

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 220811057
A. DAVIDSON AND)
M. REHA)
_____)

OPINION

Representing the Parties:

For Appellants: A. Davidson
Michael L. Witte, CPA

For Respondent: Christopher M. Cook, Tax Counsel
Eric A. Yadao, Tax Counsel IV

C. AKIN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, A. Davidson and M. Reha (appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$3,485, and applicable interest, for the 2010 tax year.

Appellants elected to have this appeal determined pursuant to the procedures of the Small Case Program. Those procedures require the assignment of a single Administrative Law Judge. (Cal. Code Regs., tit. 18, § 30209.1.) Office of Tax Appeals (OTA) Administrative Law Judge Cheryl L. Akin held an electronic oral hearing for this matter on April 21, 2023. At the conclusion of the hearing, the record was closed and this matter was submitted for an opinion.

ISSUES

1. Whether FTB’s proposed assessment for the 2010 tax year is barred by the statute of limitations.
2. If FTB’s proposed assessment is not barred by the statute of limitations, whether appellants have established error in FTB’s proposed assessment for the 2010 tax year which is based on a final federal determination.

FACTUAL FINDINGS

1. Appellants timely filed their 2010 California income tax return on March 14, 2011.
2. Subsequently, on April 10, 2017, FTB received a FEDSTAR IRS Data Sheet indicating that the IRS audited appellants' 2010 federal income tax return and made an adjustment increasing appellants' reported capital gain by \$31,335.
3. Based on the information provided by the IRS, on January 6, 2021, FTB issued a Notice of Proposed Assessment (NPA) to appellants for the 2010 tax year making a corresponding adjustment to appellants' California income tax return. The NPA proposed additional tax of \$3,485, plus applicable interest.
4. Appellants protested the NPA. FTB issued a Notice of Action (NOA) affirming its NPA.
5. This timely appeal followed.
6. On appeal, FTB provides an IRS account transcript dated August 17, 2020, and an IRS Form 4549, Income Tax Examination Changes, for appellants' 2010 tax year. The account transcript indicates that the federal adjustment was made to appellants' 2010 tax year account on March 27, 2014. The account transcript does not indicate that the IRS has cancelled or reduced its adjustment or that the IRS is in the process of reconsidering the adjustment to appellants' 2010 tax year. The IRS Form 4549 is stamped as received by FTB's Audit Business Support unit on April 10, 2017, reflects that the IRS increased appellants' 2010 capital gain by \$31,335, and indicates that appellants agreed to the IRS adjustment on March 10, 2014.

DISCUSSION

Issue 1: Whether FTB's proposed assessment for the 2010 tax year is barred by the statute of limitations.

If the IRS makes a change or correction to "any item required to be shown on a federal tax return, including any gross income, deduction, penalty, credit, or tax for any year," the taxpayer must report the federal change to FTB within six months after the date it becomes final. (R&TC, § 18622(a).) If the taxpayer or the IRS reports the change or correction within six months after the final federal determination, FTB may issue an NPA resulting from those adjustments within two years from the date of the notice. (R&TC, § 19059(a).) If the taxpayer or the IRS reports that change or correction after the six-month period, FTB may issue an NPA

resulting from those adjustments within four years from the date of the notification. (R&TC, § 19060(b).) R&TC section 19060(a) provides that if the taxpayer fails to notify FTB of the federal changes, then FTB may issue a proposed assessment at any time. The specific statute of limitations set forth in R&TC section 19060 overrides the general statute of limitations set forth in R&TC section 19057.¹ (*Appeal of Vardell*, 2021-OTA-093P, citing *Ordlock v. Franchise Tax Bd.* (2006) 38 Cal.4th 897.)

Here, the evidence in the appeal record indicates that the IRS made an adjustment to appellants' federal tax account for the 2010 tax year on March 27, 2014. However, appellants do not provide any evidence to show that they reported this federal change to FTB within six months as required by R&TC section 18622(a). At the hearing, appellants' CPA, Mr. Witte, testified that he generally leaves to his clients the decision of whether to report an IRS audit adjustment to FTB. He noted that some clients have him report the change to FTB, other clients have him file an amended return with FTB, and still others choose to allow the IRS to report the audit adjustment directly to FTB. Given the time that has passed since the IRS audit of appellants' 2010 federal tax return, Mr. Witte testified that he does not recall what was done here. He checked his records, including those in storage, and was unable to locate the relevant records since more than 10 years has elapsed from the 2010 tax year at issue in this appeal.

Appellant A. Davidson similarly testified that she does not specifically recall whether appellants reported the IRS adjustment to their 2010 tax year to FTB following the conclusion of that audit in March 2014, but stated that appellants are generally the type of people who always pay their taxes timely. For example, appellant A. Davidson explained that when appellants have a refund due in a particular tax year, appellants request to have that refund applied to their subsequent tax year rather than paid to them.

FTB, on the other hand, indicates that it has no record of appellants reporting the final federal audit adjustment to it within the six-month period required by R&TC section 18622(a). Instead, the evidence in the record indicates that FTB was informed of this final federal

¹ The general statute of limitations pursuant to R&TC section 19057(a) would have required FTB to mail its NPA to appellants within four years after the return was filed. R&TC section 19066(a) provides that for purposes of R&TC section 19057, a return filed before the last day prescribed by law for filing (determined without regard to any extension of time for filing) shall be considered as filed on the original due date. As such, appellants' 2010 return filed on March 14, 2011, is treated as being filed on April 15, 2011, for the purposes of R&TC section 19057. Thus, the general statute of limitations pursuant to R&TC section 19057(a) would have expired four years later, on April 15, 2015.

adjustment by the IRS through a FEDSTAR IRS Data Sheet provided to it on April 10, 2017.² Because FTB was only notified of the final federal adjustment on April 10, 2017, after the six-month period provided in R&TC section 18622(a), the applicable statute of limitations under R&TC section 19060(b) for FTB to propose an assessment for the 2010 tax year is four years from the date FTB was notified of the adjustment. Here, that would be April 10, 2021, four years from the April 10, 2017 notification date. Thus, the NPA issued to appellants on January 6, 2021, is timely pursuant to R&TC section 19060(b) and is not barred by the statute of limitations.

Appellants question the April 10, 2017 received date indicated on the FEDSTAR IRS Data Sheet and stamped on the IRS Form 4549, noting that these are internal FTB documents and that FTB has not produced any evidence from the IRS indicating the date the IRS first reported the 2010 audit adjustment to appellants' federal tax account to FTB. Appellants contend that it does not take the IRS three years to report audit examination changes to FTB. At the hearing, Mr. Witte testified that in his more than 30 years of experience as a CPA and working with the IRS, he has never seen a situation such as this, where the IRS reported audit adjustments to FTB so late (i.e., more than three years after the IRS concluded its examination). Mr. Witte testified that in his experience, the IRS has always reported its examination results to FTB shortly after the IRS examination is completed. Appellants note that because FTB first proposed its adjustment to their 2010 tax year more than 10 years later in 2021, appellants, their CPA, and the IRS no longer have the relevant records for the 2010 tax year and that they are unable to defend themselves as a result.

While OTA understands appellants' frustration and concern here, without evidence showing that the final federal audit adjustment made to appellants' 2010 federal tax account was reported to FTB prior to April 10, 2017, OTA is unable to determine or conclude that an earlier statute of limitations date should apply here. As noted above, R&TC section 19060(a) provides that if the taxpayer fails to notify FTB of the federal changes, then FTB may issue a proposed assessment at any time. Even if OTA were to disregard as noncredible the FEDSTAR IRS Data Sheet and the IRS Form 4549 provided by FTB containing the April 10, 2017 received date, there is still no evidence in the record to establish that appellants or the IRS ever reported the

² This is consistent with the IRS Form 4549, Income Tax Examination Changes, which is stamped as received by FTB on April 10, 2017.

final federal audit adjustment to FTB.³ Thus, pursuant to R&TC section 19060(a), FTB could issue its NPA based on the final federal adjustment at any time. Because appellants cannot show that they or the IRS reported the final IRS audit adjustment to appellants' 2010 tax year to FTB prior to April 10, 2017, appellants cannot show that an earlier statute of limitations date should apply under either R&TC sections 19059(a) or 19060(b).

While appellants assert that it does not take the IRS three years to report the results of a federal audit to FTB, the R&TC specifically contemplates situations where a final federal adjustment is reported to FTB by either the taxpayer or the IRS more than six months after the federal audit determination is final (R&TC, § 19060(b)), or is never reported to FTB at all by either the taxpayer or the IRS (R&TC, § 19060(a)). This statute (i.e., R&TC, § 19060) would not be needed if final federal audit adjustments were always timely reported (i.e., within six months after the date of the final federal determination) to FTB by the IRS. Other than generally contending that it does not take the IRS three years to report the results of a final federal audit to FTB, appellants provide no evidence which contradicts, refutes, or otherwise disproves this date of receipt by FTB. OTA, therefore, concludes that the preponderance of the evidence establishes that FTB received the FEDSTAR IRS Data Sheet and the IRS Form 4549 on the date indicated on the documents (i.e., on April 10, 2017). (See, e.g., Cal. Code Regs., tit. 18, § 30219(a), (c).)

Appellants also note that the NPA and NOA both indicate that they are not a bill, and that to date, appellants have not received a bill from FTB with respect to their 2010 tax year. To the extent appellants are arguing that FTB has not met the applicable statute of limitations since FTB still has not billed appellants for the 2010 tax year, OTA notes that R&TC section 19060(b) only requires FTB to send "a notice of proposed deficiency assessment" within four years from the date FTB was notified of the federal determination. The applicable "proposed deficiency assessment" was the NPA which was mailed to appellants on January 6, 2021. FTB has not billed appellants for the 2010 tax year because the proposed assessment for appellants' 2010 tax year is not yet a final tax liability because appellants protested the NPA with FTB and

³ As noted above, both appellant A. Davidson and Mr. Witte, appellants' CPA, were unable to specifically recall if they reported the IRS adjustment to appellants' 2010 tax year to FTB following the conclusion of the IRS audit in March 2014.

subsequently appealed FTB's adverse determination in the NOA to OTA.⁴ (See R&TC, §§ 19041(a), 19045(a).) FTB would only bill appellants for any balance due after the proposed assessment for the 2010 tax year is final following the conclusion of this appeal. (See R&TC, § 19049(a).)

In conclusion, the limited evidence in the record indicates that the final IRS audit adjustment made to appellants' 2010 tax year account was reported to FTB on April 10, 2017. Thus, the NPA issued by FTB on January 6, 2021, is timely and is not barred by the statute of limitations.⁵

Issue 2: If FTB's proposed assessment is not barred by the statute of limitations, whether appellants have established error in FTB's proposed assessment for the 2010 tax year which is based on a final federal determination.

Taxpayers shall either concede the accuracy of a final federal determination or state how it is erroneous. (R&TC, § 18622(a).) A deficiency assessment based on a federal audit report is presumptively correct, and taxpayers bear the burden of proving that the determination is erroneous. (*Appeal of Gorin*, 2020-OTA-018P.) Unsupported assertions are insufficient to satisfy the taxpayers' burden of proof with respect to an assessment based on a federal action. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing that FTB's determination is incorrect, such determination must be upheld. (*Appeal of Bindley*, 2019-OTA-179P.)

Appellants do not expressly assert that the proposed assessment based on the final federal audit determination is incorrect. Instead, appellants assert that because the NPA was issued more than 10 years after the 2010 tax year, they are unable to obtain the relevant records, and as a result, are unable to defend themselves against this adjustment. However, as noted above, the NPA was issued timely and is not barred by the statute of limitations. Because FTB's proposed

⁴ Appellants also note that the NOA incorrectly indicated that FTB did not receive a reply to its letter dated January 6, 2021. On appeal, appellants provide a letter to FTB dated January 31, 2022, and a certified mail receipt indicating that the letter was mailed to FTB on this date. OTA has reviewed this letter as part of this appeal and concludes that the content of this letter does not alter or impact the outcome of this appeal.

⁵ Appellants also question why FTB took almost four years to issue the NPA, if it was in fact notified of the final federal audit adjustment on April 10, 2017. However, the applicable statute of limitations in R&TC section 19060(b) required the NPA to be issued within four years of when FTB was notified of the federal determination. FTB met the applicable statute of limitations in R&TC section 19060(b) and was not legally required to issue its NPA earlier.

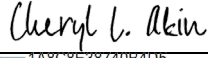
assessment is based on a final federal determination, it is presumed correct, and appellants have the burden of proving the determination is erroneous. (*Appeal of Gorin, supra.*) Appellants agreed to the IRS adjustment increasing their capital gain for the 2010 tax year by \$31,335 in March 2014, and have not provided any evidence to establish error in the corresponding adjustment made by FTB. Thus, appellants have not met their burden of establishing error in FTB's proposed assessment, and FTB's proposed assessment based on a final federal determination must be affirmed.

HOLDINGS

1. FTB's proposed assessment for the 2010 tax year is not barred by the statute of limitations.
2. Appellants have not established error in FTB's proposed assessment for the 2010 tax year which is based on a final federal determination.

DISPOSITION

FTB's action is sustained.

DocuSigned by:

Cheryl L. Akin
Administrative Law Judge

Date Issued: 6/1/2023