

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
MICHAEL W. MEANS AND
ROXANN E. MEANS

) OTA Case No. 18063286
)
) Date Issued: July 1, 2019
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)

OPINION

Representing the Parties:

For Appellants: Gevan C. Rudd, CPA

For Respondent: Anthony S. Epolite, Tax Counsel IV

For Office of Tax Appeals: Josh Lambert, Tax Counsel¹

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Michael W. Means and Roxann E. Means (appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$19,326.00 and an accuracy-related penalty of \$3,865.20,² plus applicable interest, for the 2007 taxable year.

Appellants waived their right to an oral hearing; therefore, we decide the matter based on the written record.

ISSUES

1. Have appellants proven error in FTB’s proposed assessment of additional tax, which was based on a final federal determination?
2. May the Office of Tax Appeals (OTA) determine whether appellants’ California income tax liability was discharged in a bankruptcy action?

¹ For purposes of this opinion, Josh Lambert represented the Office of Tax Appeals (OTA) in his former capacity as Tax Counsel. Effective June 3, 2019, Josh Lambert became an Administrative Law Judge at OTA.

² FTB has agreed to abate the accuracy-related penalty.

FACTUAL FINDINGS

1. Appellants timely filed a 2007 joint California Resident Income Tax Return (Form 540).
2. On July 1, 2013, FTB received information from the Internal Revenue Service (IRS) that it audited appellants' 2007 tax year return and increased Schedule C gross receipts or sales, disallowed Schedule C cost of goods sold, disallowed Schedule C other expenses, and increased the self-employment tax deduction.
3. Because of its adjustments, the IRS assessed additional federal income tax and imposed an accuracy-related penalty.
4. Appellants did not notify FTB of the federal adjustments.
5. FTB issued a Notice of Proposed Assessment (NPA) on March 28, 2016, that followed the federal adjustments. FTB proposed additional tax of \$19,326, plus applicable interest.
6. Appellants protested the NPA and submitted an order dated January 28, 2014, granting appellants a discharge under section 727 of title 11 of the United States Code (the Bankruptcy Code).³ The IRS subsequently issued a Release of Tax Lien that included unpaid taxes for taxable years 2007 and 2008.
7. Thereafter, FTB issued a Notice of Action on April 30, 2018, affirming the NPA.
8. This timely appeal followed.

DISCUSSION

Issue 1 - Have appellants proven error in FTB's proposed assessment of additional tax, which was based on a final federal determination?

Taxpayers must report to FTB, within six months, each change or correction to their federal income tax return. (R&TC, § 18622(a).) In addition, taxpayers must concede the accuracy of a federal determination or state wherein it is erroneous. (*Ibid.*) 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 Brockett* (86-SBE-109) 1986 WL 22731.) Unsupported assertions are not

³ Appellants initially protested the NPA because they believed that the time to assess taxes pursuant to R&TC section 19057 had expired, among other things. On appeal, appellants' only claims are 1) that the tax amount is incorrect, and 2) that the tax debt owed to California was not known at the time they filed a bankruptcy action.

sufficient to satisfy a taxpayer's burden of proof with respect to an assessment based on a federal action. (*Appeal of Magidow* (82-SBE-27) 1982 WL 11930.) 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) 1983 WL 15434.)

Here, FTB properly proposed the assessment of additional tax based on the federal adjustments for the 2007 tax year. Appellants were provided an opportunity to present evidence showing error in FTB's determination; however, they have not done so. Nor have appellants submitted evidence showing that the IRS modified or canceled the federal assessment on which FTB's determination is based. Accordingly, appellants have not sustained their burden of proof.

Issue 2 - May OTA determine whether appellants' California income tax liability was discharged in a bankruptcy action?

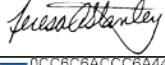
Bankruptcy courts have exclusive jurisdiction to determine whether a debt is nondischargeable under section 523(a)(2), (4), and (6) of the Bankruptcy Code (title 11 of the United States Code). Bankruptcy courts and state courts have concurrent jurisdiction to adjudicate the dischargeability of debts in the remaining classes. (*In re Aldrich* (Bankr. 9th Cir., 1983) 34 B.R. 776, 779.) However, this administrative body (Office of Tax Appeals (OTA)) is limited to determining the correct amount of an appellant's California personal income tax liability for the appeal year. (*Appeals of Dauberger, et al.* (82-SBE-082) 1982 WL 11759.) In addition, OTA's predecessor, the California State Board of Equalization, (BOE) has held that it did not have the subject matter jurisdiction to decide whether a personal income tax liability had been discharged in bankruptcy. (*Appeal of Smith* (81-SBE-145) 1981 WL 11870.) As successor to the powers and authority of the BOE, we conclude that OTA does not have jurisdiction to consider whether FTB's proposed assessment was discharged in bankruptcy.

HOLDINGS

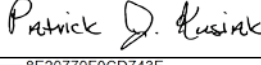
1. Appellants have not met their burden of proving error in FTB's proposed assessment of additional tax for the 2007 taxable year, that was based on a final federal determination.
2. OTA does not have jurisdiction to determine whether appellants' tax liability at issue was discharged in bankruptcy.

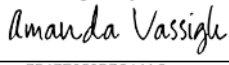
DISPOSITION

FTB's action is modified as conceded on appeal to abate the accuracy-related penalty.
FTB's action is otherwise sustained.

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Teresa A. Stanley
Administrative Law Judge

We concur:

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Patrick J. Kusiak
Administrative Law Judge

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Amanda Vassigh
Administrative Law Judge