

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
J. LEATHERS

) OTA Case No. 21047684
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OPINION

Representing the Parties:

For Appellant: J. Leathers

For Respondent: Bradley J. Coutinho, Tax Counsel III

For Office of Tax Appeals: Tom Hudson, Tax Counsel III

A. WONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, J. Leathers (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$1,533, plus applicable interest, for the 2016 tax year. Appellant waived her right to an oral hearing, so we decide this matter based on the written record.

ISSUE

Whether appellant has shown that the proposed assessment, which is based on a federal determination, is erroneous.

FACTUAL FINDINGS

1. Appellant timely filed a 2016 California income tax return, reporting no balance due.
2. Subsequently, FTB received from the IRS information indicating that, per a federal audit, appellant had unreported gambling income of \$37,294 for the 2016 tax year. Based on this IRS information, FTB sent appellant a Notice of Proposed Assessment (NPA), which proposed assessing additional tax of \$1,533, plus interest.

3. Appellant protested the NPA, claiming that she had enclosed a letter from the IRS stating that she owed nothing.¹
4. In response, FTB stated that it did not receive the IRS letter referenced in appellant's protest and requested that appellant provide IRS documentation that reduced or cancelled the federal determination.
5. FTB did not receive a response from appellant, so it issued a Notice of Action that affirmed the NPA.
6. This timely appeal followed.

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. 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 applicable burden of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) 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*.)

On appeal, appellant argues that her unreported gambling winnings were offset by unreported gambling losses, which FTB failed to consider. In support, appellant provides a copy of an unsigned and undated "amended" 2016 federal income tax return, which notes gambling losses of \$52,205.² Appellant also provides the first two pages of an unsigned and undated "revised" 2016 California income tax return, which reports a California adjusted gross income of \$53,205, itemized deductions of \$58,954, and no taxable income.³

In response, FTB contends that appellant failed to provide documentation of her alleged gambling losses. In support, FTB provides a copy of an IRS CP2000 Data Sheet dated May 21, 2021, which indicates that the IRS added \$37,294 in unreported gambling income to appellant's federal taxable income for 2016. FTB also provides an IRS Account Transcript dated

¹ The record before us does not include such an IRS letter.

² Nothing in the record indicates that appellant filed the amended 2016 federal income tax return with the IRS.

³ Nothing in the record indicates that appellant filed the revised 2016 California income tax return with FTB.

May 26, 2021, which indicates that the IRS assessed additional federal tax based on this unreported gambling income.

Per R&TC section 17201(a), which incorporates Internal Revenue Code section 165(d), gambling losses are generally allowable as an itemized deduction, but only to the extent of gambling winnings. (See also Treas. Reg. § 1.165-10.) The taxpayer bears the burden of proving the correct amount of gambling losses sought to offset gambling winnings. (*Mack v. Commissioner* (6th Cir. 1970) 429 F.2d 182, 184.)

Revenue Procedure 77-29 provides record-keeping guidelines for taxpayers seeking to prove the amount of their deductible gambling losses. Section 3 of this Revenue Procedure states that “[a]n accurate diary or similar record regularly maintained by the taxpayer, supplemented by verifiable documentation will usually be acceptable evidence for substantiation of wagering winnings and losses.” “Verifiable documentation” includes “wagering tickets, canceled checks, credit records, bank withdrawals, and statements of actual winnings or payment slips provided to the taxpayer by the gambling establishment.” (Rev. Proc. 77-29, § 3, 1977-2 C.B. 538.)

Here, FTB based its proposed assessment on a federal determination, which is supported by the IRS CP2000 Data Sheet and the IRS Account Transcript. Appellant has not provided any credible evidence showing that the federal determination is erroneous. The copies of unsigned and undated 2016 federal and California income tax returns provided by appellant, whether they were filed or not, are nothing more than appellant’s unsupported assertions and do not constitute adequate proof of gambling losses. (See *Bruno v. Commissioner*, T.C. Memo. 1990-109.) Appellant has not provided any other evidence substantiating any deductible gambling losses (e.g., a diary supplemented by verifiable documentation such as bank statements, ATM receipts, or casino win-loss statements).


In certain circumstances, the *Cohan* rule, which would allow an estimation of gambling losses, would apply. (See, e.g., *Drews. v. Commissioner*, 25 T.C. 1354, citing *Cohan v. Commissioner* (2nd Cir. 1930) 39 F.2d 540.) However, without adequate substantiation that appellant is entitled to *some* gambling losses—as is the case here—the *Cohan* rule does not apply. (See *Norgaard v. Commissioner* (9th Cir. 1991) 939 F.2d 874, 879-880.) Accordingly, appellant has not demonstrated that she is entitled to a gambling loss deduction to offset her unreported gambling income.

HOLDING


Appellant has not shown that the proposed assessment is erroneous.

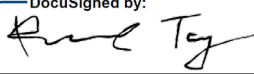
DISPOSITION

FTB’s action is sustained.

DocuSigned by:

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Andrew Wong
Administrative Law Judge

We concur:

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Daniel K. Cho
Administrative Law Judge

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Richard Tay
Administrative Law Judge

Date Issued: 5/16/2022