of Action affirming the NPA.
7. This timely appeal followed. On appeal, appellant provides a corrected Form 1099-B from Wells Fargo Clearing Services, LLC, reporting total proceeds of \$166,553.65 less total cost basis of \$159,238.33, for capital gains income of \$7,315.32. The corrected Form 1099-B includes reportable tax information from Wells Fargo Clearing Services, LLC, containing descriptions of the stocks sold, quantities sold, dates acquired and sold, proceeds, cost or other basis, and the gain or loss on each stock sale.

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))

¹ For 2019, a single taxpayer under the age of 65 with no dependents is required to file a California income tax return if they have at least California gross income \$18,241 or California adjusted gross income of \$14,593.

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 obtained third-party information that appellant had received gross income which exceeded the filing threshold for the 2019 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 2019 California filing thresholds and had a 2019 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*, 89 Cal.App.2d 509; *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 contends that FTB's assessment does not take into account appellant's cost basis in certain investments. In support of this contention, appellant provides a corrected Form 1099-B from Wells Fargo Clearing Services, LLC. The corrected form states that appellant received total proceeds of \$166,553.65, less a total cost basis of \$159,238.33, resulting in total capital gains income of \$7,315.32. Appellant did not provide any other amended forms for his other sources of income.

The corrected Form 1099-B from Wells Fargo Clearing Services, LLC, is credible, competent, and relevant evidence because it corrects the information upon which FTB based its proposed assessment. The Form 1099-B includes reportable tax information that details the stock sold, the date it was acquired, and appellant's basis in the stock.

FTB contends that appellant must file a 2019 tax return and that, absent specific information contradicting the proposed assessment, it must be upheld. FTB does not dispute the accuracy or authenticity of appellant's corrected Form 1099-B. FTB is correct in that appellant is subject to the California income tax filing requirement because his income exceeds the filing

requirement minimum. However, appellant has presented credible, competent, and relevant evidence contradicting the amount of income estimated by FTB as the basis of its proposed assessment.

When appellant's estimated income is recomputed using the corrected Form 1099-B capital gains income of \$7,315.32, appellant's total income for 2019 is \$60,235.32.² By providing corrected Form 1099-B and supporting documentation from Wells Fargo Clearing Services, LLC, appellant has met his burden of proof with respect to the difference (i.e., \$159,077.70) and the assessment shall be adjusted accordingly. Appellant has established that his income for the 2019 tax year was \$60,235.32.

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

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.³ (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 timely return. (*Appeal of Cremel and Koepfel*, *supra*.) The record indicates that, as of the date briefing closed, appellant has still not filed a 2019 California tax return. Appellant provides no specific argument establishing reasonable cause, and the record contains no facts and

² Interest income of \$64, dividend income of \$3,689, Schedule K-1 income of \$48,393, miscellaneous income of \$774, plus Form 1099-B income of \$7,315.32.

³ In response to COVID-19, FTB postponed the due dates for returns from April 15, 2020, to July 15, 2020. (See FTB Notice 2020-02.)


circumstances that warrant a finding of reasonable cause. Thus, OTA has no basis to abate it. However, the late-filing penalty shall be recomputed on the basis of the reduced 2019 tax assessment.

HOLDINGS


1. Appellant has demonstrated error in FTB’s proposed assessment of tax.
2. Appellant has not shown reasonable cause to abate the late-filing penalty.

DISPOSITION


FTB’s action is modified to recompute the amount of tax due and the late-filing penalty based on appellant’s 2019 reduced income of \$60,235.32, and is otherwise sustained.

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 Veronica I. Long
 Administrative Law Judge

We concur:
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 Ovsep Akopchikyan
 Administrative Law Judge

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 Asaf Kletter
 Administrative Law Judge

Date Issued: 2/12/2024