

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 20106796
J. HURWITZ)
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OPINION

Representing the Parties:

For Appellant: J. Hurwitz

For Respondent: Melisa Recendez, Legal Assistant

A. ROSAS, Administrative Law Judge: Under Revenue and Taxation Code (R&TC) section 19045, appellant J. Hurwitz appeals respondent Franchise Tax Board’s action proposing \$2,915 of additional tax and applicable interest for tax year 2016.¹ Appellant waived the right to an oral hearing, and therefore we decide this matter based on the written record.

ISSUE

Whether appellant established error in respondent’s proposed assessment for tax year 2016, which is based on a federal assessment.

FACTUAL FINDINGS

1. On December 23, 2016, appellant sold or disposed of various securities, some at a gain, others at a loss, for total proceeds of \$159,997. Appellant had a cost basis of \$109,085 in these securities. This resulted in a net capital gain of \$50,912.
2. Appellant filed a timely joint 2016 California Resident Income Tax Return and reported California taxable income of \$39,692. Appellant did not report the net capital gain of \$50,912. Appellant reported and received a refund.

¹ The action proposing additional tax and applicable interest was addressed to appellant and his spouse, but only appellant has appealed that action. Accordingly, we will refer only to appellant throughout this Opinion, although some of the acts and events may have also involved appellant’s spouse.

3. Respondent received audit information from the Internal Revenue Service (IRS) indicating that it adjusted appellant's federal income by an increase of \$50,912, due to unreported securities income.
4. Respondent issued a Notice of Proposed Assessment (NPA) for tax year 2016, which applied the \$50,912 adjustment based on the unreported securities income, revised appellant's California taxable income to \$90,604,² and proposed additional tax of \$2,915, plus applicable interest. Appellant timely protested the NPA.
5. When appellant did not provide evidence that the IRS revised the federal assessment, respondent issued a Notice of Action on September 30, 2020, which affirmed the NPA. This timely appeal followed.
6. As of November 5, 2020, the latest audit information from the IRS continues to indicate that the IRS adjusted appellant's federal income by an increase of \$50,912, due to unreported securities income.

DISCUSSION

R&TC section 18622(a) requires a taxpayer to concede the accuracy of federal changes to a taxpayer's income or state where the changes are 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 respondent's determination is erroneous. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Gorin*, 2020-OTA-018P.) In the absence of credible, competent, and relevant evidence showing that respondent's determination is incorrect, it must be upheld. (*Appeal of Seltzer* (80-SBE-154) 1980 WL 5068.)

Here, respondent received information from the IRS that appellant's federal adjusted gross income was adjusted for tax year 2016. Specifically, the IRS increased appellant's adjusted gross income by \$50,912, due to unreported securities income. Furthermore, according to the latest audit information from the IRS obtained on November 5, 2020, the unreported securities income of \$50,912 remained unchanged. Appellant's adjusted gross income did not change from the amount reported by the IRS. Thus, based on the evidence before us, it appears that the 2016 federal assessment was not adjusted or canceled, and it is appellant's burden to show that respondent's proposed assessment is erroneous.

² California taxable income of \$39,692 + adjustment of \$50,912 = \$90,604.

As to appellant's burden, the applicable standard of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) To meet this evidentiary standard, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.) In other words, the preponderance of the evidence standard means more than 50 percent. (*Union Pacific Railroad Co. v. State Bd. of Equalization* (1991) 231 Cal.App.3d 983, 1000.)

Appellant argues that respondent is not accounting for appellant's cost basis in the securities at issue. Appellant asserts that after he provided the IRS documentation of his cost basis in the securities, he settled the issue with the IRS. As evidence of the settlement, appellant shows that he submitted additional tax of \$14,000 to the IRS, and that the IRS refunded \$13,548.76 to appellant; thus, appellant considered the federal issue settled. However, because appellant did not submit federal documentation to establish what exact actions the IRS took regarding the \$13,548.76 refund, we disagree that this is conclusive evidence of a settlement. Under the preponderance of the evidence standard, this does not prove the existence of a federal settlement.

As to the matter of appellant's cost basis, we note that when the IRS adjusted appellant's federal income by an increase of \$50,912 due to unreported securities income, this adjustment already accounted for appellant's cost basis. The evidence showed that appellant sold or disposed of various securities on December 23, 2016, some at a gain, others at a loss, for total proceeds of \$159,997. The evidence proved that appellant had a cost basis of \$109,085 in these securities, which resulted in a net capital gain of \$50,912.

The latest audit information from the IRS continues to show that the IRS adjusted appellant's federal income by an increase of \$50,912. Appellant has not shown that this determination is erroneous. Appellant has not shown, by a preponderance of the evidence, that his cost basis was greater than \$109,085. In other words, appellant has not shown that it is more likely than not that his net capital gain was less than \$50,912. Therefore, we find that appellant did not meet his burden of proof and no adjustment is warranted.

HOLDINGS

Appellant did not establish error in respondent’s proposed assessment for tax year 2016.

DISPOSITION

We sustain respondent’s action in full.

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

We concur:

DocuSigned by:
Natasha Ralston
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Natasha Ralston
Administrative Law Judge

DocuSigned by:
Richard Tay
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Richard Tay
Administrative Law Judge

Date Issued: 5/25/2021