OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **A. VENTURA (DEC'D) AND S. VENTURA**	) OTA Case No. 18043006)))))

OPINION

Representing the Parties:

For Appellants: S. Ventura

For Respondent: Brian Werking, Tax Counsel

R. TAY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, A. Ventura (Dec'd) and S. Ventura (appellants) appeal an action by Franchise Tax Board (respondent) proposing $2,988 of additional tax, plus applicable interest, for the 2007 tax year, $6,007 of additional tax, plus applicable interest, for the 2008 tax year, and $5,070 of additional tax, plus applicable interest, for the 2009 tax year.

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

ISSUE

Whether appellants have shown error in respondent's proposed assessments of additional tax, which are based on federal adjustments, for the 2007, 2008 and 2009 tax years (the tax years at issue).[1]

FACTUAL FINDINGS

1. During the tax years at issue, appellants incurred expenses related to their activity of breeding, raising and racing thoroughbred horses. On their federal and California income

[1] In their opening brief, appellants also argue that their proposed tax liabilities should have been discharged in bankruptcy. The Office of Tax Appeals (OTA) does not have jurisdiction to determine whether a liability has been or should have been discharged in bankruptcy, and so, we do not discuss this issue further. (*Appeal of Savage*, 2020-OTA-328P; Cal. Code Regs., tit. 18, § 30104(h).)

tax returns for the tax years at issue, appellants deducted those expenses as business expenses, and reported substantial business losses, which offset their wage income.

2. The Internal Revenue Service (IRS) audited appellants' federal income tax returns for the tax years at issue, which resulted in adjustments to appellants' federal tax liabilities for the tax years at issue.

3. On September 29, 2015, respondent received information from the IRS regarding adjustments to appellants' federal income tax returns for the tax years at issue. Based on the federal adjustments, respondent issued to appellants a total of three Notices of Proposed Assessment (NPAs), one for each of the tax years at issue. Appellants protested, and on March 20, 2018, respondent issued Notices of Action affirming the NPAs. This timely appeal follows.

DISCUSSION

A deficiency 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.) Where, as here, respondent's proposed assessment is based on a final federal determination, a taxpayer may show that either respondent's determination, or the federal determination upon which it is based, is incorrect. However, 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 Gorin*, 2020-OTA-018P.) Furthermore, 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.)

Appellants argue that the expenses they incurred in their thoroughbred activities qualified as trade or business expenses deductible under Internal Revenue Code section 162.[2] However, appellants provide no evidence to OTA to substantiate their assertions that the IRS erred in classifying their expenses as hobby losses. Appellants submitted arguments they made to the IRS (that failed to convince the IRS to change its position) and to respondent during audit and protest, but provide no documents showing the IRS erred in its determination. Appellants had

[2] The IRS made additional adjustments to appellants' income tax returns for the tax years at issue; however, appellants make no arguments regarding those adjustments, and so, we do not discuss those further.

opportunities on appeal to provide any such evidence to OTA, yet appellants provided none. As stated above, the burden is on the taxpayer to show error in the federal determination and unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof.

Appellants also argue that respondent should abate its proposed assessments because the IRS deemed appellants' accounts uncollectible. However, appellants confuse the issues of determining the correct amount of tax and the collectability of the tax due. While a taxpayer's financial situation may ultimately render a liability uncollectible, the issue of ability to pay versus that of determining the correct amount of tax are two separate and distinct issues. We are only tasked with determining the correct amount of the taxpayer's California income tax liability. (*Appeals of Dauberger, et al.* (82-SBE-082) 1982 WL 11759.) We therefore lack authority to forgive a liability or make discretionary adjustments to the amount of a tax assessment based on a taxpayer's ability to pay. (*Appeal of Estate of Luebbert, Deceased, and Luebbert* (71-SBE-028) 1971 WL 2708.)

HOLDING

Appellants have not shown error in respondent's proposed assessments of additional tax, which are based on federal adjustments, for the tax years at issue.

DISPOSITION

We sustain respondent's action in full.

DocuSigned by:
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Richard Tay
Administrative Law Judge

We concur:

DocuSigned by:
Kenneth Gast
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Kenneth Gast
Administrative Law Judge

DocuSigned by:
Suzanne B. Brown
47F45ABE89E34D0...
Suzanne B. Brown
Administrative Law Judge

Date Issued: 4/7/2021