OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18010912
R. REYNOSO	)
	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant: R. Reynoso

For Respondent: Brian Miller, Tax Counsel III

For Office of Tax Appeals: Matthew D. Miller, Tax Counsel III

R.TAY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, R. Reynoso (appellant) appeals actions by respondent Franchise Tax Board (FTB) denying appellant's protests of FTB's proposed assessments of additional taxes, penalties and interest for the 1997 through 2002 tax years (the tax years at issue).[1]

Appellant waived the right to an oral hearing and therefore we decide this matter based on the written record.

ISSUES[2]

1. Whether appellant has demonstrated error in FTB's proposed assessments for the tax years at issue by showing that he made a valid mark-to-market election.
2. Whether appellant has demonstrated that FTB erred in its proposed assessment of the late-filing penalty for the tax years at issue.

[1] Appellant requested that the Office of Tax Appeals (OTA) dismiss this case for lack of jurisdiction. However, we reject appellant's request as meritless. FTB issued valid Notices of Proposed Assessment, and appellant filed a valid, timely appeal. We find no grounds to dismiss this case for lack of jurisdiction.

[2] In the course of this appeal, FTB conceded the notice and demand penalty originally imposed under R&TC section 19133, which is consequently no longer at issue and will not be discussed further.

3. Whether OTA has jurisdiction to review FTB's proposed assessment of the post-amnesty penalty for the tax years at issue.
4. Whether appellant is entitled to interest abatement for the tax years at issue.

FACTUAL FINDINGS

1. During the tax years at issue, appellant worked as a chiropractor in California.
2. Appellant failed to file timely federal or California income tax returns for the tax years at issue.
3. In 2008, appellant pleaded guilty to federal income tax evasion for the 2001 tax year, one of the tax years at issue. In his plea, appellant agreed that he made an affirmative attempt to evade and defeat the assessment and payment of income tax by placing assets into nominee accounts to conceal ownership of assets and receipt of income, and by opening bank accounts with erroneous social security numbers.
4. Thereafter, the Internal Revenue Service (IRS) issued a Notice of Deficiency for tax years 1997 through 2004, which appellant challenged in the United States Tax Court (Tax Court).
5. In 2011, while his Tax Court case was pending, appellant filed untimely California income tax returns for the tax years at issue.
6. FTB examined appellant's late-filed returns for the tax years at issue. During the course of the audit, FTB issued a formal legal demand for information. The demand also provided appellant with preliminary proposed taxes, penalties, and interest, and stated that if FTB did not receive the requested information by the deadline, FTB would issue Notices of Proposed Assessment (NPAs) based on the information available. Appellant requested additional time to respond but did not respond after FTB granted an extension of time. Consequently, on February 9, 2015, FTB issued NPAs for the tax years at issue.
7. Appellant filed timely protests with FTB but requested deferral pending the outcome of the Tax Court case on the issue of his purported mark-to-market election.
8. On October 4, 2016, the Tax Court issued a memorandum opinion and found that appellant did not show that he made a valid mark-to-market election for tax years 1997 through 2004, which includes the tax years at issue here. The Tax Court also found that

appellant was not entitled to offset ordinary income by more than $3,000 per year, and only to the extent that the IRS determined he had losses.[3]

9. On October 31, 2016, FTB issued Notices of Action, affirming its NPAs for the tax years at issue. This appeal followed.

10. In the course of this appeal, FTB received additional information from the IRS regarding the federal adjustments for the tax years at issue. FTB revised its NPAs accordingly, and thus, the following revised taxes and penalties in controversy are due, plus interest: for 1997, tax of $13,749, a late-filing penalty of $3,437, and a post-amnesty penalty of $5,347; for 1998, tax of $15,468, a late-filing penalty of $3,867, and a post-amnesty penalty of $4,707; for 1999, tax of $11,320, a late-filing penalty of $2,830, and a post-amnesty penalty of $2,684; for 2000, tax of $34,137, a late-filing penalty of $8,534, and a post-amnesty penalty of $5,756; for 2001, tax of $27,877, a late-filing penalty of $6,969, and a post-amnesty penalty of $2,913; and for 2002, tax of $76,092, a late-filing penalty of $19,023, and a post-amnesty penalty of $4,610.

DISCUSSION[4]

Issue 1: Whether appellant has demonstrated error in FTB's proposed assessments for the tax years at issue by showing that he made a valid mark-to-market election.

FTB's determinations are presumed to be correct, and a taxpayer has the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) It is well established that the failure of a party to introduce evidence that is within his or her control gives rise to the presumption that, if provided, it would be unfavorable. (*Appeal of Cookston* (83-SBE-048) 1983 WL 15434.)

[3] The Tax Court affirmed its memorandum opinion in a decision issued on March 22, 2017, which incorporated the facts and findings of the memorandum opinion and contained appellant's federal tax deficiencies and additions to tax. Appellant objected to the admission into evidence of the memorandum opinion and three of FTB's other exhibits based on lack of relevance and lack of service of process. We overrule these objections because we find the memorandum opinion and exhibits relevant to the determination of this case. (See Cal. Code Regs., tit. 18, §§ 30214(e)(1), 30102(w)(5), (8).)

[4] Appellant makes numerous arguments in support of his positions on appeal. We summarily reject any such argument not discussed herein as without merit and/or irrelevant.

Internal Revenue Section (IRC) section 475(f)(1)(A)[5] provides generally that a person who is engaged in a trade or business as a trader in securities, and who makes a valid mark-to-market election, shall recognize a gain or loss (as ordinary income or loss) on those securities held at the end of the taxable year as if such securities were sold for fair market value on the last business day of that taxable year. (IRC, § 475(d)(3)(A)(i); *Perkins v. Commissioner* (2007) 129 T.C. 58, 68.) For traders in securities, a valid federal mark-to-market election that applies to a trade or business is also valid and binding for California purposes, and a separate California-only election is not allowed. (R&TC, § 17570(d)(1).) If such a taxpayer fails to make a valid mark-to-market election for federal purposes, the taxpayer cannot elect mark-to-market treatment for state purposes. (R&TC, § 17570(d)(2).) As discussed next, because appellant failed to make a valid federal mark-to-market election for the tax years at issue, he cannot make such an election for California purposes.

IRS Revenue Procedure 99-17 describes the methods for making valid federal mark-to-market elections. For elections effective for taxable years beginning on or after January 1, 1999, a trader must file a statement identifying the election being made in the first taxable year for which the election is effective, and the trade or business for which the election is made.[6] Once a valid election is made, it applies to subsequent years until a request to change accounting methods is made to the IRS and is accepted. (Rev. Proc. 99-17, 1999-1 C.B. 503, § 4.00.)

Here, appellant's purported federal mark-to-market election that applied to the tax years at issue was at the heart of appellant's dispute with the IRS and was ultimately decided by the Tax Court. The Tax Court found no evidence to support appellant's contention that he made a valid mark-to-market election for any of the tax years at issue. Specifically, the Tax Court found dispositive the fact that appellant's accounting was inconsistent with having made a mark-to-market election and that appellant failed to file timely federal income tax returns for the tax years at issue, as required by Revenue Procedure 99-17. Thus, for federal purposes, appellant did not make a valid mark-to-market election.

The Tax Court's decision is dispositive and its determination that there was no valid federal mark-to-market election is binding. Consequently, because appellant did not make a

[5] California conforms to IRC section 475, which is incorporated by reference in R&TC section 17570.

[6] Taxpayers file Form 3115, "Application for Change in Accounting Method," to change an accounting method or the accounting treatment of any item. (Treas. Reg. § 1.446-1(e)(3)(i).)

valid federal mark-to-market election for the tax years at issue, appellant cannot make such an election for California purposes. (R&TC, § 17570(d)(2).) There is no other provision under the law that would allow appellant to make a mark-to-market election exclusively for California purposes.[7]

Issue 2: Whether appellant has demonstrated that FTB erred in its proposed assessment of the late-filing penalty for the tax years at issue.

R&TC section 19131 imposes a late-filing penalty on a taxpayer who fails to file a return by either the due date or the extended due date unless it is shown that the failure was due to reasonable cause and not willful neglect. Here, it is uncontroverted that appellant filed untimely California income tax returns for tax years 1997 through 2002 in 2011. Appellant does not contend FTB erred in its calculation of the penalty, and we also find no evidence of error.

The taxpayer bears the burden of proof to show that reasonable cause existed to support an abatement of the penalty. (*Appeal of Beadling* (77-SBE-021) 1977 WL 3831.) To meet that burden, appellant must provide credible and competent evidence to support his claim of reasonable cause; otherwise the penalty cannot be abated. (*Appeal of Xie* (2018-OTA-076P).) Appellant has provided no credible and competent evidence to show reasonable cause. We also find no basis to conclude reasonable cause existed.

Issue 3: Whether OTA has jurisdiction to review FTB's proposed assessment of the post-amnesty penalty for the tax years at issue.

R&TC sections 19730 through 19738 set forth the tax amnesty program. During the amnesty period, which ended March 31, 2005, the tax amnesty program applied to tax liabilities for taxable years beginning before January 1, 2003. (R&TC, § 19730 et seq.) R&TC section 19777.5(a)(2) provides that a penalty shall be added to the tax for each taxable year for which amnesty could have been requested for amounts that become due and payable after the last day of the amnesty period for an amount equal to 50 percent of the interest on any final amount. For amounts assessed after the last date of the amnesty period, the related penalty under the amnesty provisions is often referred to as the post-amnesty penalty.

[7] We note that the Tax Court's June 21, 2018 ruling against appellant on a motion to dismiss stated that the Tax Court lacked jurisdiction to hear appellant's case because appellant did not file a timely petition for tax years 1997 through 2004. As explained above, this is not the situation here, and that ruling has no bearing on this appeal.

FTB has no discretion to determine whether the post-amnesty penalty should be imposed and there are no statutory exceptions for taxpayers who may have acted in good faith or had reasonable cause for failing to participate in the amnesty program. (R&TC, § 19777.5.) Additionally, R&TC section 19777.5(d) strictly limits our review of FTB's imposition of the post-amnesty penalty. The only situation that allows OTA to review a post-amnesty penalty assessment is on the denial of a claim for refund that a taxpayer filed on the basis that FTB erred in its computation of the penalty. (R&TC, § 19777.5(e).) This is not the situation here; thus, we have no statutory basis to review FTB's proposed assessment of the post-amnesty penalty.

Issue 4: Whether appellant is entitled to interest abatement for the tax years at issue.

R&TC section 19101 provides that interest shall be assessed upon any portion of the tax not paid on or before the date prescribed for payment. The imposition of interest is mandatory. (R&TC, § 19101; see also *Appeal of Yamachi* (77-SBE-095) 1977 WL 3905.) Interest is not a penalty, but rather, it is compensation for the use of money from the time it was due, to the actual date of payment. *(Appeal of Jaegle* (76-SBE-070) 1976 WL 4086.) Here, appellant makes no argument to justify interest abatement. We also find no basis to grant interest abatement.

HOLDINGS

1. Appellant has not demonstrated error in FTB's proposed assessments for the tax years at issue by showing he made a valid mark-to-market election.
2. Appellant has not demonstrated that FTB erred in its proposed assessment of the late-filing penalty for the tax years at issue.
3. OTA does not have jurisdiction to review FTB's proposed assessment of the post-amnesty penalty for the tax years at issue.
4. Appellant is not entitled to interest abatement for the tax years at issue.

DISPOSITION

FTB's actions on the proposed assessments, as revised, are sustained in full.

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

We concur:

DocuSigned by:
Alberto T. Rosas
2281E8D4660141D1...
Alberto T. Rosas
Administrative Law Judge

DocuSigned by:
Teresa A. Stanley
0CC6C6ACCC6A44D...
Teresa A. Stanley
Administrative Law Judge

Date Issued: 6/9/2020