

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18114023
JORGE PERIBAN AND CAROLINA)
PERIBAN)
_____)

OPINION

Representing the Parties:

For Appellants: Rebecca Bambarger, EA

For Respondent: Brad J. Coutinho, Tax Counsel III

For Office of Tax Appeals: William J. Stafford, Tax Counsel III

D. BRAMHALL, Administrative Law Judge: This appeal is made pursuant to section 19045 of the Revenue and Taxation Code (R&TC) from the action of Franchise Tax Board (FTB) on appellants’ protest against a proposed assessment in the amount of \$13,562.00 in additional tax and an accuracy-related penalty of \$2,712.40, plus applicable interest, for the 2014 tax year.

Appellants waived their right to an oral hearing and therefore this appeal is being decided on the written record.

ISSUES

1. Whether appellants have demonstrated error with the proposed assessment of additional tax, which was based upon federal adjustments.
2. Whether appellants have shown that the accuracy-related penalty should be abated.

FACTUAL FINDINGS

1. Appellants filed a timely joint 2014 California income tax return (Form 540) on April 15, 2015, reporting a federal adjusted gross income (AGI) of \$11,052, a California taxable income of \$19,997, and a total tax due of \$245.
2. After reporting exemption credits of \$882, appellants reported a tax due of \$0.

3. On March 7, 2016, FTB received information from the Internal Revenue Service (IRS) that it had increased appellants' 2014 federal taxable income by \$217,901.
4. On February 6, 2017, FTB issued a Notice of Proposed Assessment (NPA) that increased appellants' California taxable income by \$188,892 to account for the following amounts, which were based on California conformity to the federal adjustments: medical deduction of \$1,196, real estate taxes of \$5,512, home mortgage interest of \$17,663, standard deduction of -\$7,984, Schedule C other expenses of \$166,697, Schedule C1 car and truck expenses of \$11,340, Schedule C1 depreciation of \$1,248, and one-half self-employment tax of \$6,780.
5. In response, appellant filed a timely protest on February 24, 2017, asserting that FTB should delay its assessment because the IRS had reopened the 2014 tax year for further audit.
6. In a position letter dated June 14, 2017, FTB stated that appellants should contact FTB no later than August 14, 2017, if the IRS had not completed its review of the 2014 tax year. The record contains no follow-up evidence from appellants until January 2018.
7. In a letter dated January 2, 2018, appellants stated that they were appealing the IRS's determination. With their letter, appellants included a copy of IRS Form 4549 dated December 20, 2017, which indicated that the IRS had upheld its assessment of additional tax for the 2014 tax year. Also included was an IRS letter dated February 27, 2017, noting its case was temporarily closed as non-collectible due to an inability to pay at that time.
8. After receiving no further information, FTB affirmed the NPA in a Notice of Action dated October 17, 2018.
9. In response, appellants filed this timely appeal.

DISCUSSION

Issue 1: Whether appellants have demonstrated error with the proposed assessment of additional tax, which was based upon federal adjustments.

A taxpayer must report federal changes to income or deductions to the FTB within six months of the date the federal changes become final. (R&TC, § 18622(a).) The taxpayer must concede the accuracy of the federal changes or prove that those changes, and any California

deficiency assessment based thereon, are erroneous. (R&TC, § 18622(a).) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

Appellants argue that the IRS double counted their income due to transfers of income between accounts. We note, however, that the federal adjustments, which FTB followed, primarily involve the disallowance of Schedule C deductions, not increases to appellants' income from unreported sources. Further, appellants submitted additional documentation to the IRS seeking reconsideration of its initial audit determination regarding these expenses. The IRS response allowed no changes for tax year 2014. Appellants have not provided any evidence demonstrating error in the federal adjustments or in the California assessment based thereon. In fact, we note a copy of appellants' federal transcript provided to FTB by appellant on January 8, 2019, shows that the IRS had not adjusted or reduced its original 2014 assessment.

Appellants continue to request delay in finalizing FTB's assessment. However, their letter to FTB asserting a request for IRS Appeals review was dated January 2, 2018. Nearly two years have passed since the date of that letter and no further information has been provided by appellants to document any changes to the closed audit determinations noted in an IRS letter dated February 27, 2017. Further, FTB provided an IRS account transcript showing that as of January 8, 2019, no adjustments had been made to appellants' previously determined 2014 tax liability. Accordingly, we find no basis to further delay a final determination in this matter and find that appellants have failed to establish error in FTB's determination.¹

Issue 2: Whether appellants have shown that the accuracy-related penalty should be abated.

R&TC section 19164, which generally incorporates the provisions of Internal Revenue Code (IRC) section 6662, provides for an accuracy-related penalty of 20 percent of the applicable underpayment. The penalty applies to the portion of the underpayment attributable to (1) negligence or disregard of rules and regulations, or (2) any substantial understatement of income tax. (IRC, § 6662(b).) The IRS imposed a federal accuracy-related penalty of \$10,833 due to appellants' substantial understatement of federal tax.

¹ We note that the IRS determined that its tax debt for 2014 was at that time uncollectible due to appellants' inability to pay. We have no jurisdiction to consider collectability issues in our determinations. However, we encourage appellants, once our determination is final, to discuss payment options with FTB.

For an individual, there is a “substantial understatement of income tax” when the amount of the understatement for a taxable year exceeds the greater of 10 percent of the tax required to be shown on the return, or \$5,000. (IRC, § 6662(d)(1).) In determining whether there is a substantial understatement, the taxpayer excludes any portion of the understatement for which (1) there is substantial authority for the treatment of the position, or (2) the position was adequately disclosed in the tax return (or a statement attached to the return) and there is a reasonable basis for treatment of the item. (IRC, § 6662(d)(2)(B).) To qualify as an adequate disclosure, Treasury Regulations generally require that the taxpayer disclose the details of his or her position on either a Federal Form 8275, a Form 8275-R, or a qualified amended return. (Treas. Reg. § 1.6662-4(f).) Even if an understatement is found to be substantial, the penalty shall not be imposed to the extent the taxpayer can show reasonable cause and good faith. (R&TC, § 19164(d); IRC, § 6664(c)(1); Cal. Code Regs., tit. 18, § 19164(a).) A determination of whether a taxpayer acted with reasonable cause and in good faith is made on a case-by-case basis and depends on the pertinent facts and circumstances, including the taxpayer’s efforts to assess the proper tax liability, the taxpayer’s knowledge and experience, and the extent to which the taxpayer relied on the advice of a tax professional. (Treas. Reg. § 1.6664-4(b)(1).)

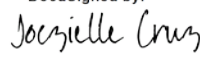
Here, the accuracy-related penalty of \$2,712.40 was properly computed as 20 percent of the understatement (i.e., \$13,562.00 x 20% = \$2,712.40). Appellants have provided no evidence establishing any of the applicable defenses to the accuracy-related penalty—and we find no such evidence in the appeal record. Further, we note that appellants’ federal account transcript shows no indication that the federal accuracy-related penalty was revised or abated.

HOLDINGS


1. Appellants have not demonstrated error with the proposed assessment of additional tax, which was based upon federal adjustments.
2. Appellants have not shown that the accuracy-related penalty should be abated.


DISPOSITION

FTB’s action is sustained.

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 Joczielle Cruz
 Staff Services Analyst, on behalf of
 Douglas Bramhall
 Administrative Law Judge

We concur:

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 Josh Lambert
 Administrative Law Judge

DocuSigned by:

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 Linda C. Cheng
 Administrative Law Judge

Date Issued: 1/6/2020