

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18063280
 W. LEE AND)
 K. LEE)
 _____)

OPINION

Representing the Parties:

For Appellants: Eugene R. Baldi, CPA

For Respondent: Brian Werking, Tax Counsel III
 Nancy Parker, Tax Counsel IV

A. VASSIGH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, W. Lee and K. Lee (appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$6,605, plus applicable interest, for the 2014 tax year.

Office of Tax Appeals (OTA) Administrative Law Judges John O. Johnson, Teresa A. Stanley, and Amanda Vassigh held an oral hearing for this matter via web-based conferencing on July 21, 2021. At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

ISSUE

Whether appellants have proven error in FTB's proposed additional tax, which is based on information provided by the IRS.

FACTUAL FINDINGS

1. Appellants filed a timely joint 2014 California personal income tax return. On the return, appellants reported a refund due of \$2,757, which appellants requested be applied towards their 2015 estimated tax.

2. Subsequently, under Internal Revenue Code section 6103(d), FTB received federal information showing that the IRS had adjusted appellants' 2014 federal return for unreported taxable dividends and capital gains dividends received from various payers.
3. Based on the federal information, FTB issued a Notice of Proposed Assessment (NPA) dated October 12, 2017, that applied the federal adjustments to appellants' California return and limited appellants' itemized deductions by \$3,925. This resulted in a proposed additional tax of \$6,605 plus applicable interest.
4. Appellants protested FTB's proposed assessment. In their protest letter, appellants explained that they were working with the IRS to reverse its assessment, which they claimed was based on "double reported income." In its response to appellants' protest, FTB sent a letter explaining that recent information from the IRS did not indicate that the IRS had made any adjustments to appellants' federal account for 2014 or that the IRS was reconsidering its adjustments.
5. Subsequently, FTB issued a Notice of Action on April 30, 2018, affirming the NPA. This timely appeal followed.
6. FTB requested and was granted a deferral of their hearing to allow time for the IRS to process appellants' amended federal return.
7. By letter dated September 28, 2018, the IRS informed appellants that their amended federal tax return had not been accepted as filed. The IRS stated, "it appears the ordinary dividends and capital gains reported by the payers in question are not included on the Form 1099-DIV (Dividends and Distributions) from LPL Financial. If you disagree with the income in question, you will need to contact each payer listed on the CP2000 Notice for a corrected income statement."
8. The IRS Account Transcript dated April 25, 2019, does not show that the IRS reconsidered or changed its adjustments to appellants' 2014 account.
9. On December 5, 2019, appellants requested and were granted another hearing deferral in order to "obtain corrected 1099-DIVs."
10. Corrected 1099-DIV forms were not presented to OTA, but appellants provided a letter from LPL Financial, affirming that LPL Financial only issued one 1099 for appellants' account and that W. Lee, the primary account holder, never had any other accounts opened at LPL Financial under his social security number. In additional briefing

requested by OTA, FTB suggested that appellants obtain corrected 1099-DIVs if they believed incorrect information was reported to the IRS.

11. A prehearing conference was held on June 30, 2021, during which the parties discussed the possibility of appellants submitting additional evidence in support of appellants' position.
12. Appellants did not submit corrected 1099-DIVs or other additional evidence in support of appellants' position.

DISCUSSION

R&TC section 18622(a) provides that a taxpayer shall either concede the accuracy of a federal determination or state wherein it is erroneous. It is well settled that a deficiency assessment based on a federal audit report is presumptively correct and that a taxpayer bears the burden of proving that the determination is erroneous. (*Appeal of Gorin*, 2020-OTA-018P.) Unsupported assertions are not sufficient to satisfy the taxpayers' burden of proof with respect to an assessment based on a federal action. (*Ibid.*) The taxpayers' failure to produce evidence that is within their control gives rise to a presumption that such evidence, if provided, would have been unfavorable to the taxpayers' case. (*Appeal of Vardell*, 2020-OTA-190P.)

Appellants assert that all of their investments in the stock market were through LPL Financial and T.R. Price and were reported on their 2014 California tax return. Appellants argue that the dividends and capital gains the IRS determined had not been reported on the federal return were already included within the LPL Financial 1099-DIV.¹ Appellants' position is that duplicative income was reported to the IRS. However, the 1099-DIV from LPL Financial is not in dispute, and the parties agree that the income reported on that 1099-DIV was properly reported on appellants' 2014 tax return. The federal adjustments (upon which FTB's proposed assessment is based) are related to unreported taxable dividends and capital gains dividends paid to W. Lee as reported on several 1099-DIVs by other payers (hereinafter, "other entities"). Appellants were advised by FTB, and earlier by the IRS, that if they believed the 1099-DIVs issued by the other entities were in error, they should obtain corrected forms from each of the other entities. Before the hearing, appellants stated they would seek corrected 1099-DIVs from the other entities, and a deferral was granted so that they could do so.

¹ Appellants concede that the item listed as "OTC Portfolio" on the IRS CP3219A Notice is not included in the LPL Financial 1099-DIV.

However, at the hearing, Mr. Baldi asserted on behalf of appellants that while “earlier in the proceedings with the Franchise Tax Board, we said, well, maybe we could go to all these people and ask each one of them to give us a negative declaration that no, they didn’t send a 1099 on their own. We decided that really wasn’t feasible from our standpoint in the time of all the craziness going on with our Covid and so forth.” However, Mr. Baldi continued, “All of this predates Covid.”² Mr. Baldi correctly noted that this matter arose prior to the COVID-19 pandemic - the IRS CP3219A Notice was issued in June 2016 and the FTB NPA was issued in October 2017, so appellants had notice of the issue and ample time (including a deferral for this specific reason) to request corrected 1099-DIVs before this hearing took place.

However, it appears that appellants decided not to seek the exact information which both the IRS and FTB had clearly stated would be necessary to revise the tax adjustments that appellants dispute. It was wholly within appellants’ control to request correct 1099s-DIVs from the other entities at any time between 2016, when the IRS notified them of the adjustments to their 2014 federal return, and July 2021, when the OTA hearing was held. The fact that they did not even attempt to produce such basic evidence is regrettable. This fact gives rise to the presumption that such evidence would have been unfavorable to their case. (*Appeal of Vardell, supra.*)

Appellants provide, instead, a spreadsheet Mr. Baldi created which shows the dividends listed in the LPL Financial’s Tax Information document, and additional dividends listed by the IRS as unreported income. Appellants argue that some of the amounts listed by the IRS are contained within the dividends captured in the LPL Financial Tax Information document. But during the hearing, Mr. Baldi admitted that is his “best guess” and that he “can’t prove it.”³ FTB provides its own spreadsheet, which compares the information detailed in LPL Financial’s Tax Information document with the 1099-DIVs listed on the federal Wage and Income Transcript. We have carefully examined these spreadsheets as illustrative aids to help us review the evidence from which they are compiled, but they do not provide definitive proof of error or lack thereof.

We look to the actual tax documents and the IRS CP3219A to understand the basis for the federal adjustments.

² Hearing Transcript, page 15, lines 10 through 16.

³ Hearing Transcript, page 16, line 25 and page 17 and line 2.

Mr. Baldi points out that some of the entities listed in the IRS' CP3219A Notice as "Qualified Dividends" are again listed in that document as "Taxable Dividends." We note that some of the same amounts are listed from entities in both the "Qualified Dividends" and the "Taxable Dividends" sections. However, we cannot surmise based solely on the fact that there are some identical amounts listed in two different sections, that the same dividend income was reported twice. The two sections list different types of dividend income – ordinary dividends which are taxable as ordinary income and qualified dividends which are ordinary dividends held for a certain amount of time and taxed as net capital gains. (West's Tax Law Dictionary (February 2021) § O591.) The evidence before us indicates that appellants received and failed to report income from some of the dividends they received in 2014.

Appellants have not provided any corrected 1099-DIVs or uncontroverted evidence that the dividend income reported by the other entities was in error. As a result, appellants have not met their burden of proof to show error in the federal adjustments or in FTB's determination based upon those adjustments.

HOLDING

Appellants have failed to prove error in FTB's proposed additional tax, which is based on information provided by the IRS.

DISPOSITION

FTB's action is sustained.

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Amanda Vassigh
Administrative Law Judge

We concur:

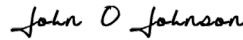
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Teresa A. Stanley
Administrative Law Judge

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John O. Johnson
Administrative Law Judge

Date Issued: 10/12/2021