

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
P. RAUCH

) OTA Case No. 21037353
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OPINION

Representing the Parties:

For Appellant: P. Rauch

For Respondent: Joel M. Smith, Tax Counsel III

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, P. Rauch (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$8,677, and applicable interest, for the 2016 taxable year.

Appellant waived the right to an oral hearing; therefore, the Office of Tax Appeals (OTA) decides the matter based on the written record.

ISSUE

Does appellant have the burden to establish error in FTB’s proposed assessment, which is based on a federal determination, and if so, has appellant met that burden?

FACTUAL FINDINGS

1. Appellant filed a timely 2016 California Resident Income Tax Return, reporting wages earned.
2. Subsequently, FTB received information from the IRS, reported on a third-party merchant account information return (Form 1099-K) indicating that PayPal Inc. (PayPal) reported payments to appellant totaling \$100,412 in 2016. The IRS increased appellant’s federal adjusted gross income (AGI) to account for this unreported amount.

3. FTB issued to appellant a Notice of Proposed Assessment (NPA) which proposed to make corresponding adjustments to appellant's California income.
4. Appellant protested the NPA, asserting that she did not receive money from PayPal and thinks her account must have been hacked.
5. FTB responded that "[f]or us to cancel or reduce our assessment, the issue needs to be resolved with the IRS." FTB did not, at that time, request any other information or documents from appellant by which to verify whether her claim of identity theft was valid.
6. Appellant's federal Account Transcript, dated March 15, 2021, indicates that appellant filed an amended federal return on July 16, 2020, and that a claim was pending as of July 20, 2020, which was later closed on October 26, 2020, with no change to appellant's liability. As of the date of the transcript, the IRS had not reduced appellant's AGI, which includes the adjustments for the amount reported by PayPal.
7. FTB issued a Notice of Action affirming its NPA.
8. This timely appeal followed.

DISCUSSION

Burden of Proof

R&TC section 18622(a) provides that a taxpayer shall either concede the accuracy of a federal determination or state wherein it is erroneous. In general, a deficiency assessment based on a federal audit report is presumptively correct, and a taxpayer bears the burden of proving that the determination is erroneous. (*Appeal of Gorin*, 2020-OTA-018P). The burden of proof may shift to FTB where a taxpayer asserts a reasonable dispute with respect to specified items of income reported on an information return filed by a third party. (R&TC, § 21024(a)). The taxpayer asserting the dispute must fully cooperate with FTB, and provide access to and inspection of all witnesses, information, and documents within the control of the taxpayer as reasonably requested by FTB. (R&TC, § 21024(b).)

Initially, appellant has the burden to prove FTB's determination is erroneous because the proposed assessment is based on a federal determination. (*Appeal of Gorin, supra.*) Appellant has asserted that the income reported by PayPal was not received by her, and appellant believes her account was hacked. Appellant's argument that the income reported by PayPal is not her

income may shift the burden to FTB if the requirements of R&TC section 21024 are met. FTB asserts that R&TC section 21024 is inapplicable to appellant for three reasons: 1) the plain language of the statute does not apply to information returns as defined in R&TC section 18631; 2) appellant has not asserted a reasonable dispute because FTB provided evidence that the income was tied to her; and 3) appellant has not fully cooperated with FTB because she did not send “an IRS document that shows that they have reduced or canceled their assessment.”¹

Application of R&TC section 21024 to appellant’s circumstances

The outcome of this appeal rests on which party has the burden of proof, and OTA must, therefore, examine whether the burden of proof should be shifted to FTB pursuant to R&TC section 21024, which is part of the Katz-Harris Taxpayers’ Bill of Rights (TPBOR). (R&TC, § 21001.) A key purpose of TPBOR is to deter state agents from asserting unreasonable and unfair claims against private citizens. (*Lucent Technologies, Inc. v. Bd. of Equalization* (2015) 241 Cal.App.4th 19, 44.)

Appellant asserts that she was “hacked” and that someone earned money using her PayPal account. In support of that assertion, appellant provided bank statements for 2016 and a copy of a PayPal credit card statement. The bank account statements do not show any deposits from PayPal, and the credit card statement shows that appellant owes money to PayPal. Based on appellant’s assertion and supporting evidence, she has asserted a reasonable dispute with respect to the income at issue. Appellant has also cooperated with FTB to the extent that FTB requested information prior to this appeal. FTB initially only requested of appellant that she provide information showing that the IRS reduced or canceled its assessment. Appellant responded to the request by acknowledging that the IRS had not done so. Appellant indicated she had made the same claim to the IRS that she made to FTB; namely, that the income was not hers. While it otherwise appears that appellant meets the initial requirements to shift the burden under R&TC section 21024, OTA must also examine whether the Form 1099-K was included as one of the information returns designated by R&TC section 21024(a)(1).

¹ The record indicates that this is the sole request of appellant by FTB prior to this appeal. FTB did not request any additional information that would help to conclusively tie the income reported on the information return to appellant.

Third-party information returns addressed by R&TC section 21024

R&TC section 21024(a)(1) points to code sections that related to specific types of information returns that would potentially shift the burden of proof from a taxpayer to FTB under circumstances like appellant's. Several of the referenced code sections have been repealed. (See R&TC, §§ 18637, 18638, 18641, 18643, 18645, 18646, 18647.) FTB asserts that the plain language of the statute is clear, and R&TC section 21024 does not expressly apply. OTA disagrees that the plain language of the statute is clear. A latent ambiguity exists because the repealed R&TC sections were neither removed nor replaced within R&TC section 21024. OTA "should not sacrifice legislative intent or purpose by overlooking a latent ambiguity and adopting a literal construction." (*Coburn v. Sievert* (2005) 113 Cal.App.4th 1483, 1496; *Appeal of NASSCO Holdings Inc.*, (2010-SBE-001) 2010 WL 5626976.) Additionally, FTB's assertion that OTA should only look to the plain language of the statute would create an implied repeal of much of R&TC section 21024(a)(1). "[A]ll presumptions are against a repeal by implication. [Citations.]" (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P, quoting *Flores v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 171, 176.) Absent an express declaration of legislative intent, an implied repeal should be found "only when there is no rational basis for harmonizing the two potentially conflicting statutes [citation], and the statutes are 'irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.'" (*Appeal of GEF Operating, Inc.*, *supra*, quoting *In re White* (1969) 1 Cal.3d 207, 212.) Therefore, OTA may look to legislative intent to determine whether R&TC section 21024(a)(1) applies to this appeal.

In 1988, the legislature adopted the TPBOR, creating Part 10.7 of the R&TC. (R&TC, § 21001, et seq., added by Stats. 1988, ch. 1573, § 2.) At the time of adoption of the TPBOR, the R&TC sections to which R&TC section 21024(a)(1) point were in a part later identified as the Administration of Franchise and Income Tax Laws (AFITL) in Part 10.² After adoption of TPBOR, the legislature adopted a legislative proposal sponsored and approved by the three-member FTB at its December 16, 1999 meeting. (See FTB Board Meeting Minutes, Dec. 16, 1999.) The purpose of the proposal was to "[a]mend numerous code sections of the AFITL regarding information reporting requirements to conform more closely to the [Internal Revenue Code (IRC)]. This proposal also would consolidate many filing requirements into the

² The administrative provisions were moved to Part 10.2 in 1993. (R&TC, Part 10.2, added by Stats. 1993, ch. 31, § 26.)

same section [R&TC section 18631] and repeal numerous sections of law which currently set forth a separate filing requirement.” (*Ibid.*) The legislature adopted the proposal resulting in the repeal of R&TC sections 18637, 18638, 18641, 18643, 18645, 18646, and 18647. (Repealed by Stats. 2000, ch. 863, § 12.) The legislative history shows a clear intent to move information returns into R&TC section 18631. (See, e.g., LP-001, R&TC, § 18637 [“Comments: This requirement simplified and moved to Sec. 18631(c)(4).”]) It appears, therefore, that due to an unintended oversight, when the sections specified in R&TC section 21024 were moved and consolidated, R&TC section 21024 was not likewise revised to reflect this relocation of the specified sections in the AFITL, and specifically in R&TC section 21024.

However, the legislative materials only address the movement of the repealed provisions to R&TC section 18631, which at the time Assembly Bill 2892 was enacted by the legislature, did not include any mention of Form 1099-K, third-party merchant account information returns, which did not exist at that time.³ Those information returns were only added to R&TC section 18631 as part of a federal conformity bill in 2010. (R&TC, § 18631, mod. by Stats. 2010, ch. 14, § 42.) OTA concludes that despite the clear error in not modifying R&TC section 21024 to point to R&TC section 18631, OTA cannot impute a legislative intent to include information returns that did not exist at the time the legislature adopted Assembly Bill 2892. Therefore, appellant retains the burden to show error in FTB’s determination.

Proposed Assessment

As indicated above, R&TC section 18622(a) provides that a taxpayer shall either concede the accuracy of a federal determination or state wherein it is erroneous. Without the operation of R&TC section 21024, appellant bears the burden of proving that FTB’s proposed assessment is erroneous. (See *Appeal of Gorin, supra.*) OTA does not shift the burden to FTB for this appeal, and therefore appellant must prove that the amounts reported by PayPal are not her income. Appellant asserts that someone must have hacked into her account. Appellant further claims that she does not know how to buy and sell anything on the computer, and that she did not receive any PayPal statements for 2016. In support appellant provided what purports to be her bank

³ R&TC section 18631(c)(24) conforms to IRC section 6050W, which relates to reporting payments by third-party merchants, such as PayPal. Thus, had R&TC section 21024(a)(1) been modified to include R&TC section 18631, as OTA believes was intended, the analysis regarding shifting the burden of proof would have applied to the 1099-K information returns at issue in this appeal.

statements from 2016 which do not show any deposits received from PayPal.⁴ OTA requested that appellant contact PayPal to provide information showing where PayPal paid or deposited the 2016 payments. OTA also requested that appellant state her claims that she did not receive income from PayPal under penalty of perjury.⁵ Appellant did not agree to a requested conference and did not respond to OTA's additional briefing request.

The bank statements provided by appellant and the sole PayPal statement relating to a credit card instead of a merchant account, support her contentions. That being said, appellant did not explain to whom or to what account the PayPal income was paid. Appellant did not respond to OTA's request and did not provide anything to show that she ever tried to contact PayPal to clear up the alleged error. Based on the foregoing, appellant has failed to prove that it is more likely than not that she did not receive the income attributed to her. Therefore, OTA must sustain FTB's proposed assessment.⁶

⁴ Appellant's bank statements show nominal monthly payments to another account entitled Way2Save. Appellant did not respond to OTA's request to provide these statements.

⁵ To make it simple for appellant, OTA included a blank declaration form that includes a place to sign under penalty of perjury.


⁶ In her appeal letter to OTA, appellant asserts that she is facing financial hardship. Once this appeal is final, appellant may wish to contact FTB directly to pursue options based on financial hardship. (See, e.g., <https://www.ftb.ca.gov/pay/if-you-cant-pay>.)

HOLDING


Appellant has the burden of proving error in FTB’s proposed assessment, which is based on a federal determination. Appellant has not met that burden.


DISPOSITION

FTB’s action is sustained.

DocuSigned by:

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Teresa A. Stanley
Administrative Law Judge

We concur:

DocuSigned by:

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John O. Johnson
Administrative Law Judge

DocuSigned by:

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Tommy Leung
Administrative Law Judge

Date Issued: 5/17/2022