

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:	)	OTA Case No. 18010736
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<b>VERA KUZMENKO</b>	)	Date Issued: May 14, 2018
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**OPINION**

Representing the Parties:

For Appellant:	Vera Kuzmenko, Taxpayer
For Respondent:	Anne Mazur, Specialist
For Office of Tax Appeals:	Tom Hudson, Tax Counsel III

KWEE, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19045,<sup>1</sup> Vera Kuzmenko (appellant) appeals actions taken by the Franchise Tax Board (FTB or respondent) with respect to proposed assessments of: (1) \$42,590 in additional tax, a \$8,518 accuracy-related penalty, plus accrued interest, for the 2011 tax year; (2) \$917 in additional tax, plus accrued interest, for the 2012 tax year; and (3) \$744 in additional tax, plus accrued interest, for the 2013 tax year.

**ISSUE**

Has appellant established that she is not liable for the additional amounts proposed to be assessed by FTB in response to the federal audit adjustments?

**FACTUAL FINDINGS**

1. On September 15, 2012, appellant timely filed a California Resident Income Tax Return, Form 540 (tax return) for 2011, reporting federal adjusted gross income (AGI) of \$8,780, a California addition to AGI of \$143 for nondeductible self-employment tax, no tax liability, and no payments or withholdings.

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<sup>1</sup> Unless otherwise indicated, all “Section” references are to sections of the California Revenue and Taxation Code.

2. On September 8, 2013, appellant timely filed a tax return for 2012, reporting federal AGI of \$12,041, a California addition to AGI of \$175 for nondeductible self-employment tax, no tax liability, and no payments or withholdings.
3. On February 21, 2014, appellant timely filed a tax return for 2013, reporting federal AGI of \$11,669, no California adjustments, no tax liability, and no payments or withholdings.
4. The Internal Revenue Service (IRS) audited these three tax years, and determined that appellant's federal AGI should be increased as follows: from \$8,780 (as reported) to \$504,854 (as audited) for 2011; from \$17,633 to \$74,043 for 2012; and from \$11,669 to \$62,784 for 2013.
5. The IRS made final assessments of the federal taxes due from its audit on June 15, 2015.
6. On December 4, 2015, a federal grand jury found appellant guilty of multiple counts of mail and wire fraud, witness tampering, and money laundering, for which appellant was later sentenced to 14 years in prison.
7. When appellant failed to report the federal audit adjustments, FTB issued a Notice of Proposed Assessment (NPA) dated June 24, 2016, for each tax year, based on the federal adjustments. The NPAs asserted proposed assessments of \$42,590 in additional tax and an \$8,518 accuracy-related penalty for 2011, \$917 in additional tax for 2012, and \$744 in additional tax for 2013.
8. By letter dated July 18, 2016, appellant protested the NPAs on the basis that appellant wanted to submit an offer in compromise (OIC) to FTB. In support, appellant stated that she was not employed, had no assets, and had no financial ability to pay the liability because she was serving a 14-year prison term at a federal correctional facility for which she was taken into custody in January 2016. Appellant also explained that she submitted an OIC to the IRS for the years at issue, and her OIC was still being reviewed.
9. FTB obtained IRS account transcripts which confirm that appellant's federal OIC was submitted on January 5, 2016, and was still pending before the IRS on the date the transcript was prepared, June 12, 2017.
10. The record does not reveal what final action, if any, the IRS has taken on appellant's federal OIC.
11. By letter dated November 22, 2016, FTB informed appellant that in order to apply for an OIC, the NPAs must be final. In the letter, FTB asked appellant to contact FTB by

telephone to discuss applying for an OIC, and attached a California OIC application packet for her to return by mail.

12. On March 6, 2017, appellant returned the completed OIC application packet to FTB. In it, she stated that she has no way of protesting the NPAs, her only option is an OIC, and she intends to borrow money from church members to pay the tax liability she has offered to pay under the OIC program.
13. On March 13, 2017, FTB issued a Notice of Action (NOA) for each tax year, denying appellant's protest of each respective NPA on the basis that appellant failed to contact FTB in response to FTB's November 22, 2016, letter.
14. On April 2, 2017, appellant timely filed this appeal, stating that she did attempt to work with FTB by submitting an OIC packet,<sup>2</sup> she has no access to a telephone to call FTB because she is incarcerated, and she has no ability to pay the liability. Appellant also contends that FTB's assessment is based on IRS adjustments and the IRS is considering her federal OIC "based on my 'insolvency' status." Appellant does not raise any arguments disputing the correctness of the NPAs. Appellant also does not contend that there was an error in the federal assessment. Instead, appellant summarizes her appeal by requesting that "[OTA] consider all the above to settle my case."

### DISCUSSION

Gross income means all income from whatever source derived, unless specifically excluded. (§ 17071; Int. Rev. Code, § 61(a).) The taxpayer bears the burden of establishing entitlement to any deductions claimed. (*Appeal of Gilbert W. Janke*, 80-SBE-059, May 21, 1980; *Appeal of J. Walshe and M. Walshe*, 75-SBE-073, Oct. 20, 1975.)<sup>3</sup> If the IRS makes a change or correction to any item of gross income or deduction (a federal change), the taxpayer must report the federal change to the FTB within six months after the date of each final federal

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<sup>2</sup> FTB provided evidence establishing that it received appellant's OIC application packet. FTB explains that it "appears the NOAs crossed in the mail with the OIC application" packet. As relevant, we note that one condition of the OIC program is the liability must be final. (§ 19443(a).) Further, upon acceptance of an OIC, the taxpayer waives their appeal rights with respect to contesting the amount of the liability. Here, although appellant applied for an OIC, FTB has not accepted or executed an OIC agreement with appellant, and the liability is not yet final.

<sup>3</sup> Pursuant California Code of Regulations, title 18, section 30501(d)(3), precedential opinions of the State Board of Equalization (BOE) that were adopted prior to January 1, 2018, may be cited as precedential authority to the Office of Tax Appeals unless a panel removes, in whole or in part, the precedential status of the opinion. BOE's precedential opinions are viewable on BOE's website: <http://www.boe.ca.gov/legal/legalopcont.htm>.

determination related thereto, and shall concede the accuracy of the final federal determination or state wherein it is erroneous. (§ 18622(a).) An NPA issued by FTB based on such a final federal determination is presumed correct, and the taxpayer bears the burden of proving error. (*Appeal of S. Brockett and H. Brockett*, 86-SBE-109, Jun. 18, 1986.)

Here, appellant does not dispute that she received the income assessed by the IRS, or claim that the federal determination is erroneous. Similarly, appellant raises no arguments against FTB's imposition of the accuracy-related penalty or interest. Further, there is no evidence to suggest that FTB's proposed assessments, which are based on the federal changes, are incorrect.

Instead, the basis for appellant's appeal is her contention that she is unable to pay the liability. Therefore, appellant asks OTA to consider settling the case. FTB has statutory authority to settle disputed liabilities with taxpayers, and to compromise certain final liabilities. (§§ 19442, 19443.) OTA, on the other hand, has no statutory authority to settle or compromise a tax liability. Further, we have no jurisdiction over FTB's settlement or OIC programs, and we express no opinion as to whether appellant qualifies for either program. Our function is to determine the correct amount of the taxpayer's California income tax liability. (*Appeals of Fred R. Dauberger, et al.*, 82-SBE-082, Mar. 31, 1982.)

While we are cognizant that a taxpayer's financial situation may ultimately render a liability uncollectible, the question of ability to pay versus that of determining the correct amount of the tax liability are two separate and distinct concepts. We lack authority to make discretionary adjustments to the amount of a tax assessment based on a taxpayer's ability to pay. (*Appeal of Estate of R. Luebbert, Deceased, and V. Luebbert*, 71-SBE-028, Sep. 13, 1971.)

Appellant also asks us to consider that she has an OIC currently under review by the IRS based upon appellant's insolvency (i.e., appellant's inability to pay). A federal compromise based on appellant's inability to pay the tax would not constitute a change in the federal determination within the meaning of Section 18622, or otherwise affect the amount of appellant's state tax liability. On the other hand, a federal compromise based on doubt as to liability could be relevant in establishing error in the federal determination. Here, however,

appellant does not contend, and there is no evidence to suggest, that the IRS is considering appellant's OIC based on a legal dispute as to the accuracy of the federal determination.<sup>4</sup>

Therefore, based on the evidence presented to us, appellant has not provided a basis upon which we can make any adjustments to the proposed assessment.

HOLDING


Appellant failed to assert and establish error in the final federal determination, or that respondent's proposed assessment was otherwise overstated or invalid. Accordingly, appellant is liable for the taxes, accuracy-related penalty and interest determined by FTB.


DISPOSITION

Respondent's actions in denying appellant's protests for the 2011, 2012, and 2013 tax years are sustained in full.

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Andrew J. Kwee  
Administrative Law Judge

We concur:

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Teresa A. Stanley  
Administrative Law Judge

DocuSigned by:  
  
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Grant S. Thompson  
Administrative Law Judge

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<sup>4</sup> The IRS has a separate OIC application form (IRS Form 656-L) for a taxpayer to request a compromise on the basis that there is a genuine legal dispute as to the existence or amount of the correct tax liability (doubt as to liability). (See Treas. Reg., § 301.7122-1; Internal Revenue Manual, § 4.18.2.) Doubt as to liability is separate from inability to pay. If appellant applied for an OIC with the IRS based on doubt as to liability, and the IRS compromises the federal determination on that basis, appellant should promptly notify the FTB and, if applicable, timely file a claim for refund.