

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)
P. MCCALLUM) OTA Case No. 230513304
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OPINION

Representing the Parties:

For Appellant: P. McCallum

For Respondent: Tristen Thalhuber, Attorney

For Office of Tax Appeals: Louis Ambrose, Attorney

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, P. McCallum (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$10,973, a late-filing penalty of \$2,743.25, and applicable interest for the 2018 taxable year.¹ Appellant waived the right to an oral hearing, so the Office of Tax Appeals (OTA) decides the matter based on the written record.

ISSUES

1. Has appellant demonstrated error in FTB’s proposed assessment of tax for the 2018 taxable year?
2. Has appellant established reasonable cause for the late filing of his 2018 tax return?

¹ On appeal, FTB concedes that its proposed assessment overstated appellant’s income by incorrectly including a \$44,202 nontaxable contribution to appellant’s employee retirement plan and a \$948 nontaxable distribution from a Roth Individual Retirement Account. Based on those changes, FTB revised the 2018 proposed assessment by reducing the proposed additional tax to \$6,774 and the late-filing penalty to \$1,693.50.

FACTUAL FINDINGS

1. FTB received information indicating that appellant had sufficient income during the 2018 taxable year to require the filing of a tax return for that year and issued a Request for Tax Return. The information includes a Form W-2 showing wages of \$53,921 and a Form 1099-R showing a taxable distribution of \$78,863 from a Thrift Savings Plan retirement fund account.
2. Appellant did not respond, and FTB issued a Notice of Proposed Assessment (NPA) which proposed tax, a late-filing penalty, and interest, totaling \$15,943.74.
3. Following appellant's timely protest of the NPA, FTB issued a Notice of Action affirming the NPA.
4. Appellant then filed this timely appeal.
5. On appeal, FTB concedes that its proposed assessment overstated appellant's income, and therefore FTB revised the 2018 proposed assessment by reducing the proposed additional tax to \$6,774 and the late-filing penalty to \$1,693.50

DISCUSSION

Issue 1: Has appellant demonstrated error in FTB's proposed assessment of tax for the 2018 taxable year?

When FTB makes a proposed assessment based on an estimate of income, FTB's initial burden is to show why its proposed assessment is reasonable and rational. (*Appeal of Bindley*, 2019-OTA-179P.) 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. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing error in FTB's determination, the determination must be upheld. (*Ibid.*)

FTB received information from the IRS indicating that appellant received taxable wages and retirement income for the 2018 taxable year totaling \$132,784, which was sufficient to require appellant to file a California income tax return. On that basis, FTB made an estimate of appellant's 2018 income. Because appellant failed to file a tax return, FTB's use of third-party information to estimate appellant's taxable income is both reasonable and rational. (*Appeal of Bindley, supra.*) OTA finds that it was reasonable and rational for FTB to rely on wage and

retirement income information reported to the IRS, and FTB has now revised its proposed assessment to remove nontaxable amounts. Thus, FTB has met its initial burden of proof for its proposed assessment, and appellant has the burden of proving FTB's proposed assessment is incorrect.

Appellant argues that FTB's proposed assessment is incorrect because tax was already withheld. However, appellant's federal Wage and Income Transcript only reports federal taxes paid to the IRS. Similarly, appellant's forms W-2 and 1099-R, which would report taxes withheld, if any, are not in OTA's record and have not been provided by appellant to substantiate his assertion that California tax was withheld. FTB allowed California withholding of \$2,301 in its computation of proposed additional tax. Appellant has not provided evidence of any additional California tax withholdings, and the record reflects no such evidence supporting appellant's allegation. Hence, appellant has not met his burden of proof to show error in the proposed assessment.

Issue 2: Has appellant established reasonable cause for the late filing of his 2018 tax return?

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.) When FTB imposes a penalty, it is presumed to have been imposed correctly. (*Appeal of Xie*, 2018-OTA-076P.) A taxpayer may rebut this presumption by providing credible and competent evidence supporting abatement of the penalty for reasonable cause. (*Ibid.*) To establish reasonable cause, 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 intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Head and Feliciano*, 2020-OTA-127P.)

FTB has established that appellant received sufficient income for taxable year 2018 to require appellant to file a return. OTA notes that in appellant's protest with FTB, he agreed that he had wage income of \$53,921, which is well above the threshold requiring filing for 2018.² However, appellant has not filed a return and has not provided any explanation or evidence for his failure to do so. Thus, appellant has not shown that the failure to file a return occurred despite the exercise of ordinary business care and prudence.


² For an individual filing with single status and no dependents who was over the age of 65, the gross income threshold requiring the filing of a California tax return was \$23,593 for 2018.

HOLDINGS

1. Appellant has not shown error in FTB’s proposed assessment.
2. Appellant has not shown reasonable cause for the late filing of his 2018 tax return.


DISPOSITION

FTB’s proposed assessment, as modified on appeal, is sustained.


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 Teresa A. Stanley
 Administrative Law Judge

We concur:

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 Suzanne B. Brown
 Administrative Law Judge

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 Amanda Vassigh
 Administrative Law Judge

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