

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
G. HARDT

) OTA Case No. 21047580
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OPINION

Representing the Parties:

For Appellant: Jeffrey Rondini, MBA, EA

For Respondent: Brian Werking, Tax Counsel III

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

E. LAM, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, G. Hardt (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$74,982.00, an accuracy-related penalty of \$14,996.40, and applicable interest, for the 2013 tax year.

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

ISSUES

1. Whether appellant has shown error in FTB’s proposed assessment of additional tax, which is based on IRS adjustments.
2. Whether the accuracy-related penalty should be abated.

FACTUAL FINDINGS

1. Appellant timely filed his 2013 California tax return (Form 540).
2. On August 9, 2016, the United States Tax Court held that appellant was liable for a deficiency of federal income tax of \$113,426 and an accuracy-related penalty of \$22,685,

- plus applicable interest, for the 2013 tax year. Appellant did not report the final federal adjustments for the 2013 tax year to FTB.¹
3. FTB was notified by the IRS that a federal audit resulted in an increase of appellant's federal taxable income for the 2013 tax year. On April 30, 2018, FTB issued a Notice of Proposed Assessment (NPA) to appellant based on the information from the United States Tax Court, and proposed to increase appellant's California taxable income by \$766,796.
 4. On June 27, 2018, appellant protested the NPA, stating that the IRS incorrectly disallowed any adjusted basis in his rental property when computing capital gain from the sale of that property in 2013. On September 19, 2018, appellant submitted to FTB a copy of his letter dated September 12, 2018, requesting the IRS to reconsider the results of the audit. This letter also asserted that an appraisal was performed and determined that the entire value of the rental property at the time of appellant's inheritance in 1997 was \$315,000.² The letter further asserted that appellant should take the entire \$315,000 as a step-up in basis against the proceeds from the sale of the rental property. FTB delayed action on the proposed assessment while appellant was waiting for a response from the IRS concerning the request for audit reconsideration.
 5. On January 20, 2021, FTB sent appellant a letter demanding additional information to show that the federal adjustments were revised, canceled, or that an audit reconsideration was filed with the IRS by February 22, 2021. The January 20, 2021 letter also stated that if appellant did not reply by that deadline, FTB would issue a Notice of Action that would affirm the NPA. When FTB did not receive a response from appellant, FTB issued a Notice of Action (NOA) affirming the NPA, and this timely appeal followed.

¹ OTA notes that the IRS's determination, which is found in a document called an Appeals Case Memo, concluded that there was a deficiency of federal taxable income in the amount of \$766,429, which resulted in a federal tax deficiency and an accuracy-related penalty. As relevant to this appeal, the IRS's memo concluded that appellant first acquired a one-half interest in a rental property in 1992 by gift from his mother, resulting in a carryover basis of \$16,000. Thereafter, appellant acquired the remaining interest in the rental property in 1997 by inheritance from his then deceased mother, resulting in a step-up in basis of \$175,000. As a result, a total adjusted basis of \$191,000 (\$16,000 carryover basis + \$175,000 step-up in basis) was allowed against the proceeds from the sale of rental property, along with other federal adjustments.

² The appraisal was not submitted during this appeal. Appellant also did not submit any documentary evidence concerning the sale of the rental property or the calculation of the capital gain. Appellant did not submit any documentary evidence to OTA that he might have submitted to the IRS during or after the IRS audit.

DISCUSSION

Issue 1: Whether appellant has shown error in FTB’s proposed assessment of additional tax, which is based on IRS adjustments.

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 adjustment to income is presumed to be correct and the taxpayer bears the burden of proving that FTB’s determination is erroneous. (*Appeal of Valenti*, 2021-OTA-093P.)

In this appeal, appellant asserts that the IRS audit determination is incorrect. Appellant asserts that the IRS did not properly calculate the capital gain from the sale of his rental property in 2013, but he has not presented any documentation that supports a finding that the IRS’s calculation is incorrect.³ Appellant also has not shown that FTB’s proposed assessment, which is based on federal adjustments made by the IRS, is incorrect. Therefore, OTA has no evidentiary basis to overturn FTB’s proposed assessment.

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, which provides for an accuracy-related penalty of 20 percent of the applicable underpayment of tax. As relevant here, the penalty applies to any portion of an underpayment attributable to negligence. (IRC, § 6662(b)(1).) When based on a federal action, FTB’s assessment of an accuracy-related penalty is presumptively correct. (See *Appeal of Head and Feliciano*, 2020-OTA-127P.) The accuracy-related penalty may be reduced or abated if the taxpayer shows that: (1) there is substantial authority for the taxpayer’s reporting position; (2) the position was adequately disclosed in the tax return (or a statement attached to the return) and there is a reasonable basis for the taxpayer’s treatment of the item; or (3) the taxpayer acted in good faith and had reasonable cause for the understatement. (IRC, §§ 6662(d)(2)(B), 6664(c)(1); R&TC, § 19164(d).)

³ OTA allowed appellant a 30-day deferral of the appeal proceedings and granted appellant a 30-day extension to file a reply brief to FTB’s opening brief. However, appellant did not provide any evidence demonstrating error in the IRS’s adjustments or FTB’s NOA based thereon.


Here, the IRS determined that the federal accuracy-related penalty should apply to the entire federal underpayment based on negligence. FTB followed the federal adjustment and imposed the accuracy-related penalty on the entire underpayment for California purposes on the same basis. On appeal, appellant has not raised any specific arguments concerning the accuracy-related penalty. Appellant also has not provided any evidence that would allow OTA to abate or reduce this penalty. Therefore, OTA has no basis to abate the accuracy-related penalty.

HOLDINGS


1. Appellant has not shown error in FTB’s proposed assessment of additional tax, which is based on IRS adjustments.
2. The accuracy-related penalty should not be abated.

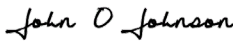
DISPOSITION

FTB’s actions are sustained.

DocuSigned by:

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 Eddy Y.H. Lam
 Administrative Law Judge

We concur:

DocuSigned by:

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 Huy “Mike” Le
 Administrative Law Judge

DocuSigned by:

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 John O. Johnson
 Administrative Law Judge

Date Issued: 10/12/2022