

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:)	OTA Case No. 18010811
DAVID KASHIFI AND SHAKIRA KASHIFI)	Date Issued: October 16, 2018
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)	

OPINION

Representing the Parties:

For Appellants:	Sandra G. Scott, Attorney
For Respondent:	Maria Brosterhous, Tax Counsel IV
For Office of Tax Appeals:	Matthew D. Miller, Tax Counsel III

J. ANGEJA, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19045,¹ David Kashifi and Shakira Kashifi (appellants) appeal an action by the Franchise Tax Board (FTB or respondent) on the proposed assessments of additional tax of \$36,464, plus interest, for the 2006 tax year; additional tax of \$108,977, plus interest, for the 2007 tax year; and additional tax of \$45,264, plus interest, for the 2008 tax year.²

Appellants waived their right to an oral hearing, and therefore the matter is being decided based on the written record.

ISSUES

1. Does the Office of Tax Appeals (OTA) have jurisdiction to consider whether appellants' tax liabilities at issue were discharged in bankruptcy?
2. Have appellants shown error in respondent's proposed assessments, which are based on federal determinations?

¹ Unless otherwise indicated, all "section" or "§" references are to sections of the California Revenue and Taxation Code.

² The length of time between the tax years at issue and the filing of this appeal is due to a federal audit, federal administrative appeal, and federal tax court litigation.

FACTUAL FINDINGS

1. Appellants filed a 2006 federal income tax return in 2008. They reported federal adjusted gross income (AGI) of -\$1,361, and zero taxable income. On June 15, 2008, appellants filed their 2006 California tax return and reported California AGI of \$13,961, and zero taxable income.
2. Appellants filed a 2007 federal income tax return in 2008. They reported federal AGI of -\$181,045, and zero taxable income. Appellants filed a timely 2007 California tax return and reported California AGI of -\$181,045, and zero taxable income.
3. Appellants filed a 2008 federal income tax return in 2009. They reported federal AGI of -\$270,691, and zero taxable income. Appellants filed a timely 2009 California tax return and reported California AGI of -\$270,691, and zero taxable income.
4. The Internal Revenue Service (IRS) audited appellants' 2006, 2007 and 2008 federal income tax returns and issued a Notice of Deficiency (NOD) reflecting adjustments for all three years.
5. Appellants filed a petition in the United States Tax Court (Tax Court), protesting the NOD. On May 16, 2012, the Tax Court entered a decision determining the following federal deficiencies: (1) additional tax of \$133,303.00, and an accuracy-related penalty of \$26,660.60, for the 2006 tax year; (2) additional tax of \$387,434.00, and an accuracy-related penalty of \$77,486.80, for the 2007 tax year; and (3) additional tax of \$204,915.00, and an accuracy-related penalty of \$40,983.00, for the 2008 tax year.
6. On July 16, 2012, the IRS assessed additional tax, penalties, and interest for the tax years at issue in accordance with the Tax Court's decision. Appellants did not report these federal changes to respondent.
7. On March 25, 2013, appellants filed for Chapter 7 bankruptcy. On their Schedule E – Creditors Holding Unsecured Priority Claims, appellants identified the FTB as a creditor for “[t]ax liability for tax periods 2006 through 2009. Estimated liability no tax has been assessed.” Appellants reported an estimated state tax claim amount of \$300,000. Appellants also listed the federal tax liabilities for 2006 through 2009. On June 25, 2013, the United States Bankruptcy Court granted appellants a Discharge of Debtor and Final Decree.

8. On March 11, 2015, the IRS provided respondent with a federal report regarding changes made to appellants' 2006, 2007, and 2008 federal tax returns. To the extent applicable under California law, respondent made adjustments to appellants' California taxable income following the federal changes reflected in the federal report.
9. On April 11, 2016, respondent issued Notices of Proposed Assessment (NPAs) for 2006, 2007 and 2008. Respondent proposed the following assessments: (1) additional tax of \$36,464.00, an accuracy-related penalty of \$7,292.80, and a delinquent return penalty of \$9,116.00, plus interest, for the 2006 tax year; (2) additional tax of \$108,977.00, plus interest, for the 2007 tax year; (3) additional tax of \$45,264.00 and an accuracy-related penalty of \$9,052.80, plus interest, for the 2008 tax year.
10. Appellants timely protested the NPAs, asserting that the proposed assessments were discharged in their 2013 Chapter 7 bankruptcy.
11. After review, respondent issued Notices of Action (NOAs) in response to appellants' protest letter. The NOAs removed the penalties because of the bankruptcy, but affirmed the assessments of additional tax and interest for all three years.³
12. Appellants then filed this timely appeal.

DISCUSSION

Issue 1 – Does the OTA have jurisdiction to consider whether appellants' tax liabilities at issue were discharged in bankruptcy?

Appellants contend that the proposed assessments for tax years 2006, 2007, and 2008 were discharged in their 2013 Chapter 7 bankruptcy. The OTA's predecessor, the California Board of Equalization (BOE), held that it did not have jurisdiction in income tax appeals to decide whether a tax liability had been discharged in a taxpayer's bankruptcy. (*Appeal of Robert G. and Jean C. Smith*, 81-SBE-145, Oct. 27, 1981; Cal. Code Regs., tit. 18, § 5412, subd. (b)(3).)⁴ Similarly, the OTA's current Rules for Tax Appeals explicitly prohibit the OTA from determining whether an income tax liability has been discharged in bankruptcy. (Cal. Code

³ Because the accuracy-related penalties have been withdrawn, this opinion will not discuss those penalties, the legal bases for imposing them, or the reasons for withdrawing them.

⁴ Published decisions of the Board of Equalization, designated by "SBE" in the citation, are available on that Board's website at: <http://www.boe.ca.gov/legal/legalopcont.htm>.

Regs., tit. 18, § 30102(b)(3).) Therefore, we do not have jurisdiction to consider whether respondent's proposed assessments were discharged in bankruptcy.

Additionally, a tax liability cannot be discharged in bankruptcy unless it has been "assessed" at least 240 days before the debtor files for bankruptcy. (11 U.S.C. §§ 523(a)(1)(A), 507(a)(8)(A)(ii).) A tax deficiency is "assessed" when the assessment becomes "final." (*In re Bracey* (9th Cir. 1996) 77 F.3d 294, 295.) Furthermore, a tax liability cannot be discharged until the assessment becomes final, after a taxpayer has exhausted all administrative appeals. (*In Re King* (9th Cir. 1992) 961 F.2d 1423; *Schatz v. Franchise Tax Board* (1999) 69 Cal.App.4th 595.) Here, the proposed assessments at issue are not yet final assessments because appellants timely appealed them. Accordingly, the liabilities have not yet been "assessed," and certainly have not been assessed more than 240 days *prior* to the date on which appellants filed the bankruptcy petition.⁵ Therefore the liabilities were not discharged in appellants' bankruptcy.

Appellants assert that the proposed tax assessments were "assessed" at least more than 240 days prior to the filing date of appellants' bankruptcy. However, as noted above, the proposed assessments were issued after appellants received their bankruptcy discharge. Further, appellants' assertion is contradicted by the admission in their bankruptcy filing that the \$300,000 state tax liability claimed for tax periods 2006 through 2009 was an estimated tax liability and that "no tax has been assessed." In addition, contrary to appellants' assertions, respondent properly relied on section 18622 to determine the statutes of limitations for issuing the NPAs. Section 18622, subdivision (a), provides, in part, that taxpayers are required to report any federal changes that result in a change in the taxpayers' gross income or deduction within six months after the date of the final federal determination of each federal change. The FTB's records show that appellants did not report the federal changes to the FTB. Pursuant to section 19060, if, after the six-month period required by section 18622, the federal changes are reported to respondent, respondent may issue a proposed assessment during the four-year period after the FTB received the federal information. (§ 19060.) As the FTB received the federal information on March 11, 2015, the NPAs issued on April 11, 2016 were timely.

⁵ Not only are the proposed assessments still not final to this date, but the NPAs proposing those assessments were not issued until 3 years *after* appellants filed for bankruptcy.

Issue 2 – Have appellants shown error in respondent’s proposed assessments, which are based on federal determinations?

Section 18622, subdivision (a), provides, in part, that a taxpayer shall either concede the accuracy of a federal determination or state wherein it is erroneous. A proposed assessment based on a federal audit report is presumptively correct, and the taxpayer bears the burden of proving that the determination is erroneous. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Sheldon I. and Helen E. Brockett*, 86-SBE-109, June 18, 1986.) 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 Aaron and Eloise 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 Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.)


Here, respondent properly proposed assessments of additional tax based on the federal adjustments for the 2006, 2007, and 2008 tax years. Appellants were provided an opportunity to present evidence showing error in respondent’s determination; however, appellants have not presented any evidence establishing error in respondent’s determinations or the federal assessments on which they are based. Therefore, we conclude that appellants have not shown error in respondent’s determinations.

HOLDINGS

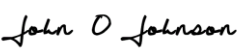
1. The OTA does not have jurisdiction to decide whether appellants’ tax liabilities at issue were discharged in bankruptcy.
2. Appellants have not shown error in respondent’s proposed assessments, which are based on federal determinations.

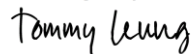
DISPOSITION

Respondent's action is sustained in full.

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Jeffrey G. Angeja
Administrative Law Judge

We concur:

DocuSigned by:

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John O. Johnson
Administrative Law Judge

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Tommy Leung
Administrative Law Judge