

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

T. BERKEY AND
N. BERKEY

) OTA Case No. 20127051
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OPINION

Representing the Parties:

For Appellants: T. Berkey

For Respondent: Kristin K. Yeager, Specialist

N. RALSTON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, T. Berkey and N. Berkey (appellants) appeal an action by the Franchise Tax Board (respondent) proposing additional tax of \$5,064, and applicable interest, for the 2016 tax year.

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

ISSUE

Whether appellants have shown error in respondent’s proposed assessment of additional tax, which is based on a federal determination.

FACTUAL FINDINGS

1. Appellants filed a timely joint 2016 California tax return.
2. Subsequently, respondent received information from the IRS, indicating that the IRS had adjusted appellants’ 2016 federal return by including unreported non-employee compensation of \$76,460, a self-employment tax deduction of \$5,168, and a student loan interest deduction adjustment of \$4.00.

3. Based on the federal information, respondent issued a Notice of Proposed Assessment (NPA) that made corresponding adjustments to appellants' 2016 California return. The NPA proposed additional tax of \$5,064, plus applicable interest.
4. Appellants protested the NPA asserting that the non-employee compensation was received and reported by appellants in tax year 2017.
5. In response, respondent sent a letter acknowledging appellants' protest and explaining respondent's position regarding the NPA – that the NPA adjustments were based on IRS information provided to respondent by the IRS. Respondent explained that the original IRS assessment has not been changed but invited appellants to submit any additional information for respondent to consider within 30 days.
6. After receiving no further information, respondent issued a Notice of Action, affirming the NPA.
7. Appellants filed this timely appeal.

DISCUSSION

A taxpayer must either concede the accuracy of a federal determination or state how the determination is erroneous. (R&TC, § 18622(a).) A deficiency assessment based on a federal audit report is presumed to be correct and the taxpayer bears the burden of proving that the determination is erroneous. (*Appeal of Gorin*, 2020-OTA-018P.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof with respect to an assessment based on a federal action. (*Ibid.*) Further, a taxpayer's failure to provide evidence that is within his or her control gives rise to a presumption that such evidence is unfavorable to his case. (*Appeal of Bindley*, 2019-OTA-179P).

Appellants contend that the non-employee compensation was related to work that appellants performed for Caltrans. Appellants assert that although the non-employee compensation was received and reported by appellants in tax year 2017, Caltrans apparently processed this payment in December 2016 and subsequently sent a Form 1099 to the IRS in the 2016 calendar year. Appellants note that they have sent several letters to the IRS and request that OTA review appellants' bookkeeping records. In support, appellants provide a copy of a letter sent to the IRS by appellants' CPA, dated July 16, 2018, wherein the CPA asserts that the income in question (the non-employee compensation) was received and reported by appellants in

2017, rather than in 2016. Appellants also assert that the IRS tax billing combined with the amount of the NPA is more than the amount of the profit appellants received for the job.

Here, respondent properly assessed additional tax based on federal adjustments. Appellants have failed to provide evidence that shows error in the federal adjustments or refutes respondent’s determination based on those adjustments. Specifically, appellants were given the opportunity in an additional briefing letter to provide evidence to support their contention that the non-employee compensation was received and reported in 2017. Appellants chose not to respond to the additional briefing or to provide any evidence to support their contentions. Thus, appellants have failed to meet their burden of proof.

HOLDING

Appellants have not established error in the proposed assessment for the 2016 tax year.

DISPOSITION

Respondent’s action is sustained in full.

DocuSigned by:
Natasha Ralston
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Natasha Ralston
Administrative Law Judge

We concur:

DocuSigned by:
Sara A. Hosey
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Sara A. Hosey
Administrative Law Judge

DocuSigned by:
Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

Date Issued: 12/14/2021