

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)
E. FRESQUEZ) OTA Case No. 221212074
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OPINION

Representing the Parties:

For Appellant: E. Fresquez

For Respondent: Andrea Watkins, Attorney

For Office of Tax Appeals: Neha Garner, Attorney

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, E. Fresquez, Jr. (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing tax of \$7,576, a late filing penalty of \$1,894, and applicable interest for the 2019 tax year.

Appellant waived the right to an oral hearing; therefore, the matter was submitted to the Office of Tax Appeals (OTA) on the written record pursuant to California Code of Regulations, title 18, section 30209(a).

ISSUES

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

FACTUAL FINDINGS

1. As of the date briefing closed, appellant did not file a California income tax return for the 2019 tax year. An IRS Account Transcript indicates that as of January 10, 2023, appellant also had not filed a federal income tax return for the 2019 tax year.
2. Through its Integrated Non-Filer Compliance Program, FTB received a 2019 Form 1098 indicating that appellant paid mortgage interest of \$22,645 to Fidelity Mortgage Lenders (Fidelity) during 2019 on a property located in Newport Beach, California (the Newport property). Fidelity issued the Form 1098 to appellant at a Newport, California, post office

- (P.O.) box address. Based on this information, FTB concluded that appellant may have a 2019 California filing requirement. However, appellant had not filed a return.
3. An IRS Wage and Income Transcript dated January 10, 2023, shows appellant also had outstanding mortgage balances on properties in Colorado and Nevada during the 2019 tax year.
 4. On March 21, 2022, FTB issued appellant a Request for Tax Return (Request) requesting that appellant file a 2019 California return, provide evidence that he already filed a 2019 California return, or complete a questionnaire showing that he had no filing requirement for the 2019 tax year.
 5. On June 10, 2022, FTB issued appellant a Notice of Proposed Assessment (NPA). The NPA stated that FTB had not received appellant's 2019 California return or information establishing that appellant did not have a filing requirement. The NPA estimated appellant's gross income for the 2019 tax year to be \$135,870,¹ and proposed a tax of \$7,576, a late filing penalty of \$1,894, and applicable interest.
 6. Appellant protested the NPA and provided a Quick Resolution Worksheet in which he claimed to be a nonresident of California. However, appellant failed to provide any documentation substantiating that he had no income from California sources. Therefore, on November 9, 2022, FTB issued a Notice of Action affirming its NPA.
 7. This timely appeal followed.
 8. During this appeal, appellant provided documents including the following:
 - a. A copy of a Nevada Driver's license issued to appellant, which lists a Las Vegas, Nevada address.
 - b. Various pieces of mail addressed to appellant, listing a P.O. box address in Nevada.
 - c. Three checks issued by various payers to appellant on May 1, 2019. Two of the checks include the following: the Newport property address, an apartment number, and a notation that the check is for rent for the month of May 2019. The third check includes the following information: a Balboa, California, P.O. Box number, and a notation that the check is for rent due on an apartment.²

¹ Based on analysis of tax returns filed by California residents, FTB estimated appellant's income to be \$135,870, which is equal to six times the amount appellant paid in mortgage interest for the 2019 tax year.

² Each check is for a different rent amount and there is insufficient information to calculate appellant's total rental property income for the 2019 tax year.

9. FTB also provided documentation indicating that the Newport property is a multi-family dwelling. According to the property records, appellant purchased the Newport property on March 12, 2014. The property records also indicate that there were seven residents at the property as of 2023.

DISCUSSION

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

California residents are taxed upon their entire taxable income, regardless of source, while nonresidents are only taxed on income from California sources. (R&TC, §§ 17041(a), (b), & (i), 17951.) Every individual subject to the Personal Income Tax Law, whose gross income from all sources exceeds certain filing thresholds, is required to file a return with FTB specifically stating the items of the individual's gross income from all sources and any allowable deductions and credits. (R&TC, § 18501(a)(1)-(4).)

If a taxpayer fails to file a return, then 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." (R&TC, § 19087(a).) FTB is given "great latitude" in estimating income when taxpayers fail to file a return or provide the information necessary to ascertain their tax liability. (*Appeal of Shanahan*, 2024-OTA-039P.) If FTB proposes a tax assessment based on an estimate of income, then FTB's initial burden is to show that its proposed assessment is reasonable and rational. (*Ibid.*) An assessment based on unreported income is presumed correct when the taxing agency introduces a minimal factual foundation to support the assessment. (*Ibid.*)

Once FTB has met its initial burden, FTB's proposed assessment is presumed correct, and the taxpayer has the burden of proving that the assessment is incorrect. (*Appeal of Bindley*, 2019-OTA-179P.) FTB's determination must be upheld in the absence of credible, competent, and relevant evidence showing error in its determination. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*) The applicable standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18 § 30219(b).) A preponderance of the evidence means a taxpayer must establish by documentation or other evidence that the circumstances the taxpayer asserts are more likely than not to be correct. (*Appeal of Estate of Gillespie*, 2018-OTA-052P.)

Here, FTB estimated appellant's income for the 2019 tax year based on the mortgage interest that appellant paid, which was reported to FTB on a 2019 Form 1098. Specifically,

Fidelity reported that appellant paid mortgage interest of \$22 for the Newport property.³ FTB estimated appellant's California income based on a six-to-one ratio of income to mortgage interest paid based on FTB's study of tax returns filed by California residents. The premise is that a non-filer who can pay mortgage interest payments may have sufficient income to generate a filing requirement. The mortgage interest paid by appellant and reported on the 2019 Form 1098 qualifies as "some evidence linking [appellant] with income-producing activity" and as a minimal factual foundation to support the proposed assessment. (See *Rapp v. Commissioner* (9th Cir. 1997) 774 F.2d 932, 935.)

In 2019, appellant paid mortgage interest of \$22,645 related to the Newport property. Appellant also had outstanding mortgages for real properties located in Nevada and Colorado. Therefore, it is reasonable to infer that appellant received sufficient income to trigger a California filing requirement. OTA finds that FTB's use of third-party information to estimate appellant's income using the six-to-one ratio of income to mortgage interest paid is reasonable and rational. (See *Appeal of Shanahan, supra.*) Accordingly, FTB has met its initial burden by showing that its proposed assessment is reasonable and rational. Therefore, the burden shifts to appellant to show that FTB's assessment is incorrect. (*Appeal of Bindley, supra.*)

On appeal, appellant asserts that FTB's proposed assessment is incorrect. Appellant argues that he is not a California resident and has no tax liability for the 2019 tax year. OTA notes that appellant provided a copy of his active Nevada's driver license and other documents to substantiate his presence in Nevada. However, there is also evidence that appellant received mail in California. For example, Fidelity issued a Form 1098 to appellant at a Newport P.O. Box address.

Regardless, even if appellant was a Nevada resident during the 2019 tax year, a nonresident taxpayer is taxed on income from California sources. (R&TC, § 17951.) Here, the evidence indicates that appellant owns a multi-family dwelling located in California, which currently houses seven tenants. Indeed, appellant provided evidence that he collected California source income in the form of rent income from tenants living in the Newport property during the 2019 tax year. Assuming that appellant received rent every month, he would have income in excess of the filing thresholds, which in 2019 was an adjusted gross income of \$14,594 or gross income of \$18,241. (See R&TC § 18501 (requiring individuals to file a return if their income meets certain thresholds).) Thus, appellants evidence supports FTB's position that he must file a California tax return. Appellant has not provided any evidence that FTB's

³ Fidelity mailed the Form 1098 to appellant at a P.O. Box address in Newport Beach, California, and appellant received this form as he included it to his protest.

calculation of the tax is incorrect. (*Appeal of Bindley, supra.*) Therefore, appellant has not established error in FTB's proposed assessment.

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

A late filing penalty will be imposed when a taxpayer fails to file a tax return on or before its due date, unless the taxpayer establishes that the late filing was due to reasonable cause and was not due to willful neglect. (R&TC, § 19131(a).) When FTB imposes a late filing penalty, the law presumes that the penalty was imposed correctly. (*Appeal of Xie, 2018-OTA-076P.*) To establish reasonable cause to abate the late filing penalty, 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 prudent businessperson to have acted under similar circumstances. (*Appeal of Head and Feliciano, 2020-OTA-127P.*)

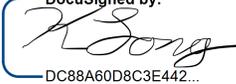
Here, there is no dispute that appellant failed to timely file a California income tax return. Accordingly, FTB properly imposed the late filing penalty. On appeal, appellant has not met his burden of proving that he did not have a filing requirement for 2019. Furthermore, appellant has not explained how he exercised ordinary business care and prudence to timely file a 2019 tax return. Accordingly, OTA finds no basis to relieve the late filing penalty.

HOLDINGS

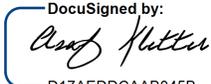
1. Appellant has not established error in FTB’s proposed assessment.
2. Appellant has not established reasonable cause to abate the late filing penalty.

DISPOSITION

FTB’s action is sustained.

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 Keith T. Long
 Administrative Law Judge

We concur:
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 Asaf Kletter
 Administrative Law Judge

Signed by:

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 Veronica I. Long
 Administrative Law Judge

Date Issued: 10/16/2025