

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
P. VO

) OTA Case No. 20106835
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OPINION

Representing the Parties:

For Appellant: P. Vo

For Respondent: Leoangelo C. Cristobal, Tax Counsel

E. S. EWING, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, P. Vo (appellant) appeals an action by the Franchise Tax Board (respondent) proposing additional tax of \$535.00 and an accuracy-related penalty of \$107.00 for the 2013 taxable year; additional tax of \$1,283.00 and an accuracy-related penalty of \$256.60 for the 2014 taxable year; and additional tax of \$1,029.00 and an accuracy-related penalty of \$205.80 for the 2015 taxable year.

Appellant waived the right to an oral hearing; therefore, the matter is decided based on the written record.

ISSUES

1. Whether appellant has shown error in respondent’s proposed assessments of additional tax, which are based on federal determinations.
2. Whether the accuracy-related penalties should be abated.

FACTUAL FINDINGS

1. Appellant filed timely California tax returns for the taxable years at issue.
2. Respondent received information that the IRS audited and made adjustments to appellant’s federal tax returns for the taxable years at issue. Appellant did not notify respondent of the federal adjustments.

3. Based on the information received from the IRS, respondent issued appellant a Notice of Proposed Assessment (NPA) for each of the taxable years at issue.
4. For the 2013 taxable year, the IRS increased appellant's federal adjusted gross income (AGI). This resulted in a \$36,412.00 net increase to appellant's federal taxable income and the imposition of the federal accuracy-related penalty. As a result, respondent proposed a \$36,412.00 increase to appellant's California taxable income, \$535.00 of additional tax, a \$107.00 accuracy-related penalty, and applicable interest.
5. For the 2014 taxable year, the IRS increased appellant's federal AGI. This resulted in a \$56,876.00 net increase to appellant's federal taxable income and the imposition of the federal accuracy-related penalty. As a result, respondent proposed a \$56,876.00 increase to appellant's California taxable income, \$1,283.00 of additional tax, a \$256.60 accuracy-related penalty, and applicable interest.
6. For the 2015 taxable year, the IRS increased appellant's federal AGI. This resulted in a \$56,580.00 net increase to appellant's federal taxable income and the imposition of the federal accuracy-related penalty. As a result, respondent proposed a \$56,580.00 increase to appellant's California taxable income, \$1,029.00 of additional tax, a \$205.80 accuracy-related penalty, and applicable interest.
7. Appellant filed a timely protest of the NPAs. At protest, appellant provided respondent with a copy of a letter appellant submitted to the IRS requesting reconsideration of its audit findings. Appellant requested a postponement of the protest proceedings pending the outcome of the requested IRS audit reconsideration.
8. On July 26, 2019, respondent requested appellant provide documentation that the IRS had canceled or reduced its audit assessments. Appellant did not respond to the request.
9. On May 11, 2020, respondent received account transcripts from the IRS that showed there had been no changes to the IRS audit and resulting federal tax assessments for the 2013, 2014, and 2015 taxable years. Respondent then issued appellant Notices of Action (NOAs) for each of the taxable years at issue. The NOAs affirmed the NPAs in their entirety.
10. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has shown error in respondent's proposed assessments of additional tax, which are based on federal determinations.

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. (*Appeal of Gorin*, 2020-OTA-018P.) Where respondent's proposed assessment is based on a final federal determination, a taxpayer shall either concede the accuracy of a federal determination or state wherein it is erroneous. (R&TC, § 18622(a).) The applicable burden of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) A preponderance of the evidence means that the taxpayer must establish by documentation or other evidence that the circumstances he or she 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.) Moreover, 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, supra.*) In the absence of credible, competent, and relevant evidence showing that respondent's determinations are incorrect, such determinations must be upheld. (*Appeal of Seltzer* (80-SBE-154) 1980 WL 5068.) A taxpayer's failure to produce evidence that is within the taxpayer's control gives rise to a presumption that such evidence is unfavorable to the taxpayer's case. (*Appeal of Cookston* (83-SBE-048) 1983 WL 15434.)

Here, appellant asserts that appellant repeatedly requested the IRS reconsider its audit of appellant's federal returns and that appellant has the right to resolve appellant's disagreement with the IRS before a determination is made with respect to respondent's assessments. However, appellant provided no evidence that the IRS ever agreed to reconsider its audit, and the record shows that the IRS did not do so. The record is also clear that the IRS audit of appellant's taxable years at issue is final. 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. (*Appeal of Gorin, supra.*) Here, respondent's proposed assessment is based on a final federal determination and appellant has failed to show that either respondent's determination, or the federal determination upon which it is based, is incorrect.

Issue 2: Whether the accuracy-related penalty should be abated.

R&TC section 19164 generally incorporates the provisions of Internal Revenue Code (IRC) section 6662 and imposes an accuracy-related penalty of 20 percent of the applicable underpayment. As relevant here, the penalty applies to any portion of an underpayment attributable to negligence or disregard of rules and regulations, or any “substantial understatement of income tax.” (IRC, § 6662(b)(1) & (2).) When respondent imposes a penalty, it is presumed to have been imposed correctly. (*Appeal of Xie*, 2018-OTA-076P.)

Here, the IRS increased appellant’s federal AGI for the taxable years at issue, resulting in an increase to appellant’s California tax. Additionally, the IRS assessed the accuracy-related penalty for each of the three taxable years at issue based on negligence or disregard of rules or regulations.¹ Respondent similarly imposed the accuracy-related penalties based on negligence or disregard of rules or regulations.

The record also shows that appellant sent various letters to the IRS requesting that it reconsider its audits. However, there is no evidence in the record that the IRS did, in fact, do so. On the contrary, the record shows that the IRS audit of appellant’s taxable years at issue is final and appellant has provided no evidence to show a reasonable basis for the return position or reasonable cause for abatement of the penalty. Thus, we find no basis to abate the accuracy-related penalty.


¹It is clear the IRS imposed the accuracy-related penalty on the basis of negligence or disregard of rules or regulations, as the federal audit assessments for the 2013, 2014, and 2015 taxable years did not exceed the threshold for a “substantial” understatement under IRC section 6662(d)(1). For an individual, there is a “substantial understatement of income tax” when the amount of the understatement for a taxable year exceeds the greater of 10 percent of the tax required to be shown on the return, or \$5,000. (IRC, § 6662(d)(1).) The additional federal tax assessments were less than \$5,000 for each of the 2013, 2014, and 2015 taxable years.

HOLDINGS


1. Appellant has not shown error in respondent’s proposed assessments of additional tax, which are based on federal determinations.
2. The accuracy-related penalties are not abated.


DISPOSITION

We sustain respondent’s actions in full.

DocuSigned by:

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 Elliott Scott Ewing
 Administrative Law Judge

We concur:

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 Alberto T. Rosas
 Administrative Law Judge

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 Andrea L.H. Long
 Administrative Law Judge

Date Issued: 7/29/2021