

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
JEANNETTE KATZIR AND
OMER KATZIR

) OTA Case No. 18043046
)
) Date Issued: August 27, 2019
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)
)

OPINION

Representing the Parties:

For Appellants: Jeannette Katzir and Omer Katzir¹
For Respondent: Mira Patel, Tax Counsel
Maria Brosterhous, Tax Counsel IV

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Jeannette Katzir and Omer Katzir (appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing \$105,373 of additional tax, plus applicable interest, for the 2007 taxable year.

Office of Tax Appeals (OTA) Administrative Law Judges Teresa A. Stanley, Kenneth Gast, and Linda C. Cheng, held an oral hearing for this matter in Los Angeles, California, on June 19, 2019. At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

ISSUES

1. Have appellants shown error in FTB’s proposed assessment which is based on a federal determination?
2. Have appellants shown that they are entitled to abatement of interest?

¹ The initial appeal was filed on behalf of appellants by their attorney, Stephen J. Pieklik.

FACTUAL FINDINGS

1. Appellants filed a joint 2007 California Resident Personal Income Tax Return (Form 540) on October 15, 2008. Appellants filed an amended 2007 Form 540 on December 24, 2008.
2. Appellants owned a business known as Katzir's Floor and Home Design, Inc., doing business as National Hardwood Flooring & Moulding. The corporation, during 2004, 2005, and 2006, contributed \$1,250,000 to a Voluntary Employees' Beneficiary Association (VEBA).²
3. Appellants assert that the Internal Revenue Service (IRS) issued deficiency notices to them as individuals and to the corporation for 2004, 2005, and 2006, and that a notice of deficiency was issued to appellants for 2007. Appellants further assert that during the pendency of this appeal, they were working with the IRS to dismiss the deficiencies for 2004, 2005, and 2006 in exchange for not contesting the additional tax proposed for 2007.
4. On March 21, 2011, the IRS provided FTB with information showing the IRS adjusted appellants' 2007 federal income tax return. Among other things, the IRS increased appellants' "other income" by \$1,122,040. The "other income" included in appellants' gross income was attributable to the accumulated value of the contributions to the VEBA.
5. FTB made corresponding adjustments to appellants' 2007 California tax and issued a Notice of Proposed Assessment (NPA) on February 29, 2012. The NPA increased appellants' California taxable income by \$1,092,657.40 and proposed additional tax of \$105,373, an accuracy-related penalty of \$21,074.60, and applicable interest.
6. Appellants protested the NPA by letter dated April 25, 2012, stating that they were provided with an investment opportunity that later turned out to be fraudulent and that fraudulent investment was the basis for the additional tax and penalties. Appellants requested that FTB abate the penalties for the same reason the IRS had done so.
7. Based on information provided by appellants, FTB issued a Notice of Action (NOA) that abated the accuracy-related penalty but affirmed the additional \$105,373 of tax, plus interest, proposed by the NPA. Appellants filed this timely appeal.

² Generally, VEBAs that are qualified under Internal Revenue Code section 501(c)(9) may be exempt from corporate tax.

DISCUSSION

Issue 1 - Have appellants shown error in FTB's proposed assessment which is based on a federal determination?

R&TC section 18622 requires a taxpayer to concede the accuracy of the federal changes or to state wherein the changes are erroneous. It is well-established in California that a proposed deficiency assessment based on federal adjustments to income is presumed to be correct, and the burden is on the taxpayer to prove it is erroneous. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Brockett* (86-SBE-109) 1986 WL 22731.) Unsupported assertions are not sufficient to satisfy the taxpayer's burden of proving FTB's deficiency assessment was in error. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) Generally, California conforms to the definition of "gross income" contained in section 61 of the Internal Revenue Code (IRC).³ Gross income is defined as "all income from whatever source derived," unless specifically excluded. (IRC, § 61(a).)

Here, FTB obtained federal information showing the IRS made adjustments to appellants' 2007 federal income tax return. Based on the federal information, FTB adjusted appellants' 2007 California tax account, proposing additional tax of \$105,343, an accuracy-related penalty of \$21,074.60, plus applicable interest. Appellants do not appear to contest FTB's proposed tax assessment but have instead argued that FTB should abate the accuracy-related penalty and interest. In their communications with FTB, and throughout this appeal, appellants have claimed that they were defrauded by an insurance company into contributing money for a life insurance VEBA. Appellants assert that they had reasonable cause for their failure to report the VEBA contributions as income because they followed the advice of an employee of a wealth management firm, and they sought the advice of three independent attorneys. The IRS abated the federal accuracy-related penalty, and appellants requested the same of FTB. FTB followed the IRS and abated the accuracy-related penalty; however, appellants have continued to plead for abatement. The NOA issued by FTB on March 16, 2018, reports the total owed by appellants, which consists of additional tax and interest and does not include an accuracy-related penalty.⁴

³ See R&TC section 17071.

⁴ Appellants may be confusing the IRS penalty with the FTB additional tax assessment. The amounts of \$106,730.85 (the penalty paid by and refunded to appellants by the IRS) and \$105,343 (additional tax owed to FTB but not paid) appear similar.

To be clear, only the tax on appellants' increased taxable income, plus applicable interest, remains an unpaid liability. Appellants have not alleged nor shown that the assessment of additional tax was incorrect. We have no authority to address appellants' argument that they were defrauded by an insurance agency.⁵ The only power we have is to determine the correct amount of an appellant's California personal income tax liability for the appeal year at issue. (*Appeals of Dauberger* (82-SBE-082) 1982 WL 11759.) Absent argument and support that FTB improperly assessed the additional tax, appellants have not satisfied their burden of showing error in the assessment. Therefore, there is no basis to adjust appellants' tax liability for 2007.

Issue 2 - Have appellants shown that they are entitled to abatement of interest?

Appellants also ask that interest be relieved on the proposed assessment of tax. Interest must be assessed from the date a tax payment is due through the date that it is paid. (R&TC, § 19101.) Imposition of interest is mandatory; it is not a penalty, but it is compensation for a taxpayer's use of money after it should have been paid to the state. (*Appeal of Yamachi* (77-SBE-095) 1977 WL 3905.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Goodwin* (97-SBE-003) 1997 WL 258474.) To obtain relief from interest, a taxpayer must qualify under the waiver provisions of R&TC sections 21012, 19112, or 19104. The relief of interest under R&TC section 21012 is not relevant here, as FTB did not provide appellants with any written advice. Under R&TC section 19104, FTB is authorized to abate or refund interest if there has been an unreasonable error or delay in the performance of a ministerial or managerial act by an employee of FTB. Here, appellant has not alleged, and the record does not reflect, any such errors or delays. Finally, we have no authority to review FTB's decision to abate, or not abate, interest under the financial hardship provisions of R&TC section 19112. (*Appeal of Moy*, 2019-OTA-057P.) Accordingly, we find that appellants are not entitled to abatement of interest.

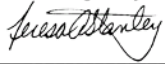
⁵ Appellants testified that they later settled with the insurance company, in 2015, and received \$900,000 and therefore have losses of \$300,000. The issue of whether appellants are entitled to a loss deduction for taxable year 2015 is not before us in this appeal.

HOLDINGS

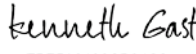
1. Appellants did not show error in FTB's proposed assessment of additional tax based on a federal determination for the 2007 tax year.
2. Appellants have not shown that they are entitled to abatement of interest.


DISPOSITION

FTB's action is sustained in full.

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Teresa A. Stanley
Administrative Law Judge

We concur:

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Kenneth Gast
Administrative Law Judge

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Linda C. Cheng
Administrative Law Judge