

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18032529
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WHITESIDE CONSTRUCTION) Date Issued: June 20, 2019
CORPORATION, INC.)
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)

OPINION

Representing the Parties:

For Appellant: Ruth A. Rowlette
For Respondent: Brandon S. Knoll, Tax Counsel

N. ROBINSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Whiteside Construction Corporation, Inc. appeals an action by the Franchise Tax Board (FTB) proposing \$30,777 of additional tax, and applicable interest, for the 2009 tax year.

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

ISSUES

1. Whether the Notice of Proposed Assessment (NPA) was timely issued.
2. Whether appellant is liable for the additional tax based on a federal audit adjustment.

FACTUAL FINDINGS

1. Appellant is a corporation incorporated under the laws of the State of California and registered with the Secretary of State (SOS) on December 15, 1988.
2. For tax purposes, appellant elected to be treated as an S corporation.
3. On May 15, 2010, appellant filed a 2009 California S Corporation Franchise or Income Tax Return (Form 100S) reporting a total net loss of \$70,525 and paying the \$800 annual minimum tax.

4. The Internal Revenue Service (IRS) commenced an audit of appellant's 2009 federal income tax return in or about April of 2012.
5. The IRS audit resulted in the IRS increasing appellant's gross receipts by \$2,075,589, reducing appellant's bad debt deduction by \$82,484 and other deductions by \$17,599, for total adjustments of \$2,175,672. According to the information from the IRS, appellant agreed with these federal adjustments.
6. Appellant did not notify FTB of the federal adjustments to its income. FTB was advised of the audit results when the IRS provided FTB with appellant's "FEDSTAR IRS Data Sheet" (FEDSTAR) on June 9, 2014.
7. The June 5, 2018 IRS Account Transcript shows that the federal examination of appellant's tax return closed on June 9, 2014, with no additional tax having been assessed by the IRS against appellant for 2009.¹
8. On March 1, 2016, FTB issued an NPA to appellant, in which FTB calculated a revised taxable net income of \$2,105,147 by applying the federal adjustment of \$2,175,672 to appellant's reported net loss of \$70,525. Although the Schedule of Net Operating Losses enclosed with the NPA showed a Net Operating Loss (NOL) carryover deduction of \$2,483,517, FTB disallowed the NOL pursuant to R&TC section 24416.21, due to the suspension of NOL deductions for taxpayers with taxable incomes of \$500,000 or greater for the taxable year at issue. Applying the 1.5 percent franchise tax to appellant's revised taxable net income of \$2,105,147, FTB proposed an additional tax assessment of \$31,577, and credited appellant \$800, reducing the tax due to \$30,777, to account for the annual minimum tax previously reported and paid.
9. Appellant timely protested the NPA by letter dated April 26, 2016. In this letter, appellant disagrees with how the NOL carryover deductions should be applied in the 2007 through 2014 tax years.
10. According to FTB's January 22, 2018 determination letter, appellant requested an oral protest hearing on September 20, 2016; however, appellant subsequently requested four postponements. As a result, FTB issued a Notice of Action on February 16, 2018, sustaining the NPA.
11. By letter dated March 14, 2018, appellant filed this timely appeal.

¹ The IRS did not assess additional tax because the federal adjustments pass through to appellant's owners.

DISCUSSION

Issue 1 - Whether the NPA was timely issued.

In general, FTB must issue an NPA within four years of the date the taxpayer filed his or her return. (R&TC, § 19057.) If there are federal adjustments to a taxpayer's income, deductions or credits and the taxpayer or IRS reports the change within six months of the date the federal change becomes final, FTB may issue an NPA within two years from the date of notification. (R&TC, § 19059(a).)

Appellant enclosed with its opening brief a position letter issued by FTB on September 14, 2017, to appellant's shareholders, David and Michelle Whiteside. This position letter concerns FTB's audit of David and Michelle Whiteside's individual tax returns for years 2011 through 2015. In its position letter, FTB states that it identified additional tax for 2009, but the additional tax cannot be assessed because the statute of limitations has expired. Appellant argues that because FTB determined the 2009 individual period for issuing an assessment against appellant's shareholders has expired, assessing additional tax against the corporation must also be outside the limitations period.²

We hold, however, that FTB's NPA was timely issued. Appellant's federal Account Transcript shows a final federal determination date of June 9, 2014, and FTB's FEDSTAR shows that FTB received appellant's federal information on June 9, 2014. Because the IRS reported the federal change within six months of the date it became final, FTB had two years from the date it received notice of the federal change (i.e., until June 9, 2016) to issue the NPA. Thus, the March 1, 2016 NPA was timely issued. With respect to appellant's argument that the NPA was not timely issued because an individual tax assessment for 2009 was beyond the statute of limitations for David and Michelle Whiteside at the time of FTB's September 14, 2017 position letter, this argument lacks merit. FTB's determination that it cannot timely assess additional tax against appellant's individual shareholders for 2009 has no bearing on whether an assessment issued against appellant is timely, and FTB's failure to assess additional tax against appellant's shareholders does not invalidate an NPA issued to appellant, which, as explained above, was timely issued.

² Appellant also refers to Rev. Rul. 81-88, 1981-1 CB 585; however, this ruling concerns claims for refund for NOL carryover deductions and is not relevant to timeliness of the NPA.

Issue 2 - Whether appellant is liable for the additional tax based on a federal audit adjustment.

R&TC section 18622(a) requires a taxpayer to concede the accuracy of a federal change to a taxpayer's income or to state where the change is erroneous. It is well-settled that a deficiency assessment based on a federal adjustment to income requires the taxpayer to bear the burden of proving that FTB's determination is erroneous. (*Appeal of Sheldon I. and Helen E. Brockett* (86-SBE-109) 1986 WL 22731.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof with respect to an assessment. (*Appeal of Michael Scanlon and Devon Scanlon* (2018-OTA-075P) July 25, 2018.)

In its opening brief, appellant appears to argue that the IRS's bad debt deduction adjustment of \$84,484 is overstated. Appellant asserts that adjustment relates to a lawsuit with a general contractor that was not resolved until 2009. Appellant states that it had costs that exceeded the billings on this particular job, and appellant was unable to recoup the expenses, and so the overall job was a loss in 2009 and taken as a bad debt on the 2009 corporate tax return. Appellant has not provided any evidentiary support for this argument, and therefore we find appellant's unsupported assertion in this regard unpersuasive.

Similarly, appellant states in its opening brief that the IRS's other deduction adjustment of \$17,599 is a "catch all category for any costs not specifically billed to a specific job number"; however, appellant has not provided any evidentiary support for its argument that the IRS's other deduction adjustment is overstated. Therefore, we find appellant's unsupported assertion in this regard does not satisfy its burden of proof.

As for the IRS's gross receipts adjustment of \$2,075,589, appellant does not raise any arguments specific to its gross receipts but instead refers to FTB's audit of appellant's shareholders, David and Michelle Whiteside, and their belief that they established during their personal audit that the funds they advanced to appellant were loans rather than capital contributions. Appellant's opening brief also refers to a January 24, 2017 letter and a January 25, 2017 letter appellant submitted to FTB in anticipation of a February 8, 2017 meeting with FTB regarding the audit of appellant's shareholders. However, as with the opening brief's reference to David and Michelle Whiteside's loans, these letters concern appellant's shareholders' disputes regarding FTB's computation of appellant's shareholders' basis, and do not contain any discernable arguments relevant to the federal adjustments to appellant's gross receipts that are at issue here. Therefore, we find appellant has failed to meet its burden of

proving the federal gross receipts adjustment is wrong. Thus, appellant has not shown error in respondent's proposed deficiency assessment based on federal adjustments.

HOLDINGS

1. The NPA was timely issued.
2. Appellant has failed to demonstrate that FTB's determination of additional tax, based on federal adjustments, was improper.

DISPOSITION

FTB's proposed assessment for the 2009 tax year is sustained.

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Neil Robinson
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Neil Robinson
Administrative Law Judge

We concur:

DocuSigned by:
Jeffrey Margolis
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Jeffrey I. Margolis
Administrative Law Judge

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