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2019 – OTA – 316
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011029
MARK J. MILLER	) Date Issued: October 15, 2019

OPINION

Representing the Parties:

For Appellant: Mark J. Miller

For Respondent: Rachel Abston, Senior Legal Analyst

For Office of Tax Appeals: Corin Saxton, Tax Counsel III

P. KUSIAK, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Mark J. Miller (appellant) appeals an action by the respondent Franchise Tax Board (FTB) proposing $37,545 of additional tax, plus applicable interest, for the 2011 tax year.

Although appellant requested an oral hearing, the hearing was waived when appellant failed to timely respond to the Office of Tax Appeals (OTA) notice of oral hearing and pre-hearing conference. Therefore, the matter is being decided on the written record.

ISSUE

Whether appellant has established that FTB erred in its proposed assessment of additional tax for the 2011 tax year based on a federal assessment.

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FACTUAL FINDINGS

1. Appellant and his wife timely filed a joint 2011 California Resident Income Tax Return.[1] On this return, they reported federal adjusted gross income (AGI) of $179,419, plus California additions of $39, less itemized deductions of $86,540, for taxable income of $92,918 and California tax of $3,977. Appellant and his wife also reported exemption credits of $834 and California withholdings of $4,225, resulting in an overpayment of $1,082, which FTB refunded on October 22, 2012.
2. FTB subsequently received information from the Internal Revenue Service (IRS) that adjustments were made to appellant and his wife's 2011 taxable income. Specifically, the IRS increased the couple's income for unreported wages of $402,212 from P2F Holdings, LLC (P2F Holdings), taxable dividends of $512, capital gains of $12, pension or annuity income of $15,209, nonemployee compensation of $22,513, and a disallowed miscellaneous deduction of $8,799. The IRS also allowed a self-employed tax deduction of $543.
3. Based on the federal information, FTB issued a Notice of Proposed Assessment (NPA) that applied the foregoing adjustments to the couple's taxable income and limited their California itemized deductions by $17,172. This resulted in proposed additional tax due of $37,545, plus interest.
4. Appellant protested the NPA. The protest consisted of a note and an undated letter from Michael Freede to the IRS. Mr. Freede identifies himself as one of the original owners of P2F Holdings, and states that he is researching the situation and will try to get to the bottom of it. Appellant supplemented this protest by letter sent May 31, 2015, in which appellant argues that the wage information listed on his W-2 from P2F Holdings is overstated by $400,000 and that Mr. Freede is in the process of adjusting the W-2. Appellant resubmitted the same documentation on June 15, 2015, along with a letter in which appellant requested a hearing.
5. On August 19, 2015, FTB sent appellant a position letter with a CP2000 notice enclosed that described the nature of the IRS adjustments to appellant's 2011 income. In this

[1] Appellant filed a joint return with his spouse, Sharon L. Mintie, who was also included in FTB's Notice of Proposed Assessment and Notice of Action. By letter sent March 19, 2018, OTA notified appellant and Ms. Mintie that Ms. Mintie or her representative would need to sign the appeal letter or submit a separate appeal letter to be included in appellant's appeal. Because Ms. Mintie did not respond to this letter, she is not a party to this appeal.

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letter, FTB explained that information recently received from the IRS does not show its assessment was cancelled or reduced and that FTB believes the NPA is correct.

6. By letter dated December 15, 2016, FTB notified appellant of a telephonic protest hearing scheduled for January 17, 2017.

7. By letter faxed January 9, 2017, appellant requested that the protest hearing be rescheduled. On January 11, 2017, appellant submitted a letter stating that the IRS "stopped all proceedings" and that P2F Holdings has not shown why it added the additional pay to appellant's W-2. In support of this assertion, appellant enclosed a protest letter he sent to the IRS on March 11, 2016. In this letter, appellant asserts that for three years he tried to obtain his paystubs from P2F Holdings without success. Appellant also states in this letter that P2F Holdings paid him only $172,461.34 during 2011. Included in appellant's January 11, 2017 submission were letters from the IRS dated April 13, 2016, and April 19, 2016, which the IRS issued in response to letters from appellant sent March 11, 2016, March 14, 2016, and April 4, 2016.[2] The IRS states in these letters that it has not resolved the matter because it has not completed all the processing necessary for a complete response, and that the IRS needs to contact P2F Holdings for further information to resolve the issue. Also included in appellant's January 11, 2017 submission are emails from March 3, 2016, to March 7, 2016, between appellant and P2F Holdings' payroll department. In these emails, P2F Holdings states that it does not have copies of appellant's paystubs but that it would be able to provide appellant a copy of the payroll register for 2011. In his January 11, 2017 submission, appellant included a copy of the 2011 payroll register P2F Holdings provided, as well as a handwritten summation, by month, of his 2011 wages from P2F Holdings, which—according to appellant's calculations—totaled $172,461.34.

8. By letter dated April 5, 2017, FTB stated that the information appellant provided in its January 11, 2017 submission does not demonstrate error in the W-2 issued by P2F Holdings. FTB's letter states that appellant told FTB during a January 17, 2017 telephone conversation that appellant was in the process of scheduling a hearing with the IRS. FTB requested a copy of the IRS letter showing that appellant's case is in dispute so that FTB could place appellant's case in pending status. FTB gave appellant until

[2] Appellant has not provided us with copies of his March 14, 2016 or April 4, 2016 letters to the IRS.

DocuSign Envelope ID: 97468D92-A00A-4512-9DF6-3E3AE4A66F87

May 5, 2017, to make this submission or provide any additional information.

9. By letter dated August 15, 2017, FTB informed appellant that, although appellant stated in a June 20, 2017 telephone conversation with FTB that appellant was going to meet with the IRS, appellant had failed to follow up with FTB. In addition, FTB stated that its review of "recent IRS information" (i.e., appellant's 2011 federal account transcript) does not show the IRS's assessment was cancelled or in the process of being reconsidered. Therefore, FTB stated that a written notice affirming the NPA was forthcoming.
10. FTB issued a Notice of Action (NOA) dated August 24, 2017, affirming the NPA.
11. On September 23, 2017, appellant appealed the NOA.

DISCUSSION

R&TC section 18622(a) requires a taxpayer to concede the accuracy of a federal change to a taxpayer's income or to state wherein it is 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. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of 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 based on a federal action. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

R&TC section 17041(a) provides, as relevant here, that tax shall be imposed upon the entire taxable income of every resident of California. Generally, California conforms to the definition of "gross income" contained in section 61 of the Internal Revenue Code (IRC). (See R&TC, § 17071.) Gross income is defined as "all income from whatever source derived," unless specifically excluded. (IRC, § 61(a).) The sweeping definition of income in IRC section 61 specifically includes, among other things, compensation for services. Income includes any "accessions to wealth." (*Commissioner v. Glenshaw Glass Co.* (1955) 348 U.S. 426, 431.) Gain derived from labor is also gross income. (*Appeals of Wesley et al.* (2005-SBE-002) 2005 WL 3106917.) A taxpayer recognizes income if he or she realizes an economic gain, and that gain primarily benefits him or her personally. (*United States v. Gotcher* (5th Cir. 1968) 401 F.2d 118, 121.)

In this situation, FTB obtained federal information showing adjustments made to appellant's 2011 federal tax return. To verify the status of these federal adjustments, FTB obtained copies of appellant's 2011 federal Account Transcript and individual Wage and Income

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Transcripts, which showed no pending claims or adjustments to the IRS's assessment. FTB also obtained information from the Employment Development Department (EDD), which listed Personal Income Tax Wages of $402,212.92 from P2F Holdings paid to appellant in 2011.

Appellant's sole argument is that he only received wages of $172,461.34 from P2F Holdings in 2011, and appellant asserts that he has attached his "paychecks" for 2011; however, while the 2011 payroll register is included in appellant's September 23, 2017 appeal of the NOA, his paychecks are not. Appellant notes that the payroll register identifies personal loans of $214,535.92 and $90,408.59 made by P2F Holdings to appellant, but he asserts that "[n]one of these has been documented and this is fraud by P2F Holdings. No one from this company has given me any documentation to verify." Although appellant provided a payroll register, appellant has not clearly explained how he calculated wages of $172,461.34 or why the W-2 Wages of $402,212 from P2F Holdings is overstated. For example, appellant's summation of wages for 2011 includes wage amounts and pay dates that are not listed anywhere on the payroll register.

The payroll register shows various amounts that appear to signify deductions, some of which appear to be identified as personal loans. Although appellant argues that the loan amounts listed on the payroll register are fraudulent, appellant has not provided any evidence in support of this assertion. Nonetheless, to the extent that some of appellant's wages may have been used to repay personal loans, these wages constitute compensation for services rendered and are therefore taxable as gross income. (See IRC, § 61(a)(1).)

It should also be noted that appellant has never contested, challenged, or offered any evidence to rebut other revisions made by FTB based on the other federal adjustments, i.e., unreported taxable dividends of $512, unreported capital gains of $12, unreported pension or annuity income of $15,209, unreported nonemployee compensation of $22,513, a disallowed miscellaneous deduction of $8,799, and a self-employed tax deduction of $543.

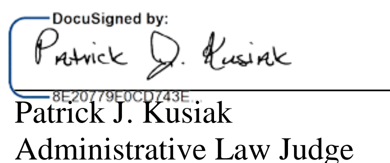
Based on the foregoing, appellant has not satisfied his burden of showing error in the final federal assessment or overcome the presumption of correctness in FTB's determination based on the final federal assessment.

HOLDING

Appellant has not shown error in FTB's proposed assessment of additional tax for the 2011 tax year based on a federal determination.

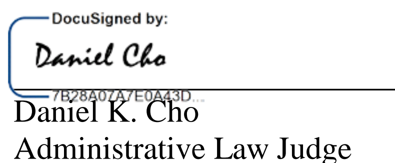
DISPOSITION

FTB's proposed assessment for the 2011 tax year is sustained.

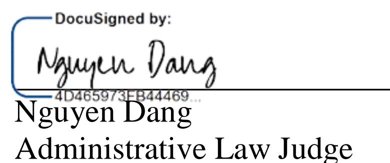


Patrick J. Kusiak
Administrative Law Judge

We concur:



Daniel K. Cho
Administrative Law Judge



Nguyen Dang
Administrative Law Judge