

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)
C. MONTAGNA) OTA Case No. 230112391
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OPINION

Representing the Parties:

For Appellant: Daniel E. Dumas, E.A.

For Respondent: Brian Werking, Attorney

A. KLETTER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, C. Montagna (appellant)¹ appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$8,333, an accuracy-related penalty (ARP) of \$1,666.60 and applicable interest for the 2018 tax year.²

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

ISSUES

1. Whether appellant has established error in FTB’s proposed assessment, which is based on a final federal determination.
2. Whether the ARP was properly imposed, and if so, whether it may be abated.

FACTUAL FINDINGS

1. Appellant timely filed a joint California tax return for the 2018 tax year.

¹ Appellant’s spouse passed away in 2021. C. Montagna appealed on their own behalf.

² Appellant doesn’t make any specific argument for interest abatement. Generally, to obtain waiver of interest, taxpayers must qualify under R&TC section 19104, 19112, or 21012. However, the Office of Tax Appeals (OTA) lacks jurisdiction to abate interest under R&TC section 19112. (*Appeal of Moy*, 2019-OTA-057P.) Appellant does not allege that R&TC section 19104 or 21012 applies to the facts of this appeal; and based on the record, OTA concludes that neither provision applies. Therefore, OTA will not address interest abatement further.

2. Subsequently, FTB received information from the IRS showing that the IRS increased appellant's federal adjusted gross income (AGI) for the 2018 tax year to include \$46 of taxable interest; \$4,368 of wages, salaries and tips, etc.; and \$91,707 of other income. The federal determination became final. The IRS assessed additional federal tax based on the federal adjustments and imposed a federal ARP. Appellant did not report the federal changes to FTB.
3. Based on the federal adjustments, FTB issued a Notice of Proposed Assessment (NPA) to appellant proposing to increase appellant's California AGI by \$96,121 ($\$46 + \$4,368 + \$91,707 = \$96,121$). The NPA determined total tax of \$10,371, and proposed to assess additional tax of \$8,333 and an ARP of \$1,666.60.
4. Appellant protested the NPA. Appellant claimed that the federal adjustments were based on the unreported gambling winnings of appellant's deceased spouse. Appellant asserted that they filed an amended federal tax return with the IRS to report gambling losses, but that the IRS had not yet processed the amended federal tax return.
5. In general correspondence, FTB explained to appellant that it received information from the IRS showing that appellant's federal AGI was \$97,037 greater than the AGI reported on the California tax return. FTB issued the NPA for \$96,121, lower than the federal adjustment because of differences between federal and state law regarding state income tax refunds. FTB requested that appellant provide evidence showing that their case with the IRS was not final, or that the assessment had been reduced or canceled.
6. When appellant did not respond to FTB's request, FTB issued a Notice of Action affirming the NPA.
7. Appellant timely filed this appeal.
8. Appellant's federal transcript for the 2018 tax year shows that, as of November 21, 2023, the IRS received and denied appellant's amended federal tax return for the 2018 tax year, and that the IRS did not cancel or reduce its assessment for the 2018 tax year.

DISCUSSION

Issue 1: Whether appellant has established error in FTB's proposed assessment, which is based on a final federal determination.

A taxpayer shall concede the accuracy of federal determination to a taxpayer's income or state where the determination is erroneous. (R&TC, § 18622(a).) A deficiency assessment based on a federal adjustment is presumed correct and a taxpayer bears the burden of proving that FTB's determination is erroneous. (*Appeal of Gorin*, 2020-OTA-018P.) In the absence of credible, competent, and relevant evidence showing that FTB's determination is incorrect, it must be upheld. (*Appeal of Chen and Chi*, 2020-OTA-021P.)

Here, FTB received information from the IRS that it increased appellant's federal AGI by \$96,121 in unreported income. Based on this federal determination, FTB proposed to assess additional taxes, plus interest. Because there is no evidence to indicate that the federal determination was adjusted or cancelled, FTB's proposed assessment is presumed correct and appellant bears the burden of showing it is erroneous.

Appellant claims that they disagree with the IRS and FTB assessments, and filed an amended federal tax return, which the IRS lost. Appellant claims that they plan to file an amended California tax return once the IRS accepts the amended federal tax return. Appellant does not specifically dispute the \$46 of taxable interest or \$4,368 of wages, salaries and tips, etc. At protest, appellant claimed that the federal adjustments were due to the unreported gambling winnings of appellant's deceased spouse, and that an amended federal tax return was filed to report gambling losses. However, appellant has not provided any evidence establishing that appellant or their spouse incurred gambling losses to offset the gambling winnings. In addition, appellant's federal transcript for the 2018 tax year shows that, as of November 21, 2023, the IRS received and denied appellant's amended federal tax return and has not canceled or reduced its assessment.

Therefore, appellant has not established error in FTB's proposed assessment, which is based on a final federal determination.

Issue 2: Whether the ARP was properly imposed, and if so, whether it may be abated.

R&TC section 19164, which generally 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. (See *Appeal of Daneshgar*, 2021-OTA-210P.) When FTB imposes a penalty, such as an ARP, it is presumed to have been imposed correctly. (*Appeal of Steffier*, 2024-OTA-017P.) As relevant here, the penalty applies to the portion of the underpayment attributable to any substantial understatement of income tax. (IRC, § 6662(b)(2).) An "understatement" of tax is defined as the excess of the amount of tax required to be shown on the tax return for the tax year, over the amount of tax that is shown on the return, reduced by any rebate. (IRC, § 6662(d)(2)(A)(i)-(ii).) For individual taxpayers, there is a "substantial understatement of income tax" when the amount of the understatement for a tax year exceeds the greater of 10 percent of the tax required to be shown on the return, or \$5,000. (IRC, § 6662(d)(1)(A).)

Here, the record supports FTB's imposition of the ARP for the 2018 tax year. The tax required to be shown on the California tax return was \$10,371. FTB determined that the additional tax, or understated tax, was \$8,333. The understated tax of \$8,333 exceeds \$5,000, which is greater than 10 percent of the tax required to be shown on the return of \$1,037.10 (\$10,371 x 10 percent), and therefore, it was a substantial understatement. Thus, FTB correctly imposed the ARP.

There are various exceptions to the imposition of the ARP. The ARP shall be reduced by the portion of the understatement attributable to the tax treatment of any item if there is or was substantial authority for that treatment, or the relevant facts affecting the item's tax treatment are adequately disclosed and there is a reasonable basis for the tax treatment of such item. (IRC, § 6662(d)(2)(B)(i)-(ii).) Additionally, 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(a).) The taxpayer bears the burden of proving any defenses to the imposition of the ARP. (*Recovery Group, Inc. v. Commissioner*, T.C. Memo. 2010-76.)

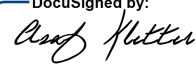
Appellant has not asserted any facts or legal authority to establish any applicable exceptions to the ARP, and the record does not reflect any potential grounds for abating it. Therefore, the ARP cannot be abated.

HOLDINGS

1. Appellant has not established error in FTB’s proposed assessment, which is based on a final federal determination.
2. The ARP was properly imposed and it may not be abated.

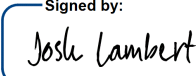
DISPOSITION

FTB’s action is sustained in full.

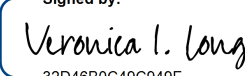
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 Asaf Kletter
 Administrative Law Judge

We concur:

Signed by:

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 Josh Lambert
 Administrative Law Judge

Signed by:

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 Veronica I. Long
 Administrative Law Judge

Date Issued: 8/12/2024