OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011422
JOHNNY A. MEZ	) Date Issued: May 1, 2019

OPINION

Representing the Parties:

For Appellant: Tax Appeals Assistance Program (TAAP)[1]

For Respondent: Gi Nam, Tax Counsel

For Office of Tax Appeals: Neha Garner, Tax Counsel III

A. ROSAS, Administrative Law Judge: Under Revenue and Taxation (R&TC) Code section 19045, appellant Johnny A. Mez (Mez) appeals respondent Franchise Tax Board's (FTB) action proposing $2,777 of additional tax, and applicable interest, for the 2010 tax year.

Mez waived his right to an oral hearing and therefore we decide this matter based on the written record.

ISSUES

1. Is FTB's proposed assessment barred by the statute of limitations?
2. If not, did Mez establish error in the proposed assessment?

FACTUAL FINDINGS

1. Mez and his spouse filed their 2010 California Resident Income Tax Return on May 12, 2011.[2]

[1] Appellant wrote his appeal letter. Subsequently, the following TAAP law students represented appellant consecutively: Earl Cease (signed reply brief), Son Huynh, and Jeremy Castro.

[2] Although Mez and his spouse filed a joint return, his spouse did not sign the appeal letter. Consequently, Mez's spouse is not a party to this appeal. Because Mez's spouse participated in some of the events described herein, our references to "Mez" shall mean either Mr. Mez individually or him and his spouse jointly, as the circumstances require.

2. Over two years later, in October 2013, the Internal Revenue Service (IRS) and Mez agreed, after an audit, to a total adjustment increase of $29,074 in taxable income for the 2010 tax year. They also agreed to a $8,915 federal income tax deficiency.
3. On April 4, 2015, FTB received a Statement - Income Tax Changes dated October 8, 2014, and a United States Tax Court decision entered October 28, 2014, regarding the Mez's 2010 and 2011 tax years. The information showed a tax deficiency of $8,915 for the Mez's 2010 tax year and a tax overpayment of $165 for the Mez's 2011 tax year. The IRS provided this information to FTB; Mez did not report the federal changes to FTB.
4. The following year, on April 22, 2016, FTB sent a Notice of Proposed Assessment (NPA) to Mez, based on the final federal adjustments for 2010.[3] Mez timely protested.
5. In April 2017, FTB responded to the protest, stating that FTB issued its proposed assessment correctly, based on the IRS's reported changes for 2010. In the event the IRS subsequently changed or revised its assessment, FTB requested documentation from Mez showing these changes or revisions. FTB also requested that, if Mez still disagreed, he should provide supporting documentation by May 19, 2017. Mez did not respond.
6. FTB issued a Notice of Action dated June 14, 2017, and Mez timely appealed.

DISCUSSION

Issue 1 – Is the proposed assessment barred by the statute of limitations?

There is a misunderstanding about the proper statute of limitations. It is understandable why Mez, in his words, may find it "hard to comprehend the basis for assessing [him] additional tax after 7 years." After all, generally, FTB must issue a proposed assessment within four years of the date the taxpayer filed his or her California return. (R&TC, § 19057.) Mez filed his California tax return on May 12, 2011, so it is understandable for him to believe that, under the general rule, FTB should have issued the NPA by May 12, 2015.

But the misunderstanding does not end with Mez. For example, in FTB's opening brief, FTB argued that its "proposed assessment dated April 22, 2016, was sent timely pursuant to section 19060(b) because Respondent issued its NPA within four years from April 4, 2015,

[3] The parties did not provide OTA with any information regarding any adjustment to the Mez's 2011 state tax liability.

which is the date the IRS notified Respondent of the federal change." However, the issue before us concerns a *two-year* statute of limitations, not a four-year statute.

While Mez is correct that R&TC section 19057 generally provides a four-year statute of limitations from the date the return is filed (as stated above), exceptions to this statute of limitations exist. These exceptions provide three alternative periods.[4]

First, if there are adjustments to a taxpayer's federal account and either the taxpayer or the IRS notifies FTB *within six months* of the date the federal changes became final, FTB may issue a proposed assessment within *two years* of the date of notification, or within the general four-year period, whichever expires later. (R&TC, § 19059(a).) Second, if either the taxpayer or the IRS notifies FTB *after this six-month period* (from the date the federal changes became final), FTB may issue a proposed assessment within *four years* of the date of that notification. (R&TC, § 19060(b).) Finally, if neither the taxpayer nor the IRS notifies FTB of the federal changes, then FTB may issue a proposed assessment at any time. (R&TC, § 19060(a).)

Here, we focus on R&TC section 19059(a) and the alternative two-year period. In October 2013, the IRS and Mez agreed to $8,915 in federal income tax deficiency for the 2010 tax year and $29,074 in adjustments to their income. Both the Statement - Income Tax Changes, dated October 8, 2014, and the United States Tax Court's decision, dated October 28, 2014, reflect a final federal determination. On April 4, 2015—less than six months after both documents were executed, the IRS provided information to FTB regarding the final federal determination.

Thus, because the IRS notified FTB within six months of the date the federal changes became final, FTB may issue the NPA within *two years* of April 4, 2015, or within the general four-year period, whichever expires later. (R&TC, § 19059(a).) The alternative two-year period expired on April 4, 2017, and the general four-year period expired on or about May 12, 2015. FTB issued the NPA on April 22, 2016. Accordingly, FTB issued the NPA timely within the statute of limitations—within R&TC section 19059(a)'s alternative two-year period.

[4] The California Supreme Court, when discussing R&TC section 19057's predecessor, indicated it "is a general statute of limitations and it expressly provides for exceptions to the general rule. Either of two exceptions applies when federal changes are made to a taxpayer's gross income or deductions . . . ." (*Ordlock v. Franchise Tax Bd.* (2006) 38 Cal.4th 897, 911.) The California Supreme Court pointed out that "[i]n the event of such IRS intervention, section 19059 or section 19060 provides an alternative period during which the FTB may notify the taxpayer of a deficiency assessment, the duration of which depends upon when or *whether* the taxpayer reports to the FTB the final results of the federal authorities' examination of the taxpayer's return." (*Id.* at p. 902.)

Issue 2 – Did Mez establish error in FTB's proposed assessment?

A taxpayer must either concede the accuracy of federal changes to a taxpayer's income or state where the changes are erroneous. (R&TC, § 18622(a).) Under well-settled law, there is a presumption of correctness when FTB bases its deficiency assessment on a final federal adjustment to income, and a taxpayer bears the burden of proving FTB's determination is erroneous. (*Appeal of Brockett*, 86-SBE-109, June 18, 1986; *Appeal of Lew*, 78-SBE-073, Aug. 15, 1978; *Appeal of Webb*, 75-SBE-061, Aug. 19, 1975.) Likewise, a deficiency assessment based on a final federal determination resulting from a settlement agreement between the taxpayer and the IRS is presumed to be correct. (*Appeal of Chow*, 86-SBE-130, July 29, 1986.)

The applicable burden of proof is by a preponderance of the evidence. (*Appeal of Estate of Gillespie*, 2018-OTA-052P, June 13, 2018, at p. 4.) That is, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.)

"The taxpayer cannot merely assert the incorrectness of a determination of a tax or the method used and thereby shift the burden to the Commissioner to justify the tax and the correctness thereof." (*Todd v. McColgan*, (1949) 89 Cal.App.2d 509, 514.) 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.) Furthermore, while a taxpayer's claim that he or she only acquiesced to federal adjustments because of coercion or economic reasons may explain a taxpayer's motivation, this has no bearing on whether the federal determination was correct. (*Appeal of Johnston*, 75-SBE-030, Apr. 22, 1975; *Appeal of Bachrach*, 80-SBE-011, Feb. 6, 1980; *Appeal of Hutchinson*, 82-SBE-121, June 29, 1982.)

We will divide R&TC section 18622(a) in two parts and discuss each separately: (1) whether Mez conceded the accuracy of federal changes to his income, or (2) whether Mez stated where the changes are erroneous.

As to the first part, for several reasons Mez does not concede the accuracy of the federal changes. He argues that the IRS representative did not provide him with all the relevant information prior to Mez agreeing to the settlement; that the IRS representative never informed him that settlement may cause FTB to assess any additional tax; and that his agreement with the

IRS resulted from coercion. Mez accuses the IRS representative of pressuring him to accept the settlement.

As to the second part, because Mez does not concede the accuracy of the federal changes, we turn to whether he stated how the federal changes are erroneous. (R&TC, § 18622(a).) Despite Mez's argument about coercion, he does not offer any proof that the federal adjustments are erroneous. Mez bases his argument on the premise that the IRS representative pressured Mez to accept the settlement. This is an unsupported assertion, but even if true, it only shows why he accepted the federal adjustments; it does not prove that the federal adjustments are incorrect. (See *Appeal of Johnston, supra*.; *Appeal of Bachrach, supra*; *Appeal of Hutchinson, supra*.)

Mez also argues that FTB cannot use the federal settlement to determine a proposed assessment because, on the one hand, FTB was not a party to the settlement, and, on the other hand, evidence of a compromise is inadmissible to prove liability.

Mez's arguments are without merit. The California Personal Income Tax Law is largely based on the Internal Revenue Code. Therefore, the IRS's determination on the same issue generally applies for California tax purposes. (*Calhoun v. Franchise Tax Bd.* (1978) 20 Cal.3d 881.) But we do not consider the settlement agreement as conclusive evidence of Mez's California tax liability. Rather, the evidence of a federal change to the Mez's income creates a rebuttable presumption that FTB should make a comparable change for state tax purposes. Mez had the opportunity to prove, by a preponderance of the evidence, that the federal changes, and the state assessment based thereon, are erroneous. However, despite his arguments, Mez has not addressed the substance of the IRS adjustments to his income. Thus, Mez failed to satisfy his burden of proof, and he failed to show error in FTB's proposed assessment.

HOLDINGS

1. Under R&TC section 19059, FTB's proposed assessment was timely, and it is not barred by the statute of limitations.
2. Mez did not establish error in FTB's proposed assessment, which is based on a federal determination under R&TC section 18622.

DISPOSITION

We sustain FTB's action in full.

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Alberto Rosas
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Alberto T. Rosas
Administrative Law Judge

We concur:

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John O. Johnson
Administrative Law Judge

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Tommy Leung
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Tommy Leung
Administrative Law Judge