

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 21037507
VISION PACK BRANDS, INC.)
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OPINION

Representing the Parties:

For Appellant: James T. Burnes, Attorney

For Respondent: Camille Dixon, Tax Counsel

R. TAY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Vision Pack Brands, Inc. (appellant) appeals actions by the Franchise Tax Board (respondent) proposing additional tax of \$11,776.00, an accuracy-related penalty (ARP) of \$353.28, and applicable interest, for the 2014 tax year; and additional tax of \$24,242.00, and applicable interest, for the 2015 tax year.

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

ISSUES

1. Whether appellant has shown that respondent erred in its proposed assessments for the 2014 and 2015 tax years, which are based on a final federal determination.
2. Whether appellant has shown that respondent erred in its imposition of the ARP for the 2014 tax year.

FACTUAL FINDINGS

1. Appellant filed timely 2014 and 2015 California corporation franchise or income tax returns.
2. On March 19, 2019, appellant submitted information regarding an IRS audit that resulted in changes to appellant’s federal tax account for the 2014 and 2015 tax years.

Specifically, appellant entered into a settlement agreement with the IRS agreeing to assessments of additional tax and the ARP for both tax years. The U.S. Tax Court issued a decision affirming the agreed upon amounts of tax deficiencies and the IRS's assessment of the ARP.

3. After receiving information of the federal adjustments, respondent issued proposed assessments for appellant's 2014 and 2015 tax years accordingly. Appellant submitted timely protests.
4. At protest, appellant argued respondent "did not correctly apply those IRS allowances and other adjustments" and overstated the additional tax because of computational errors. Additionally, appellant argued that it was entitled to "additional deductions, credits, exemptions, non-recognition treatment, offsets, net operating losses, and similar tax benefits"
5. Respondent conducted an oral hearing during the protest, and affirmed its proposed assessments, except that it withdrew the ARP for the 2015 tax year.¹ Respondent issued Notices of Action on March 5, 2021, and appellant filed this timely appeal.

DISCUSSION

Issue 1: Whether appellant has shown that respondent erred in its proposed assessments for the 2014 and 2015 tax years, which are based on a final federal determination.

R&TC section 18622(a) requires a taxpayer to concede the accuracy of federal changes to a taxpayer's income or state where the changes are erroneous. It is well settled that 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. (*Ibid.*)

On appeal, appellant asserts it "correctly reported all its gross receipts" and reported deductions that "are properly allowable to [a]ppellant." Appellant concludes respondent should not have proposed any deficiency attributable to an increase in gross receipts and/or a disallowance of deductions. Appellant makes such assertions without providing evidence or law

¹ According to appellant's federal account transcript for the 2015 tax year, the IRS inexplicably assessed the late payment penalty instead of the ARP. Respondent did not follow the IRS in this regard, but instead, withdrew its assessment of the ARP for the 2015 tax year, despite the decision from the U.S. Tax Court and appellant's understatement of tax for the 2015 tax year.

to show the IRS erred in its assessments, and/or the IRS canceled or otherwise revised the federal adjustments. Additionally, there is no evidence in the record that respondent erred in its corresponding assessments, which are based on the IRS's actions. Appellant's unsupported assertions are not sufficient to satisfy its burden of proof. (See *Appeal of Gorin, supra.*) Consequently, OTA finds no reason to overturn respondent's proposed assessments.

Issue 2: Whether appellant has shown that respondent erred in its imposition of the ARP for the 2014 tax year.

R&TC section 19164, which incorporates the provisions of Internal Revenue Code (IRC) section 6662, provides for an ARP of 20 percent of the portion of an underpayment of the tax that was required to be shown on the taxpayer's return. As relevant here, the penalty applies to the portion of the underpayment attributable to any substantial understatement of income tax. (IRC, § 6662(b)(2).) If the understatement of income tax in a taxable year is less than \$5,000,000, the understatement of tax is considered a "substantial understatement of income tax" when the amount of the understatement exceeds 10 percent of the tax required to be shown on the return or \$2,500, whichever is greater. (IRC, § 6662(d)(1)(B); R&TC, § 19164(a)(3).)

Appellant argues respondent erroneously imposed the ARP because "the underpayment is not attributable to any of the reasons specified in IRC section 6662(b)(1) through (5)." However, appellant's understatement of tax for the 2014 tax year is \$11,776.00, which is less than \$5,000,000 and greater than \$2,500.² Thus, appellant's understatement of tax for the 2014 constitutes a substantial understatement, and appellant's argument is unavailing.

As relevant here, the ARP will not be imposed to the extent that a taxpayer has shown that a portion of the underpayment was due to reasonable cause and the taxpayer acted in good faith with respect to that portion of the underpayment. (IRC, § 6664(c)(1); Treas. Reg. §§ 1.6664-1(b)(2), 1.6664-4.) The taxpayer bears the burden of proving any defenses to the imposition of the accuracy-related penalty. (*Recovery Group, Inc. v. Commissioner*, T.C. Memo. 2010-76.)

Appellant argues it had reasonable cause to excuse the substantial understatement of tax. Specifically, appellant asserts that it relied on a qualified accountant and CPA, Mr. Dunn, who had full access to all the necessary information and documents to prepare the 2014 return. In

² \$2,500 is greater than 10 percent of the tax required to be shown on appellant's 2014 California income tax return (\$1,773).

support of its assertion, appellant provides a declaration from Mr. Ritts, appellant's president. Mr. Ritts states he hired Mr. Dunn on the referral of friends and business colleagues, and that Mr. Dunn would visit appellant's office on a monthly basis, at minimum, and had full access to appellant's "books, records, bank statements, checks, Quickbooks, etc." Thus, appellant argues it reasonably relied on Mr. Dunn because Mr. Dunn had full access to all of the information and documents necessary to accurately calculate and report appellant's tax due, but failed to do so.

Reliance on the advice of a tax professional may demonstrate reasonable cause for an understatement of tax, if the reliance was reasonable and in good faith. (*Kierstead v. Commissioner* (9th Cir. 2009) 330 Fed.Appx. 126; Treas. Reg. § 1.6664-4(b)(1).) Critical to this analysis is the requirement that a taxpayer show it reasonably relied on professional *advice*. (See *Neonatology Associates, P.A. v. Commissioner* (2000) 115 T.C. 43, 91, *affd.* (3rd Cir. 2002) 299 F.3d 221; Treas. Reg. § 1.6664-4(c).) In this appeal, the record has no evidence that appellant relied on advice rendered by its CPA; rather, appellant relied on its CPA for bookkeeping and tax return preparation. There is a distinction between tax preparation and tax advice, and for reasonable cause purposes, taxpayers must show they sought and received tax advice. (*Patacsil v. Commissioner* T.C. Memo. 2023-8 (*Patacsil*).

In *Patacsil, supra*, at p. *17, the U.S. Tax Court defined "tax advisor" as "a person who analyzes an issue and communicates his [or her] conclusions to the taxpayer." The taxpayers in *Patacsil* provided evidence they hired a tax professional for tax preparation services, but provided no evidence that they asked their tax professional for tax advice for the 2015 tax year. However, for 2017, the taxpayers' CPA testified that he had provided advice to the taxpayers regarding a specific tax issue (net operating losses). Importantly, the court found no reasonable cause for 2015, but that reasonable cause existed for 2017 based in part on this distinction.

Here, this distinction is controlling. Mr. Ritts stated in his declaration that appellant's CPA, Mr. Dunn, performed bookkeeping and tax preparation services, but did not state the CPA gave actual tax advice as defined above. In its reply brief, appellant argues that because it "relied on a qualified accountant . . . to prepare [its] returns for the tax years at issue . . . it should not be subject to the accuracy-related penalty." Bookkeeping and tax preparation services are not tax advice, and appellant has not provided any other evidence showing Mr. Dunn provided actual tax advice. Thus, appellant has not shown reasonable cause existed based on its reliance on the advice of a tax professional. Appellant does not argue reasonable cause existed on any

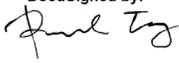
other grounds, and OTA also finds no grounds for reasonable cause in the record. Consequently, appellant has not met its burden.

HOLDINGS

1. Appellant has not shown that respondent erred in its proposed assessments for the 2014 and 2015 tax years, which are based on a final federal determination.
2. Appellant has not shown that respondent erred in its imposition of the ARP for the 2014 tax year.

DISPOSITION

Respondent’s actions are sustained in full.

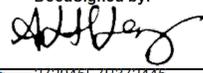
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F8E81582726F448...
 Richard Tay
 Administrative Law Judge

We concur:

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 Kenneth Gast
 Administrative Law Judge

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 Andrea L.H. Long
 Administrative Law Judge

Date Issued: 9/19/2023