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BOARD OF EQUALIZATION

STATE OF CALIFORNIA

In the Matter of the Appeal of:	**HEARING SUMMARY**
	PERSONAL INCOME TAX APPEAL
ISAAC CONTRERAS[1]	Case No. 519049[2]

Year	Proposed Assessment Tax	Proposed Assessment Penalties[3]
2001	$1,416.00	$903.98

Representing the Parties:

For Appellant: Isaac Contreras

For Franchise Tax Board: Jaclyn N. Appleby, Graduate Legal Assistant

QUESTION: Whether appellant has demonstrated error in the assessment, which was based upon federal adjustments.

[1] Appellant resides in Fresno County, California.

[2] This appeal was originally scheduled for the Board's August 24-26, 2010 oral hearing calendar. Later, this appeal was rescheduled for the Board's September 14-16, 2010 nonappearance calendar because appellant failed to respond to the hearing notice. Subsequently, at appellant's request, this appeal was placed back on the August 24-26 oral hearing calendar.

[3] The penalties consist of a $725.00 late filing penalty and a $178.98 amnesty penalty.

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HEARING SUMMARY

Background

Appellant filed a 2001 California income tax return on May 31, 2005, reporting a federal adjusted gross income (AGI) of $39,493 and California itemized deductions of $2,960, for a California taxable income of $36,533 and a tax liability of $1,484.

Subsequently, the FTB learned that the Internal Revenue Service (IRS) increased appellant's 2001 AGI by $35,902 to account for the following federal adjustments: (i) federal Schedule E rent/royalties losses were reduced by $1,357, (ii) federal Schedule D long-term gains were increased by $14,000, and (iii) other losses on a federal Form 4797 were disallowed in the amount of $20,545.

On April 7, 2009, the FTB issued a Notice of Proposed Assessment (NPA) that conformed to the federal adjustments by adding $35,902.00 to appellant's 2001 California taxable income, resulting in a proposed additional tax of $3,323.00, a late filing penalty of $1,201.75, and an amnesty penalty of $378.26, plus applicable interest.

Appellant timely protested the NPA, indicating that the "other gain/loss for 4797 for $20,545.00 is a loss."

In response, the FTB issued a Notice of Action (NOA) dated November 16, 2009, conceding that the other losses of $20,545 should have been allowed, but affirming the adjustments of $1,357 (from Schedule E rent/royalties) and $14,000 (form Schedule D long-term gains). The NOA set forth an additional tax of $1,416.00, a late filing penalty of $725.00, and an amnesty penalty of $178.98, plus applicable interest. This timely appeal followed.

Contentions

Appellant

Appellant contends that the IRS adjustments of $1,357 (from Schedule E rent/royalties) and $14,000 (form Schedule D long-term gains) are based on incorrect information. Along with his appeal letter, appellant provided a partial copy of his 2001 federal return. In his reply brief, appellant states that he would like to present information to the Board to support his case. Appellant does not directly address the penalty amounts.

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The FTB

The FTB contends that its NOA correctly conforms to the federal adjustments. The FTB states that appellant failed to provide evidence showing the IRS revised its adjustments or that the IRS adjustments, and the California NOA based thereon, were made in error. Thus, the FTB contends that appellant failed to carry his burden of proving error. The FTB does not directly address the penalty amounts.

Applicable Law

Proposed Assessment

A taxpayer must report federal changes to income or deductions to the FTB within six months of the date the federal changes become final. (Rev. & Tax. Code, § 18622, subd. (a).) The taxpayer must concede the accuracy of the federal changes or prove that those changes are erroneous. (Rev. & Tax. Code, § 18622, subd. (a); *Appeal of Sheldon I. and Helen R. Brockett*, 86-SBE-109, June 18, 1986; *Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.)[4] It is well settled that respondent's determination based on a federal audit report is presumptively correct, and the burden is on the taxpayer to prove that the determination is erroneous. (*Appeal of Sheldon I. and Helen R. Brockett*, *supra*.)

Income tax deductions are a matter of legislative grace, and a taxpayer bears the burden of establishing his entitlement to any claimed deductions. (*Appeal of James C. and Monablanche A. Walshe*, 75-SBE-073, Oct. 20, 1975; *New Colonial Ice Co. v. Helvering* (1934) 292 U.S. 435, 436). Unsupported assertions are not sufficient to carry a taxpayer's burden of proof. (*Appeal of Aaron and Eloise Magidow*, *supra*.)

Late Filing Penalty

California imposes a penalty for failure to file a return by its due date, unless the failure to file was due to reasonable cause and not due to willful neglect. (Rev. & Tax. Code, § 19131.) To establish reasonable cause, a taxpayer "must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinary

[4] Board of Equalization cases are generally available for viewing on the Board's website (www.boe.ca.gov).

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intelligent and prudent businessman to have so acted under similar circumstances." (*Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) Ignorance of a filing requirement or a misunderstanding of the law generally does not excuse a late filing. (*Appeal of Diebold, Incorporated*, 83-SBE-002, Jan. 3, 1983.)

Amnesty Penalty

In 2004, the Legislature enacted the income tax amnesty program. (Rev. & Tax. Code, §§ 19730-19738.) Eligible taxpayers could participate by filing an amnesty application and paying their outstanding liabilities of tax and interest, or entering into an installment plan, during the period of February 1, 2005, through March 31, 2005, inclusive. (Rev. & Tax. Code, §§ 19730 & 19731.) For liabilities that remained outstanding after the last day of the amnesty period, a penalty was imposed equal to 50 percent of the accrued interest payable. (Rev. & Tax. Code, § 19777.5, subd. (a).)

This Board's jurisdiction to review the amnesty penalty is limited. For example, a taxpayer has no right to an administrative protest or appeal of an unpaid amnesty penalty. (*Id.*, subd. (d).) A taxpayer also has no right to file an administrative claim for refund of a paid amnesty penalty, except upon the basis that the penalty was not properly computed. (*Id.*, subd. (e).) Therefore, the Board's jurisdiction to review the amnesty penalty is limited to situations where the penalty is assessed and paid, the taxpayer files a timely appeal from a denial of a refund claim, and the taxpayer attempts to show a computational error in the penalty.

STAFF COMMENTS

Proposed Assessment

At the oral hearing, appellant should be prepared to substantiate that the IRS revised its adjustments or that the IRS adjustments, and the California NOA based thereon, are incorrect. As noted above, unsupported assertions are not sufficient to carry appellant's burden of proof. (*Appeal of Aaron and Eloise Magidow, supra*.) Staff notes that there is little information in the record as to the $14,000 gain adjustment the IRS made. The FEDSTAR IRS Data Sheet dated January 4, 2010, indicates the adjustment of $14,000 as "Sch D-Long-Term Gain/Loss". Appellant should provide documentation from the IRS audit concerning this adjustment plus any information and documentary evidence as to why the $14,000 adjustment is incorrect. Appellant should further provide evidence that he owned and

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rented the residential real property claimed on his Schedule E, and documentation supporting the claimed rents, depreciation, and expenses. Pursuant to California Code of Regulations, title 18, section 5523.6, if appellant wishes to provide additional evidence to the Board, appellant should submit his additional evidence to the Board Proceedings Division at least 14 days prior to the oral hearing in this matter.[5]

Late Filing Penalty

Appellant may wish to discuss his reasons for filing his return late at the oral hearing so that the Board may consider whether appellant had reasonable cause for the late filing.

Amnesty Penalty

It does not appear this appeal meets the criteria for the Board to consider the amnesty penalty; the penalty is not yet assessed or paid, further, there is no claim for refund here asserting a computational error in the penalty.

Offer-In-Compromise

In its Opening Brief, the FTB notes that appellant apparently resolved his tax liability with the IRS through an offer-in-compromise. Depending on the Board's decision in this appeal, appellant might want to consider submitting an offer-in-compromise or an installment payment plan request with the FTB.

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[5] Evidence exhibits should be sent to: Claudia Madrigal, Appeals Analyst, Board Proceedings Division, State Board of Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.

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