

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 19115451  
N. SAIFAN, JR. AND )  
N. SAIFAN )  
\_\_\_\_\_ )

**OPINION**

Representing the Parties:

For Appellants: N. Saifan, Jr. and N. Saifan

For Respondent: David Hunter, Tax Counsel IV

For Office of Tax Appeals: William J. Stafford, Tax Counsel III

A. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, N. Saifan, Jr. (appellant-husband) and N. Saifan (appellant-wife) (collectively, appellants) appeal an action of respondent Franchise Tax Board (FTB) proposing additional tax of \$36,046, and applicable interest for the 2006 tax year.<sup>1</sup>

Administrative Law Judges Richard Tay, Asaf Kletter, and Andrea L.H. Long, held an oral hearing for this matter in Cerritos, California, on October 12, 2022. At the conclusion of the hearing, the record was held open to allow the parties to provide additional briefing. On December 20, 2022, the record was closed, and this matter was submitted for an opinion.

**ISSUE**

Whether appellants have demonstrated error with the proposed assessment.

**FACTUAL FINDINGS**

1. Appellants timely filed a joint 2006 California income tax return, reporting wages of \$179,012, taxable income of \$85,432, and a net tax of \$2,953, which appellants paid through withholdings.

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<sup>1</sup> The length of time between the year at issue and the filing of this appeal is due to federal court activity that lasted through 2019.

2. On July 8, 2009, FTB issued a Notice of Proposed Assessment (NPA), increasing appellants' 2006 taxable income by \$51,275, attributable to foreign income excluded from appellants' 2006 return.
3. Appellants did not file a protest; therefore, the NPA became a final assessment, which appellants later paid in full.
4. On December 7, 2011, a grand jury indicted appellant-husband for, among other things, federal tax evasion for the 2006 tax year in violation of title 26, United States Code, section 7201 (Count 3). The indictment for Count 3 states the following:

“On or about March 6, 2007, in the Central District of California, defendant [appellant-husband], did willfully attempt to evade and defeat the payment of a substantial part of the income tax due and owing by him and [appellant-wife] to the United States of America for the calendar year 2006, by preparing and causing to be prepared, and by signing and causing to be signed, a false and fraudulent U.S. Individual Income Tax Return, Form 1040, on behalf of himself and his spouse, which was filed with the Internal Revenue Service. In that return, it was stated that their joint taxable income for the calendar year 2006 was the sum of \$128,573.00 and that the amount of tax due and owing thereon was the sum of \$5,688. In fact, as defendant [appellant-husband] knew, their joint taxable income for the calendar year was substantially in excess of the amount stated on the return, and, upon the additional taxable income, a substantial additional tax was due and owing to the United States of America.”
5. During the 2006 tax year, appellant-husband was the sole shareholder of Defense Logistical Support & Services Corporation (DLSS).
6. On May 5, 2014, appellant-husband pleaded guilty to Count 3.
7. In the United States' Response to Pre-Sentence Report and Government's Position, it states that appellant-husband used substantial corporate funds for personal purchases and payments to himself without claiming the distributions and payments as income to himself on his individual tax returns. The United States characterized these payments as constructive dividends. The United States stated that appellant-husband failed to report as taxable income approximately \$400,845 paid by DLSS. These expenses included a \$200,000 down payment for a personal residence, \$10,708 for home remodeling expenses, \$24,824 for appellant-wife's personal vehicle, and \$140,000 towards appellant-husband's personal credit cards. Appellant-husband was sentenced to imprisonment for 48 months.

8. On May 15, 2015, FTB issued an NPA, increasing appellants' 2006 California taxable income by, among other things, unreported constructive dividends of \$400,845.
9. In response, appellants filed a timely protest, asserting that the adjustment for unreported constructive dividends of \$400,845 was incorrect.
10. During the protest proceedings, FTB made repeated requests (via letters dated January 23, April 18, June 5, July 17, and December 4, 2017) for evidence demonstrating that appellants were working with the IRS to redetermine the amount of constructive dividend income.
11. On April 24, 2018, appellants appealed their 2006 federal deficiency assessment to the United States Tax Court.
12. Appellants and the IRS subsequently entered into an agreement, under which appellants' tax court case was dismissed. The tax court decision dated February 27, 2019, states in relevant part, "Pursuant to the agreement of the parties in this case, it is [¶] ORDERED AND DECIDED: That there is no deficiency in income tax due from, nor overpayment due to, the petitioners for the taxable year 2006; and That there is no penalty due from the petitioners for the taxable year 2006 under the provisions of I.R.C. § 6663."
13. Later, FTB issued a Notice of Action (NOA) dated August 30, 2019, that set forth an additional tax of \$36,046, plus applicable interest.
14. Appellants filed this timely appeal.
15. At the oral hearing, FTB clarified that it issued the May 15, 2015 NPA pursuant to R&TC section 19087, based upon appellant-husband's federal guilty plea for federal tax evasion.

### DISCUSSION

Every individual subject to the Personal Income Tax Law is required to make and file a return with FTB "stating specifically the items of the individual's gross income from all sources and the deductions and credits allowable," in excess of certain filing thresholds. (R&TC, § 18501(a)(1)-(4).) If a taxpayer files a false or fraudulent return with intent to evade tax, for any taxable year, FTB at any time "may make an estimate of the net income, from any available information, and may propose to assess the amount of tax, interest and penalties due." (R&TC, § 19087(a).)

When FTB makes a proposed assessment of additional tax based on an estimate of income, FTB's initial burden is to show why its proposed assessment is reasonable and rational.

(*Appeal of Bindley*, 2019-OTA-179P.) An assessment based on unreported income is presumed correct when the taxing agency introduces a minimal factual foundation to support the assessment. (*Ibid.*) Here, FTB based its assessment on appellant's federal tax evasion conviction for unreported income; therefore, the assessment is reasonable and rational.

In addition to whether the proposed assessment was reasonable and rational, the parties also discussed whether it was issued within the applicable statute of limitations. FTB asserts that the assessment is timely based on R&TC section 19087 because the return was fraudulent, and FTB bears the burden of showing as such. (*Appeal of Allec* (75-SBE-004) 1975 WL 3265.) Fraud may be proved by circumstantial evidence, and the taxpayer's entire course of conduct may establish the requisite fraudulent intent. (*City Wide Transit, Inc. v. Commissioner* (2d Cir. 2013) 709 F.3d 102, 106.) For federal purposes, a conviction for tax evasion under title 26, United States Code, section 7201 collaterally estops a taxpayer from denying fraudulent intent under IRC section 6501(c)(1).<sup>2</sup> (*Williams v. Commissioner*, T.C. Memo. 2009-81.) Under the doctrine of collateral estoppel, conviction for income tax evasion for a year conclusively establishes that the taxpayer committed tax fraud that year. (*Platts v. Commissioner*, T.C. Memo. 2018-31.) Here, appellant-husband was convicted of income tax evasion for 2006, which means that appellants' underpayment for the 2006 tax year for federal purposes is attributable to fraud. Because appellants' 2006 California tax return is based on appellants' 2006 federal tax return, both of which fail to disclose the receipt of constructive dividends, OTA finds that appellants filed a fraudulent 2006 California tax return with the intent to evade tax and FTB's 2006 assessment is timely. (See R&TC, § 19087.)

Appellants contend that appellant-husband entered into a plea agreement based on a legal strategy by his attorney. However, his motivation in entering into the plea agreement is irrelevant and in no way undermines the reliability of the federal conviction for tax evasion. (See *Evans v. Commissioner*, T.C. Memo. 2010-199.) Moreover, statutes of limitations barring the collection of taxes otherwise due are strictly construed in the favor of the tax agency. (See *City Wide Transit, Inc. v. Commissioner*, *supra*, 709 F.3d 102, 107.) FTB has met its burden of proving fraud under R&TC section 19087.

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<sup>2</sup> For federal tax purposes, the IRS must assess a deficiency "within 3 years after the return was filed." (IRC, § 6501(a).) However, similar to R&TC section 19087, if the deficiency was determined "in the case of a false or fraudulent return with the intent to evade tax," then the IRS may assess the deficiency at any time. (IRC, § 6501(c)(1).)

Once FTB has met its initial burden, the proposed assessment of additional tax is presumed correct, and the taxpayer has the burden of proving it to be wrong. (*Appeal of Bindley, supra.*) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing error in FTB's determination, the determination must be upheld. (*Ibid.*) A taxpayer's failure to produce evidence that is within its control gives rise to a presumption that such evidence is unfavorable to its case. (*Ibid.*)

Appellants argue that despite appellant-husband's conviction, the IRS has determined that no tax was owing for the 2006 tax year and therefore no additional tax is owed to FTB. On this basis, they contend that they should have no further California tax liability for the 2006 tax year.

FTB is not bound to follow the IRS's determination. (*Appeal of Black, 2023-OTA-023P.*) In addition, appellants' argument ignores the fact that the tax court's decision was entered "pursuant to the agreement" of appellants and the IRS, but appellants have not provided a copy of the agreement to indicate the basis for determining that no additional tax was owed for 2006 for federal tax purposes.

At the conclusion of the oral hearing before OTA, appellants were invited to produce records to substantiate their position that the receipt of \$400,845 was not constructive dividends from DLSS. Appellants submitted the following: (1) a letter sent by appellant-husband to the IRS; (2) appellants' letter of explanation to the IRS with a schedule of payments made; (3) a letter from appellant-husband's brother-in-law stating that appellant-husband borrowed money and lists the amounts owed and amounts paid; (4) invoices from Koons Ford of College to DLSS; (5) two invoices from LunaSat; and (6) a printout from a USAA account listing account holder as "Norman Motor Co Inc T/A Koons." These documents do not support a finding that the \$400,845 at issue are not constructive dividends received from DLSS. Accordingly, absent proof to the contrary, FTB's assessment is upheld.

HOLDING


Appellants have not demonstrated error with the proposed assessment.


DISPOSITION

FTB’s action is sustained in full.

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Andrea L.H. Long  
Administrative Law Judge

We concur:

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Richard Tay  
Administrative Law Judge

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Asaf Kletter  
Administrative Law Judge

Dated: 3/23/2023