

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

MIRCEA MANEA

) OTA Case No. 18010972  
) Date Issued: June 26, 2018  
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## OPINION

### Representing the Parties:

For Appellant: Joseph Fleishon, Unicorn Tax Services

For Respondent: Eric R. Brown, Tax Counsel III

For Office of Tax Appeals: Sheriene Anne Ridenour, Tax Counsel III

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19045,<sup>1</sup> Mircea Manea (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) proposing \$27,966 of additional tax, and an accuracy-related penalty of \$5,593.20, plus applicable interest, for the 2010 tax year.

Appellant waived his right to an oral hearing and therefore the matter is being decided based on the written record.

## ISSUES

1. Whether appellant has demonstrated error in the proposed assessment, which is based on a federal determination.
2. Whether appellant has demonstrated that the accuracy-related penalty should be abated.

## FACTUAL FINDINGS

1. Appellant filed a timely 2010 California tax return, reporting adjusted gross income (AGI) of \$31,631, less a standard deduction of \$7,340, resulting in taxable income of \$24,291 and tax of \$404. After applying exemption credits totaling \$297 and a

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

nonrefundable renter's credit of \$120, appellant reported a zero-tax liability. After applying estimated tax payments of \$157, appellant claimed an overpayment of \$157, which the FTB transferred to appellant's 2005 tax year account.

2. The Internal Revenue Service (IRS) provided information to FTB indicating that the IRS allowed a self-employment AGI adjustment of \$9,040, and disallowed the following Schedule C expenses<sup>2</sup> claimed on appellant's federal return: (1) \$231,914 in cost of goods sold; (2) \$24,420 in rent/lease - other business property; and (3) \$58,893 in interest - other. The IRS increased appellant's federal AGI by \$306,187, from \$31,631 to \$337,818, and increased appellant's federal taxable income by \$306,187, from \$5,622 to \$311,809. The IRS assessed additional tax of \$108,331.00 and imposed an accuracy-related penalty of \$22,401.60. Appellant did not notify FTB of the federal adjustments.
3. There is no evidence that the IRS cancelled or reduced its assessment. Despite appellant having filed an amended federal tax return for the 2010 tax year, appellant's federal Account Transcript for that year (Exhibit I) does not indicate any additional adjustments to appellant's tax liability. The IRS assessment was a final federal determination when the IRS closed its examination on December 30, 2013.
4. Consistent with the federal adjustments, FTB issued a Notice of Proposed Assessment (NPA) on July 15, 2014. The NPA increased appellant's taxable income by \$306,187 (i.e., \$231,914 (disallowed Schedule C cost of goods sold) + \$24,420 (disallowed Schedule C rent or lease) + \$58,893 (disallowed Schedule C interest expense) - \$9,040 (self-employment AGI adjustment)), from \$24,291 to \$330,478. The NPA proposed additional tax of \$27,966.00 and an accuracy-related penalty of \$5,593.20, plus applicable interest.
5. Appellant timely protested the NPA, asserting that "[t]here was no IRS adjustment for the subject tax period." Appellant asserted that he has supporting documentation for all of the claimed deductions. Appellant contended that: (1) the claimed interest is for finance charges paid to a finance company secured by the towing trucks; (2) the claimed rent is for a facility used for parking tow trucks and storing vehicles and other equipment; and (3) the claimed cost of goods sold is for purchases associated with the operation of the

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<sup>2</sup> Appellant filed a Schedule C with his 2010 federal return for a tow truck business named Affordable Towing.

business. Appellant requested FTB to provide him with a detailed explanation for the adjustments, as well as a copy of IRS Form 4549-A or Form 4549-B (Income Tax Examination Changes). Appellant did not submit any documentation with his protest letter.

6. In response, FTB sent a letter dated October 30, 2014, to appellant acknowledging his protest letter. FTB indicated that enclosed with its letter was a copy of the 2010 IRS audit report. FTB indicated that if appellant had additional information that he wanted FTB to consider, he should provide such information by December 1, 2014. When FTB did not receive a response, it issued a Notice of Action (NOA) dated June 10, 2015, affirming the NPA. This timely appeal followed.
7. On appeal, appellant asserts that his due process rights have been violated because he never received the FTB's October 30, 2014 letter, and that FTB never sent a copy of that letter to appellant's representative.<sup>3</sup>

### DISCUSSION

1. Whether appellant has demonstrated error in the proposed assessment, which is based on a federal determination.

Section 18622(a) provides in pertinent part that a taxpayer shall either concede the accuracy of a federal determination or state wherein it is erroneous. It is well-settled that a deficiency assessment based on a federal audit is presumptively correct and that a taxpayer bears the burden of proving that the determination is erroneous. (*Appeal of Brockett*, 86-SBE-109, June 18, 1986<sup>4</sup>; *Todd v. McColgan* (1949) 89 Cal.App.2d 509.) Income tax deductions are a

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<sup>3</sup> To the extent appellant is making a due process claim, the Office of Tax Appeals notes that it is precluded from determining the constitutional validity of California statutes, and has an established policy of declining to consider constitutional issues. (Cal. Const., art. III, § 3.5; *Appeal of Aimor Corp.*, 83-SBE-221, Oct. 26, 1983; *Appeal of Walter R. Bailey*, 92-SBE-001, Feb. 20, 1992.) In *Bailey*, *supra*, the Board of Equalization (the predecessor to the Office of Tax Appeals) stated:

[D]ue process is satisfied with respect to tax matters so long as an opportunity is given to question the validity of a tax at some stage of the proceedings. It has long been held that more summary proceedings are permitted in the field of taxation because taxes are the lifeblood of government and their prompt collection is critical.

Here, appellant has been provided an opportunity to question the assessment during this appeal. Therefore, we find that appellant's due process rights were respected and we decline to further consider constitutional arguments.

<sup>4</sup> Board of Equalization decisions (designated "SBE") may generally be found at: <http://www.boe.ca.gov/legal/legalopcont.htm>.

matter of legislative grace, and a taxpayer who claims a deduction has the burden of proving by competent evidence that he or she is entitled to that deduction. (See *New Colonial Ice Co. v. Helvering* (1934) 292 U.S. 435; *Appeal of Myers*, 2001-SBE-001, May 31, 2001.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof with respect to an assessment based on a federal action. (*Appeal of Magidow*, 82-SBE-274, Nov. 17, 1982.) It is well established that the failure of a party to introduce evidence which is within his or her control gives rise to the presumption that, if provided, it would be unfavorable. (*Appeal of Cookston*, 83-SBE-048, Jan. 3, 1983.)

Here, appellant's 2010 federal Account Transcript is final and there are no pending claims or adjustments listed in the transcript. Appellant has provided no evidence showing error in the final federal assessment or in FTB's proposed assessment based on the final federal assessment. While appellant provided documents dated between January of 2002 and December of 2007, such as purchase orders, invoices, commercial lease agreements, a check, and an inspection report, as well as spreadsheets listing Affordable Towing's purported profits, losses, and transactions between January 2010 through December 2010, appellant has provided no documentation substantiating payments made in 2010 (e.g., bank statements, cancelled checks, receipts for cash payments, receipts for debit card payments, credit card statements, vehicle lease statements, etc.). As such, appellant has not satisfied his burden of showing error in the final federal assessment or overcome the presumption of correctness in FTB's determination based on the final federal assessment.

2. Whether appellant has demonstrated that the accuracy-related penalty should be abated.

When FTB assesses an accuracy-related penalty based on a federal action, the assessment of the penalty is presumptively correct. (*Appeal of Abney*, 82-SBE-104, June 29, 1982.) Section 19164, which incorporates the provisions of Internal Revenue Code (IRC) section 6662, provides for an accuracy-related penalty of 20 percent of the applicable underpayment. IRC section 6662(b) provides, in part, that the penalty applies to the portion of the underpayment attributable to (1) negligence or a disregard of rules and regulations or (2) any substantial understatement of income tax. (Int.Rev. Code, § 6662(b).) The Internal Revenue Code defines "negligence" to include "any failure to make a reasonable attempt to comply" with the provisions of the code.

(Int.Rev. Code, § 6662(c).) The term “disregard” is defined to include any “careless, reckless, or intentional disregard.” (*Ibid.*) IRC section 6662 provides that a substantial understatement of tax exists if the amount of the understatement exceeds the greater of 10 percent of the tax required to be shown on the return or \$5,000. (Int.Rev. Code, § 6662(d)(1).) An “understatement” means the excess of the amount required to be shown on the return for the taxable year over the amount of the tax imposed which is shown on the return, reduced by any rebate. (Int.Rev. Code, § 6662(d)(2).)

There are three exceptions to the imposition of the accuracy-related penalty. The taxpayer bears the burden of proving any defenses to the imposition of the accuracy-related penalty. (*Recovery Group, Inc. v. Comm’r*, T.C. Memo. 2010-76.) Under the first exception, the accuracy-related penalty shall be reduced by the portion of the understatement attributable to the tax treatment of any item if there is or was substantial authority for such treatment. (Int.Rev. Code, § 6662(d)(2)(B).) Under the second exception, the accuracy-related penalty shall be reduced by the portion of the understatement attributable to a tax treatment of any item if the relevant facts affecting the item’s tax treatment are adequately disclosed and there is or was a reasonable basis for the tax treatment of such item. (Int.Rev. Code, § 6662(d)(2)(B).) The exception for adequate disclosure, however, will not apply if the taxpayer failed to keep adequate books or records or the taxpayer failed to substantiate items on the return. (Treas. Reg. § 1.6662-3(c)(1).) Under the third exception, the accuracy-related penalty will not be imposed to the extent that a taxpayer shows a portion of the underpayment was due to reasonable cause and that the taxpayer acted in good faith with respect to such portion of the underpayment. (Int.Rev. Code, § 6664(c)(1); Treas. Reg. §§ 1.6664-1(b)(2) & 1.6664-4.)

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).) Generally, the most important factor is the extent of the taxpayer’s effort to assess his proper tax liability. (*Id.*) Circumstances that may indicate reasonable cause and good faith include an honest misunderstanding of fact or law that is reasonable in light of all of the facts and circumstances, including the experience, knowledge, and education of the taxpayer. (Treas. Reg. § 1.6664-4(b)(1).)

According to appellant's 2010 federal Account Transcript, the IRS imposed an accuracy-related penalty of \$22,401.60. In accordance with the federal penalty, FTB correctly imposed an accuracy-related penalty of 20 percent of the applicable underpayment in the amount of \$5,593.20 (i.e., \$27,966.00 x .20).


Appellant has provided no argument or evidence establishing that he acted reasonably in determining his 2010 tax liability. Appellant has failed to show either substantial authority to justify the understatement or adequate disclosure of the understatement specifying a reasonable basis. Further, appellant's 2010 federal Account Transcript shows no indication that the federal accuracy-related penalty was revised or abated. Accordingly, appellant has failed to produce credible and competent evidence to show that FTB improperly imposed an accuracy-related penalty based on the final federal audit or that the penalty should be abated.

### HOLDINGS


1. Appellant has not demonstrated error in the proposed assessment.
2. Appellant has not demonstrated that the accuracy-related penalty should be abated.

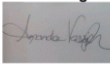
### DISPOSITION

Based on the foregoing, FTB's action is sustained.

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Jeffrey G. Angeja  
Administrative Law Judge

We concur:

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Linda C. Cheng  
Administrative Law Judge

DocuSigned by:  
  
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Amanda Vassigh  
Administrative Law Judge