

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)
G. OLIVEIRA) OTA Case No. 230613714
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OPINION

Representing the Parties:

For Appellant: Rob Goldstein, Representative

For Respondent: Christopher T. Tuttle, Attorney

For Office of Tax Appeals: Linda Frenklak, Attorney

H. BOYD, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19331, G. Oliveira (appellant) appeals respondent Franchise Tax Board’s (FTB’s) deemed denial¹ of appellant’s claim for refund of \$1 or more for the 2006 tax year.²

Appellant waived the right to an oral hearing; therefore, the matter was submitted to the Office of Tax Appeals (OTA) on the written record pursuant to California Code of Regulations, title 18, section 30209(a).

ISSUES

1. Whether appellant has demonstrated error in FTB’s proposed assessment of tax, which is based on a federal determination.
2. Whether appellant has demonstrated a basis to abate the late-filing penalty.
3. Whether appellant has demonstrated a basis to abate the accuracy-related penalty.

¹ FTB did not issue a notice of action denying appellant’s claim for refund before appellant submitted an appeal with the Office of Tax Appeals but agrees that appellant properly appealed the penalty as a deemed denial of the claim.

² Although the 2007 tax year was included in this appeal, there is no dispute that there is no tax liability for the 2007 tax year. Appellant’s only payment was for a non-refundable lien fee of \$11, and appellant signed a document conceding that there is no dispute for the 2007 tax year. This Opinion will therefore address only the 2006 tax year.

FACTUAL FINDINGS

1. FTB received third party information that appellant earned income in excess of the filing requirement. After appellant failed to timely file a California income tax return for tax year 2006, FTB issued appellant a Demand for Tax Return (Demand).
2. After appellant did not respond to the Demand, FTB issued appellant a Notice of Proposed Assessment (NPA).
3. According to FTB records, appellant filed his 2006 California Resident Income Tax Return on September 15, 2009.³
4. FTB subsequently received a FEDSTAR IRS Data Sheet from the IRS showing that: (1) appellant reported a total tax of \$2,598 on his 2006 federal return; (2) the IRS made changes to appellant's 2006 federal return, including disallowing claimed Schedule C1 deductions for contract labor, supplies, and insurance for a net increase to taxable income of \$544,689; and (3) the IRS assessed additional tax of \$174,439. After the audit, the IRS assessed a late-filing penalty, and an accuracy-related penalty.
5. FTB made corresponding adjustments to appellant's 2006 return to the extent applicable under California law and issued appellant a second NPA dated August 27, 2012. The NPA revised appellant's taxable income by \$544,689. The NPA proposed tax of \$50,072, a late-filing return penalty of \$12,518, and an accuracy-related penalty of \$10,014.40, plus interest. The August 27, 2012 NPA became due and collectible when appellant failed to timely protest it.
6. FTB initiated collection action. Between July 25, 2014, and June 21, 2021, FTB received total payments and credits of \$127,098, which satisfied appellant's 2006 account balance due.
7. On March 31, 2020, appellant filed a protective claim for refund for the undetermined payment amounts applied within the past 12 months to appellant's 2006 account on the grounds that the federal audit reconsideration process was pending.
8. In a letter to appellant, FTB acknowledged receiving appellant's protective claim for refund for tax year 2006 and indicated that the proposed assessment was based on federal adjustments to appellant's federal return. FTB stated that the information it received indicated that no revisions were made to the federal adjustments. FTB requested that, if the changes it made do not match appellant's final agreement with the IRS, appellant produce a complete copy of any revised IRS report or other information

³ A copy of the filed return is not in the record; however, the parties do not dispute the date of filing or the amounts reported.

- showing revisions to the federal adjustments. FTB stated that in the absence of additional information, it intended to close appellant's protective claim for refund.
9. This timely appeal followed.
 10. In a letter to appellant dated September 7, 2023, FTB informed appellant that it closed his protective claim for refund for tax year 2006 because the information FTB received from the IRS indicated that there had been no change to the 2006 federal assessment and appellant did not provide any additional information to support his protective claim for refund. FTB denied appellant's claim for refund.
 11. On September 20, 2023, appellant sent OTA additional information including a copy of his federal 2006 income tax return and a letter. The letter stated in part, "In the reconsideration audit I sent in copies of invoices and expenses along with the request." No copies of invoices or expenses were provided to OTA with the additional information.
 12. On appeal, FTB submitted a copy of appellant's federal account transcript for the 2006 tax year dated December 8, 2023, which shows that a tax assessment of \$173,140, a late-filing penalty of \$43,609.50, and an accuracy-related penalty of \$34,887.80 were entered on October 24, 2011.
 13. OTA issued the parties an additional briefing letter. OTA provided FTB an opportunity to discuss the 2006 balance due, the status of the refund claim, jurisdiction, the statutes of limitations, and the late-filing penalty. OTA also provided appellant an opportunity to address FTB's responses and to discuss whether he received any documentary evidence from the IRS showing that the 2006 federal adjustments were revised and to provide a complete copy of any IRS report or other information showing that there were any revisions to the federal adjustments. FTB responded to OTA's additional briefing request; however, appellant did not respond or submit any additional evidence.

DISCUSSION

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

A taxpayer shall either concede the accuracy of a federal determination or state how it is erroneous. (R&TC, § 18622(a).) 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. (*Ibid.*) A federal determination is deemed final when the adjustment resulting from an IRS examination is assessed. (R&TC, § 18622(d); Internal Revenue Code

(IRC), § 6203, see also *Appeal of King Solarman*, 2024-OTA-203P.) As relevant here, an IRS account transcript is a valid record of assessment. (See Treas. Reg. § 301.6203-1; Rev. Rul. 2007-21, 2007-14 I.R.B. 865.)

It is well settled that a proposed assessment based on a federal audit report is presumptively correct and that the taxpayer bears the burden of proving that the determination is erroneous. (*Appeal of Gorin*, 2020-OTA-018P.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof with respect to an assessment based on a federal action. (*Ibid.*) R&TC section 17071 incorporates IRC section 61, which defines "gross income" to include all income from whatever source derived, including compensation for services, such as fees, commissions, fringe benefits, and similar items. (IRC, § 61(a)(1).)

Here, appellant contends that he is entitled to a refund because he does not owe the amount of the proposed assessment. Appellant asserts that he filed with the IRS a reaudit consideration and he is still waiting for the IRS to respond to his appeal. He also asserts that the process has remained unresolved and is stalled due to COVID-19, and he could submit a copy of his reaudit consideration.

Appellant submitted a copy of his federal return for 2006. Tax returns, however, are not evidence that the statements contained therein are correct. (See, e.g., *Roberts v. Commissioner* (1974) 62 T.C. 834, 837 ["merely signing a tax return under penalty of perjury does not establish the facts contained therein"].) Appellant has not provided any evidence indicating that the proposed assessment of tax or the federal adjustments are erroneous or that the IRS revised the federal adjustments. The December 8, 2023 federal account transcript does not show that the IRS revised the federal assessment.

During the appeal, OTA provided appellant another opportunity to address FTB's contentions, to discuss whether he received any documentary evidence from the IRS showing that the 2006 federal adjustments were revised, and to provide a complete copy of any IRS report or other information showing that there were revisions to the federal adjustments. Appellant did not provide a response. Accordingly, appellant has not met his burden of proving that the proposed assessment of tax, which is based on a federal determination, is erroneous.

Issue 2: Whether appellant has demonstrated a basis to abate the late-filing penalty.

A late-filing penalty will be imposed when a taxpayer fails to file a tax return before its due date, unless the taxpayer establishes that the late filing was due to reasonable cause and was not due to willful neglect. (R&TC, § 19131(a).) The late-filing penalty is calculated at

5 percent of the tax due for every month that the return is late, without any regard to extensions of time for filing, up to a maximum of 25 percent. (R&TC, § 19131(a).)

When FTB imposes a penalty, the law presumes that the penalty was imposed correctly, and the burden of proof is on the taxpayer to show that reasonable cause exists to support abating the penalty. (*Appeal of Xie*, 2018-OTA-076P.) To establish reasonable cause, the taxpayer must show that the failure to file a timely return occurred despite the exercise of ordinary business care and prudence, or that an ordinarily intelligent and prudent businessperson would have so acted under similar circumstances. (*Appeal of Belcher*, 2021-OTA-284P.)

Appellant's 2006 tax return had an original filing due date of April 15, 2007. (See R&TC, § 18566.) California law provides individual taxpayers an automatic six-month filing extension from the original statutory due date of April 15, but this extension is only allowed if a return is filed within the extension period. (R&TC, § 18567; Cal. Code Regs., tit. 18, § 18567.) FTB's records show that appellant untimely filed his 2006 return on September 15, 2009. FTB therefore properly imposed the late-filing penalty of \$12,518, which is 25 percent of the proposed tax of \$50,072.

On appeal, appellant makes no specific reference to, or provide arguments regarding, the late-filing penalty. As appellant has not demonstrated that his failure to timely file his 2006 return was due to reasonable cause and not to willful neglect, appellant has not demonstrated that he is entitled to abatement of the late-filing penalty.

Issue 3: Whether appellant has demonstrated a basis to abate the accuracy-related penalty.

IRC section 6662, incorporated by R&TC section 19164, provides for an accuracy-related penalty of 20 percent of the applicable underpayment of tax. As relevant, here, the accuracy-related penalty applies to the portion of the underpayment attributable to: (1) negligence or disregard of the rules and regulations (negligence), or (2) any substantial understatement of income tax (substantial understatement).⁴ (IRC, § 6662(b)(1), (2).)

Appellant's 2006 IRS Account Transcript and FEDSTAR IRS Data Sheet show that the IRS imposed a federal accuracy-related penalty of \$34,887.80, which is 20 percent of \$174,439. According to the available evidence, the IRS imposed an accuracy-related penalty based on a

⁴ "Negligence" is defined to include "any failure to make a reasonable attempt to comply" with the provisions of the IRC. (IRC, § 6662(c).) "Disregard" is defined to include "careless, reckless, or intentional disregard." (*Ibid.*) "Substantial understatement of income tax" exists when the amount of the understatement of tax 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).)

substantial understatement of tax because the amount of the federal understatement of tax exceeds the substantial understatement of tax thresholds and is also greater than \$5,000 under the second condition of IRC section 6662(d)(1)(A). Specifically, the total amount of tax for the 2006 federal return was \$177,037. Appellant stated on the 2006 federal return a tax amount of \$2,598, and 10 percent of the \$177,037 in tax required to be shown on the return was \$17,703.70. Appellant's federal understatement of tax was \$174,439, an amount significantly greater than both \$5,000 and 10 percent of the tax or \$17,703.70. Thus, the penalty of 20 percent of the underreported amount was applied to appellant's federal 2006 tax liability.

Similarly, appellant's California understatement of tax of \$50,072 exceeds \$5,007.20, which is 10 percent of the \$50,072 in tax required to be shown on appellant's 2006 California return. Accordingly, FTB properly imposed an accuracy-related penalty of \$10,014.40 based on a substantial understatement of tax.

The accuracy-related penalty may be reduced or abated to the extent a taxpayer shows that: (1) there is substantial authority for the taxpayer's 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 treatment of the items, or (3) the taxpayer acted in good faith and had reasonable cause for the understatement of tax. (IRC, §§ 6662(d)(2)(B), 6664(c)(1); R&TC, § 19164(d); Cal. Code Regs., tit. 18, § 19164(a); see *Appeal of Dillahunty*, 2024-OTA-024P.)

On appeal, appellant makes no specific reference to the accuracy-related penalty. Appellant has not asserted any facts or legal authority to establish any of the potentially applicable defenses, nor has he otherwise met his burden of proving error in FTB's imposition of the accuracy-related penalty. Accordingly, appellant has failed to establish that the accuracy-related penalty should be abated.

HOLDINGS

1. Appellant has not demonstrated error in FTB’s proposed assessment of tax, which is based on a federal determination.
2. Appellant has not demonstrated a basis to abate the late-filing penalty.
3. Appellant has not demonstrated a basis to abate the accuracy-related penalty.

DISPOSITION

FTB’s deemed denial of appellant’s claim for refund is sustained.

Signed by:

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 Heather Boyd
 Administrative Law Judge

We concur:

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 Sheriene Anne Ridenour
 Administrative Law Judge

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 Asaf Kletter
 Administrative Law Judge

Date Issued: 11/5/2025