v
DocuSign Envelope ID: 1125CFE4-E22E-4519-999E-51391B9049B9

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18010027
M. F. CREAMER AND	)
M. CREAMER	)
	)
	)

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellants: A. Lavar Taylor, Esq.

For Respondent: Gi Nam, Tax Counsel

J. JOHNSON, Administrative Law Judge: On February 28, 2020, the Office of Tax Appeals (OTA) issued a majority opinion (hereafter, the Opinion) that sustained in full Franchise Tax Board's (FTB) proposed assessment of a tax deficiency and an accuracy-related penalty against appellants for 2010.[1] Appellants timely filed a petition for rehearing pursuant to Revenue and Taxation Code section 19048. Upon consideration of appellants' petition, we conclude that appellants have not established a basis for granting a rehearing.

In the Opinion, OTA sustained FTB's determination that appellant-husband (Mr. Creamer) failed to report $363,292 of income from his law practice, which he conducted as a sole proprietorship. As a result, the Opinion upheld FTB's determination of a deficiency in appellants' reported tax liability for the 2010 tax year of $34,094, an accuracy-related penalty of $6,818.80, and applicable interest. FTB's determination, in turn, was based upon a final federal determination against appellants, which made the same income adjustment and also imposed an accuracy-related penalty.

The IRS and, derivatively, FTB based their determination of unreported income upon several Form 1099s that were issued to Mr. Creamer's sole proprietorship (law practice) by insurance companies in connection with the settlement of cases.

[1] One panel member wrote a separate opinion concurring in part and dissenting in part from the Opinion.

DocuSign Envelope ID: 1125CFE4-E22E-4519-999E-51391B9049B9

Mr. Creamer testified that the Form 1099s were in the amounts of the entire recoveries, including the amounts due to the clients, which allegedly constituted at least 60 percent of the amounts reported on the Form 1099s. Mr. Creamer testified that the law firm promptly paid over the amounts due to the clients. Ms. Schultz, an attorney who Mr. Creamer asserted handled the cases relevant to the Form 1099s at issue using his business name, submitted an affidavit[2] that Mr. Creamer had prepared for her signature, and which largely corroborated Mr. Creamer's testimony regarding their business relationship. However, Mr. Creamer provided no contemporaneous documentation to support his position.[3] When asked about corroborating evidence during the hearing, such as bank statements, records of his agreement with Ms. Schultz (including a fee-sharing agreement, evidence of her expenses incurred, or anything in writing or email), and client trust fund account and other records, Mr. Creamer indicated that these records never existed, he never had them, he disposed of them already, or that they would not be relevant. The majority did not find Mr. Creamer's unsupported testimony sufficiently credible by itself to carry his burden of proof.[4]

It is within OTA's purview to weigh unsupported testimony, particularly where, as here, one would have expected the taxpayer to have retained and provided some supporting documentary evidence.[5] Here, no banking records, client retainer agreements, case settlement agreements, client trust accounting records, court records, or client case files were provided to support Mr. Creamer's contention that the amounts shown on the Form 1099s included the client recovery portions of the settlement payments. Mr. Creamer's explanations as to why such records were no longer available to him (or, in some cases, never available to him) did not

[2] Appellants also provided an affidavit from Mr. Creamer on appeal, prior to Mr. Creamer providing his testimony at the oral hearing.

[3] According to Ms. Schultz's affidavit, the insurance recoveries generally were deposited into Mr. Creamer's client trust fund account and promptly transferred to Ms. Schultz's client trust fund account.

[4] Furthermore, the majority found troubling the fact that there were inconsistencies in the facts presented in affidavits and testimony provided, despite the fact that all affidavits and testimony were prepared and provided by Mr. Creamer. Based on the lack of supporting documentation and the inconsistencies, we disagree with the dissenting opinion's determination that Mr. Creamer's testimony was credible and sufficient to overcome his burden of proving that at least 60 percent of the amounts on the Form 1099s was paid to the clients and did not constitute income to Mr. Creamer.

[5] At the hearing, it was discussed that Mr. Creamer was obligated under state record-keeping rules or other guidelines to maintain several of the documents listed above. It was also noted that Mr. Creamer disposed of records pertaining to the tax year pursuant to an office move that took place during the period the tax year was under investigation by the IRS.

DocuSign Envelope ID: 1125CFE4-E22E-4519-999E-51391B9049B9

sufficiently explain why at least some of the relevant documents had not been assembled and provided to the IRS in early 2013 when appellants' 2010 tax year first came under IRS audit. The Opinion also concluded that the Form 1099 information, together with Mr. Creamer's admission that the income was deposited into his client trust account, was sufficient to support FTB's position, which is presumed correct since it is based on a federal determination. Appellants bore the burden of providing error in FTB's position or the underlying federal determination, which they failed to do. Accordingly, the Opinion sustained FTB's determination in full.

Appellants contend that a rehearing is justified because the Opinion erred in interpreting the Form 1099s upon which the IRS and FTB based their deficiency determinations. Appellants contend that "the issuance of any Forms 1099 to Mr. Creamer under [Internal Revenue Code section] 6045(f) had nothing to do with whether or not Mr. Creamer received income, and given that all of the evidence, . . . indicates that Mr. Creamer did not improperly take money from his clients, it was wholly improper for the majority opinion to conclude that the 60% of the gross recoveries was taxable income to him."[6] Appellants argue that the majority's discussion of the Treasury Regulation section 1.6045-5 in support of its interpretation is misleading because it ignores the possibility that an attorney might have no income at all from an insurance recovery and still receive a Form 1099 showing an amount paid. Thus, appellants contend that the issuance of the Form 1099s under Internal Revenue Code section 6045(f) is unrelated to the issue of whether the amounts reflected on those forms constitute income to the attorney. In this fashion, appellants reassert their position on appeal that the Form 1099 information does not support a finding that the entirety of the amounts listed on the Form 1099s are taxable income to Mr. Creamer. For purposes of a petition for rehearing, the grounds under which to analyze this argument are whether there is insufficient evidence to justify the written opinion or whether the opinion is contrary to law. (Cal. Code Regs., tit. 18, § 30604(a)(4) & (5).)[7]

[6] Appellants allege that their inability to provide case file information regarding the settlements at issue arises from the fact that Ms. Schultz took the case files related to those settlements. Appellants also assert that appellant-husband's unblemished state bar record undermines any potential claim that appellants might have retained the client recovery portions of the settlements.

[7] Prior to a revision to the Rules for Tax Appeals, effective March 1, 2021, these grounds were listed together in California Code of Regulations, title 18, section 30604(d).

DocuSign Envelope ID: 1125CFE4-E22E-4519-999E-51391B9049B9

To find that the opinion is not supported by sufficient evidence means "that there is an absence of evidence or that the evidence received is lacking in probative force to establish the proposition of fact to which it is addressed." (*Renfer v. Skaggs* (1950) 96 Cal.App.2d 380, 382-383.) A rehearing shall not be granted upon the ground of insufficiency of the evidence unless, after weighing the evidence, the panel is convinced from the entire record, including reasonable inferences therefrom, that they clearly should have reached a different decision. (See Code Civ. Proc., § 657.)[8] Here, the proposed assessment is based on a federal determination, and is therefore presumed correct without additional evidence required to meet FTB's initial burden. Appellants provided affidavits and testimony asserting that the amount of income at issue was received by Mr. Creamer in some form during the year at issue. Appellants have provided an affidavit from one individual and an affidavit and testimony from Mr. Creamer, but have not provided evidentiary documentation, contemporaneous or otherwise, that supports their position that not all of the income at issue should be taxable income attributable to Mr. Creamer. Based on the weight of the entire record, we are not convinced that we clearly should have reached a different decision on appeal.

To find that an opinion is contrary to law, OTA must determine that the opinion is "unsupported by any substantial evidence." (*Appeal of Graham and Smith*, 2018-OTA-154P, quoting *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 906 (*Sanchez-Corea*).) The relevant question is not over the quality or nature of the reasoning behind the Opinion, but whether the Opinion can or cannot be valid according to the law. (*Appeal of NASSCO Holdings, Inc.*, *supra*.) In deciding this question, we review the opinion and indulge "in all legitimate and reasonable inferences" to see if the opinion may be upheld. (*Sanchez-Corea*, *supra*, 38 Cal.3d at p. 907.) Here, FTB's determination is presumed correct, and is supported by a federal determination reaching the same conclusion after audit. Appellants provided only affidavits and testimony in support of their position, and when asked about supporting documentation that reasonably should be available and would tend to prove what happened to the income at issue, appellants contend that they never had the documentation, they had it but disposed of it while these transactions were under federal audit, or they could provide it but it would not be helpful in

[8] The grounds for a rehearing are based on a portion of the grounds for granting a new trial. (See *Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.) As such, analysis of the grounds for granting a new trial are useful in interpreting the relevant grounds for a rehearing.

DocuSign Envelope ID: 1125CFE4-E22E-4519-999E-51391B9049B9

resolving this matter. As noted above, it is within OTA's purview to discredit unsupported testimony, and therefore we must find that the opinion is not "contrary to law." (See, e.g., *Appeal of Magidow* (82-SBE-274) 1982 WL 11930 ["it is our view that appellant's unsupported assertions are not sufficient to satisfy [his] burden"].)

Finally, appellants also note a discrepancy in FTB's evidence, namely that an IRS Wage and Income Transcript issued under Mr. Creamer's social security number does not reflect most of the income that has been attributed to Mr. Creamer.[9] As a result, appellants now contend that most of the Form 1099s that formed the foundation of the IRS and FTB determination "were never issued!" However, this discrepancy was apparent to the parties at and before the hearing, and Mr. Creamer never disputed that he received the amounts that are at issue in this appeal and that he deposited those amounts into his client trust account.[10] Thus, this discrepancy is not new information that might serve as a basis for overturning our Opinion on a petition for rehearing.

For the foregoing reasons, we find that appellants have not established grounds for a rehearing. Consequently, the petition for rehearing is denied.

DocuSigned by:
John O Johnson
873D9797B9E64E1...
John O. Johnson
Administrative Law Judge

I concur:

DocuSigned by:
F8E81582726F448...
Richard Tay
Administrative Law Judge

[9] The Wage and Income Transcript appears to reflect only $10,000 of the unreported income amounts at issue.

[10] Furthermore, Mr. Creamer itemized the insurance company payments on the affidavit that he prepared for Ms. Schultz's signature and offered into evidence at the hearing, confirming the amounts at issue.

DocuSign Envelope ID: 1125CFE4-E22E-4519-999E-51391B9049B9

Dissenting Opinion of J. Margolis:

I would grant the petition for rehearing on the ground of the insufficiency of the evidence to support the majority opinion (hereafter, the Opinion). The only evidence supporting the Opinion is the IRS determination, which, in turn, was based upon Form 1099 information. The Form 1099 information was equivocal at best, in that the relevant Treasury Regulations do not weigh in favor of one side or the other as to whether the amounts reflected on the Form 1099s would have included the amounts that were paid over to clients. The majority asserts that a presumption arises in favor of FTB from appellants' failure to produce evidence requested by the IRS in 2013 and at the hearing before us in 2020. However, that presumption is a weak one, particularly where, as here, Mr. Creamer reasonably claims that he no longer has the records sought by FTB (and in some instances, that he never had such records). While I agree that the Form 1099 evidence and the IRS determination based thereon was sufficient to shift the burden of producing evidence to appellants, in light of the uncontradicted testimony from Mr. Creamer (which I found to be credible), and the supporting affidavit from Ms. Schultz, I believe that the evidence cannot support our determination that *all* of the moneys paid by the insurance companies to Mr. Creamer's law firm constituted income to him. (See generally *Dominguez v. Pantalone* (1989) 212 C.A.3d 201, 215 [in a case tried without a jury, the trial court "should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict"].) Accordingly, I dissent.

DocuSigned by:
1777BAD36C0B3437...
Jeffrey I. Margolis
Administrative Law Judge

Date Issued: 4/29/2021