

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18011190
)
JORDAN LEBOVICH) Date Issued: July 11, 2018
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_____)

OPINION

Representing the Parties:

For Appellant: Jordan Lebovich
For Respondent: Donna L. Webb, Staff Operation Analyst

J. ANGEJA, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19045,¹ Jordan Lebovich (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) on a proposed assessment of additional tax in the amount of \$599, plus applicable interest, for the 2011 tax year.

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

ISSUE

Whether appellant has demonstrated error in the proposed assessment, which is based on a federal determination.

FACTUAL FINDINGS

1. Appellant filed a timely 2011 California personal income tax return. On the return, appellant reported federal adjusted gross income (AGI) of \$28,806, less itemized deductions of \$23,517, for a taxable income of \$5,289. After reporting total taxes due of

¹ Unless otherwise indicated, all “Section” references are to sections of the California Revenue and Taxation Code.

\$363 and a California withholding credit of \$480, appellant reported an overpayment of \$117, which FTB refunded to appellant on April 14, 2012.

2. Subsequently, under section 6103(d) of the Internal Revenue Code (IRC), FTB received federal information showing that appellant's federal AGI included an early distribution from a qualified retirement plan (hereinafter, early distribution) that was subject to an additional 10 percent federal tax. The federal information showed that appellant had received early distribution of \$38,497, all of which was subject to an early distribution tax, and that appellant paid the required additional 10 percent tax to the Internal Revenue Service (IRS) of \$3,850. Appellant reported the required 10 percent tax on his federal return, but underreported the corresponding 2.5 percent tax on his state return. On his state return, appellant reported that \$14,500 of his total distribution of \$38,497 was subject to the early distribution tax on his state return, as shown on Form 3805P.
3. Based on the federal information, FTB issued a Notice of Proposed Assessment (NPA) dated December 26, 2014, that assessed a 2.5 percent early distribution tax on the taxable portion of the early distribution ($\$38,497 \times 2.5\% = \962). The NPA proposed additional tax of \$599 ($\962 less \$363 previously reported) plus applicable interest.
4. Appellant protested the NPA, asserting that he had qualifying medical expenses and appellant attached copies of his California Schedule CA and federal Schedule A.
5. There is no evidence that the IRS cancelled or reduced its assessment.
6. Respondent issued a Notice of Action (NOA) dated April 19, 2017, affirming the NPA, and this timely appeal followed.
7. Appellant's federal Schedule A shows that he claimed a \$9,729 itemized deduction for amounts paid for medical care,² and in its October 11, 2017 brief FTB has agreed to allow that amount as an exception to the early distribution tax pursuant to IRC section 72(t)(2)(B).³ Accordingly, FTB determined that of appellant's \$38,497 early distribution, \$28,768 is subject to the 2.5 percent early distribution tax ($\$38,497$ less medical expenses of $\$9,729 = \$28,768$) which results in additional tax of \$719 ($\$28,768 \times 2.5\% = \719).

² This amount was also included in the itemized deduction claimed on line 18 of appellant's state tax return.

³ IRC section 72(t)(2) provides for certain exceptions to the early distribution tax. One such exception to the early distribution tax is for distributions made to the extent the distribution does not exceed the amount allowable as a deduction under IRC section 213 for amounts paid for medical care. (IRC, § 72(t)(2)(B).)

Because appellant previously paid \$363, FTB has agreed to reduce the proposed additional tax to \$356 plus interest.

DISCUSSION

Section 18622(a) provides that a taxpayer shall either concede the accuracy of a federal determination or state wherein it is erroneous. It is well settled that a deficiency assessment based on a federal audit report is presumptively correct and that a taxpayer bears the burden of proving that the determination is erroneous. (*Appeal of Brockett*, 86-SBE-109, June 18, 1986; *Appeal of Hutchinson*, 82-SBE-121, June 29, 1982.)⁴ Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof with respect to an assessment based on a federal action. (*Appeal of Magidow*, 82-SBE-274, Nov. 17, 1982.)

Generally, early distributions from qualified retirement plans are taxable, and a ten percent additional tax applies at the federal level on early distributions. (IRC, § 72(a)(1), (t).) Section 17085 in relevant part conforms to IRC section 72. Section 17085(c)(1) reduces the percentage of the tax on early distributions to 2.5% for California purposes.

Here, appellant's Forms 1099-R indicate that appellant received an early distribution of \$38,497. FTB determined that of appellant's \$38,497 early distribution, \$28,768 is subject to the 2.5 percent early distribution tax (\$38,497 less medical expenses of \$9,729 = \$28,768) which results in additional tax of \$356 (\$28,768 x 2.5% = \$719, less the \$363 reported on the return). Appellant does not dispute that he received the early distribution, and in fact appellant reported the applicable federal early distribution tax on this amount. Appellant has not proven that there were any errors in FTB's proposed assessment based on the federal information, or that any other exception to the early distribution tax applies.

HOLDING

Appellant has not shown error in respondent's determination.

⁴ Board of Equalization cases are generally available for viewing on the Board's website (<http://www.boe.ca.gov/legal/legalopcont.htm>)

DISPOSITION

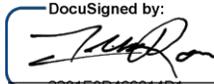
Respondent's action in assessing a tax deficiency for 2011 is modified consistent with respondent's concession that the tax deficiency due for that year should be reduced to \$356, plus interest.

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Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

We concur:

DocuSigned by:

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Andrew J. Kwee
Administrative Law Judge

DocuSigned by:

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Alberto T. Rosas
Administrative Law Judge