

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18011001
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MICHAL TABOR AND KATE TABOR) Date Issued: November 6, 2018
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OPINION

Representing the Parties:

For Appellants: Michal Tabor

For Respondent: Donna L. Webb, Staff Operation Specialist

D. CHO, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19045,¹ Michal Tabor and Kate Tabor (collectively referred to as appellants) appeal from a proposed assessment by the Franchise Tax Board (FTB or respondent) of \$700 in additional tax and an accuracy-related penalty of \$140,² plus interest, for the 2012 tax year.

Appellants did not request an oral hearing and therefore the matter is being decided based on the written record.³

ISSUES

1. Whether appellants have established that respondent erred in its proposed assessment of additional tax for the 2012 tax year based on a federal determination.

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

² By memorandum dated July 26, 2018, FTB conceded that the federal adjustments were not California source income based on information requested by OTA. Accordingly, FTB recalculated appellants’ tax liability to \$79 in additional tax and a corresponding accuracy-related penalty of \$15.80.

³ By letter dated November 8, 2017, appellants were asked to indicate whether they wished to have an oral hearing and informed that failure to respond to the letter would result in the appeal being submitted for decision based on the written record and without oral hearing. After appellants failed to respond, they were notified that the appeal would be decided on the basis of the written record and without an oral hearing.

2. Whether appellants are entitled to abatement of the accuracy-related penalty.
3. Whether appellants are entitled to abatement of accrued interest.

FACTUAL FINDINGS

1. Appellants timely filed a joint 2012 California Nonresident or Part-Year Resident Income Tax Return. On this return, appellants reported that they became nonresidents of California on May 1, 2012. Appellants reported California adjusted gross income of \$95,606, California taxable income of \$92,744, and a corresponding California tax of \$6,835. Appellants also reported exemption credits of \$197, which reduced appellants' California tax owed to \$6,638.
2. Appellants reported a California withholding credit amount of \$7,459, which resulted in a requested refund of \$821. Respondent refunded this amount on April 2, 2013.
3. Respondent subsequently received information from the Internal Revenue Service (IRS) that appellants underreported their 2012 taxable income. The IRS increased appellants' taxable wages by \$8,824 (listing Prudential Insurance as the payor of the income), increased appellants' interest income by \$116, and increased appellants' pension income by \$12; these adjustments resulted in \$3,931 of additional federal income tax. The IRS also assessed an accuracy-related penalty of \$786 and applicable interest.
4. According to the federal information, appellants paid the federal assessment. Appellants did not report the federal adjustments to respondent.
5. Based on the federal adjustments, respondent issued a Notice of Proposed Assessment (NPA) that increased appellants' 2012 California income by \$8,836,⁴ which resulted in an additional California tax of \$700. Respondent also included an accuracy-related penalty of \$140 plus interest in conformity with the federal adjustments.
6. On April 18, 2016, appellants protested the NPA. Appellants stated that they disagreed with the NPA, but did not provide specific reasons as to why they disagreed with the NPA.
7. By letter dated April 14, 2017, respondent informed appellants that the NPA was based on the federal adjustments and that respondent has not received any information or documentation establishing that the federal assessment was cancelled or reduced.

⁴ Respondent did not include any of the \$116 interest income from the federal adjustments in respondent's proposed assessment.

Respondent provided appellants an opportunity to provide such information and documentation.

8. Appellants did not provide any additional information in response to the April 14, 2017 letter, and respondent issued a Notice of Action that affirmed the NPA on June 12, 2017.
9. This timely appeal followed.
10. By letter dated July 2, 2018, the Office of Tax Appeals requested additional briefing from respondent, requesting an explanation of the basis for FTB's determination that the federal adjustments were California source income.
11. By memorandum dated July 26, 2018, FTB responded that it received additional evidence from the Employment Development Department, which indicated that the federal adjustments were not California source income. Therefore, respondent accepted appellants' California adjusted gross income of \$95,606 as stated in their original return. However, respondent increased appellants' federal adjusted gross income on their California return, which resulted in an additional tax of \$79 and an accuracy-related penalty of \$15.80.
12. Appellants did not respond to FTB's July 26, 2018 memorandum.

DISCUSSION

Issue 1 – Whether appellants established error in respondent's proposed assessment of additional tax for the 2012 tax year.

Section 18622(a) requires a taxpayer to concede the accuracy of federal changes to a taxpayer's income or to state where the changes are erroneous. It is well settled that a deficiency assessment based on a federal adjustment to income is presumed to be correct and a taxpayer bears the burden of proving that FTB's determination is erroneous. (*Appeal of Sheldon I. and Helen E. Brockett*, 86-SBE-109, June 18, 1986.)

Generally, California conforms to the definition of "gross income" contained in section 61 of the Internal Revenue Code (IRC). (See § 17071.) Gross income is defined as "all income from whatever source derived," unless specifically excluded. (IRC § 61(a).) In addition, Section 17085 generally conforms to IRC section 72 and requires inclusion in income of gross amounts received from annuities, including retirement plan distributions.

Here, respondent received federal information that showed adjustments were made to appellants' 2012 federal tax return. Specifically, appellants' taxable wages were increased by \$8,824, interest income was increased by \$116, and pensions/annuities income was increased by \$12. Based on this information, respondent adjusted appellants' federal adjusted gross income on their California return, which resulted in an additional California tax of \$79.

Although appellants' initial protest letter stated that they did not concede the originally proposed assessment of tax, they have not offered any evidence or explanations as to respondent's adjustments to their tax liability. In fact, appellants paid the federal assessment, which was the only adjustment made on their California return. Therefore, we find that appellants have not met their burden.

Issue 2 – Whether appellants are entitled to abatement of the accuracy-related penalty.

The law imposes a 20-percent accuracy-related penalty on any underpayment attributable to, among other things, negligence or disregard of rules or regulations.⁵ (§ 19164(a)(1)(A), IRC § 6662(b)(1).) The accuracy-related penalty does not apply to any portion of an underpayment if it is shown that there was reasonable cause for the underpayment and the taxpayer acted in good faith with respect to the underpayment. (IRC § 6664(c)(1).) Such a determination is made on a case-by-case basis, taking into account all the pertinent facts and circumstances. (Treas. Reg. § 1.6664-4(b).) The relevant factors include the taxpayer's efforts to assess the proper tax liability. (*Ibid.*)

The IRS imposed the federal accuracy-related penalty on appellants; accordingly, respondent included an accuracy-related penalty in its NPA. Although appellants paid the federal assessment, which included the assessment of the accuracy-related penalty, appellants are protesting the application of the accuracy-related penalty to respondent's proposed assessment arguing that they did not have any malicious intent in their original filing of their California income tax return. As a result, appellants believe that they should not be assessed any penalties or interest.

As stated above, appellants bear the burden of proof to demonstrate that reasonable cause exists to abate the accuracy-related penalty. Although appellants argue that they did not have

⁵ It appears that the federal accuracy-related penalty was assessed on a theory of negligence or disregard of rules or regulations because the amount of the tax deficiency was less than \$5,000 and 10 percent of the tax required to be shown on the return. (See IRC § 6662(b).)

any malicious intent when filing their California income tax return, appellants do not explain why they failed to accurately report their federal adjusted gross income, which caused the additional tax. Without such an explanation, we are unable to find that reasonable cause exists to warrant the abatement of the accuracy-related penalty. In addition, we note that there are other potential bases for abating the accuracy-related penalty (e.g., substantial authority and adequate disclosure with reasonable basis, etc.); however, none of those theories are being advanced here. Therefore, we find that appellants have not established reasonable cause to abate the accuracy-related penalty.

Issue 3 – Whether appellants are entitled to interest abatement.

Interest is not a penalty. It is compensation for the taxpayer's use of money, and the law requires respondent to collect interest on past-due taxes. There is no reasonable cause exception to the imposition of interest. (§ 19101(a); *Appeal of Yvonne M. Goodwin*, 97-SBE-003, Mar. 19, 1997.) However, respondent can abate interest when the interest is attributable to any unreasonable error or delay by an FTB officer or employee while performing a ministerial or managerial act in his or her official capacity. (§ 19104(a).) Furthermore, an error or delay can be taken into account “only if no significant aspect of that error or delay can be attributed to the taxpayer involved and after the Franchise Tax Board has contacted the taxpayer in writing with respect to that deficiency or payment.” (§ 19104(b)(1).)

Here, respondent received the federal information from the IRS on January 13, 2016. Accordingly, there could not have been any error or delay by the FTB prior to January 13, 2016. After receiving the federal information, respondent compared the federal information to the information reported on appellants' California income tax return and determined a tax deficiency. Respondent then issued the NPA on February 18, 2016, which is approximately one month after receiving the federal information. Although appellants believe it took respondent four years to issue the NPA, appellants failed to realize that respondent received the federal information approximately one month prior to the issuance of the NPA. Therefore, we find that there was no unreasonable error or delay during this time period.

Appellants have not alleged that there were any other unreasonable errors or delays, and our review of the procedural history of this appeal does not indicate that there were any unreasonable errors or delays by an FTB employee. Accordingly, we find that appellants are not entitled to abatement of interest.

HOLDINGS

1. Appellants did not show error in respondent's determination or in the federal adjustment on which it is based.
2. Appellants are liable for the accuracy-related penalty.
3. Appellants are not entitled to interest abatement.

DISPOSITION

Respondent's proposed assessment for the 2012 tax year is sustained, except the liability is reduced to \$79 in tax with a corresponding reduction to the accuracy-related penalty to \$15.80, as conceded by FTB, plus interest.

DocuSigned by:
Daniel K. Cho
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Daniel K. Cho
Administrative Law Judge

We concur:

DocuSigned by:
Tommy Leung
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Tommy Leung
Administrative Law Judge

DocuSigned by:
Grant S. Thompson
FC572D5881AE41B...
Grant S. Thompson
Administrative Law Judge