

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18011222
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JEFFREY WILLIAMS) Date Issued: May 8, 2018
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OPINION

Representing the Parties:

For Appellant: Jeffrey Williams

For Respondent: Donna L. Webb, Staff Operations Specialist

Counsel for the Office of Tax Appeals: Tom Hudson, Tax Counsel III

A. VASSIGH, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,¹ Jeffrey Williams (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) proposing an assessment of \$382 in additional tax for the 2010 tax year, plus applicable interest.

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

ISSUE

Has appellant established that the proposed assessment for tax year 2010 was in error?

FACTUAL FINDINGS

1. Appellant filed a timely California tax return (Form 540) for the 2010 tax year, reporting federal adjusted gross income (AGI) of \$48,697, California adjustments (subtractions) of \$31,300, California AGI of \$17,397, and claiming a standard deduction of \$3,670, resulting in California taxable income of \$13,727, and tax of \$237. After applying the exemption

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

credit of \$99 and renter's credit of \$60, appellant reported total tax of \$78. After applying withholding credits of \$10, appellant reported tax due of \$68, which appellant paid on August 3, 2011.

2. Subsequently, the FTB received federal tax information from the Internal Revenue Service (IRS) showing appellant's federal AGI (as accepted by the IRS) as \$47,608, which included an early distribution from a retirement plan that was subject to a 10 percent additional federal tax. The information showed that the taxable portion of this pension distribution was \$16,308 and the 10 percent additional tax was \$1,631.
3. The FTB then reviewed appellant's tax return and determined that appellant had overstated his federal AGI by \$1,089 (i.e., appellant's AGI of \$48,697 reported on Form 540 was higher than appellant's actual AGI of \$47,608, as reported by the IRS). In addition, the FTB determined that appellant's early distribution from a qualified retirement plan was subject to California's 2.5 percent additional tax. The FTB determined that appellant reported the required 10 percent tax on his federal return, but did not report the corresponding 2.5 percent additional tax on his state return.
4. Based on the federal information, the FTB issued a Notice of Proposed Assessment (NPA) on March 27, 2015 that reduced appellant's federal AGI by \$1,089, to a taxable income of \$12,638, and assessed a 2.5 percent early distribution tax on the taxable portion of appellant's pension distribution (i.e., $\$16,308 \times 2.5\% = \407.70). The NPA proposed additional tax of \$382, plus applicable interest.
5. Appellant timely protested the NPA by means of a letter dated May 21, 2015, and agreed that he owed the "penalty of 2.5%" on his pension income and the resulting tax of \$382, plus applicable interest, for the 2010 tax year.
6. FTB sent appellant a letter stating that the statute of limitations period for issuing assessments for 2010 is four years from the return's due date or four years from the date when the return was filed, whichever is later. The FTB subsequently issued a Notice of Action (NOA), dated December 29, 2016, affirming the NPA and stating that the information provided by appellant did not establish that the proposed assessment was incorrect.
7. Appellant timely filed the instant appeal of FTB's NOA for the 2010 tax year. In his appeal letter, appellant explains that he filed his 2012 tax return in a timely manner, using

his valid mailing address, which is “a private mail services business” known as Mailboxes of Oceanside. Rather than using that mailing address, appellant contends that the FTB repeatedly used a San Diego address where appellant had never lived. Appellant contends that the proposed assessment for the 2010 tax year was issued in retaliation for a protest he filed regarding his 2012 tax year.

8. Appellant concedes the accuracy of the proposed assessment for 2010, stating, “Although the online tax filing software included the penalty for early 401k withdraw[al] on my federal return, I found a legitimate mistake not processed by the online tax return filing software for the State of CA return.” As stated during the protest process, appellant contends that the FTB owes him \$8 because he is owed a refund for tax year 2012 that exceeds the amount he concedes he owes for the tax year 2010.

DISCUSSION

Has appellant established that the proposed assessment for tax year 2010 was in error?

Burden of Proof

The FTB’s determination is presumed correct and a taxpayer has the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509.) California Code of Regulations, title 18, section 30705, subdivision (c), states that unless there is an exception provided by law, “the burden of proof requires proof by a preponderance of the evidence.”² Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.)

Early Distribution Tax

Section 17041 imposes a tax “upon the entire taxable income of every resident of this state.” Section 17071 incorporates Internal Revenue Code (IRC) section 61, which defines “gross income” as “all income from whatever source derived,” including pension income. IRC section 72(t)(2), generally imposes a 10 percent tax (in addition to the income tax otherwise imposed) on early distributions from qualified retirement plans that are includible in gross income. This 10

² A preponderance of evidence means that the taxpayer must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc., v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.)

percent tax also is known as the federal early distribution tax or penalty. Section 17085(c)(1), adopts IRC section 72 for California income tax purposes, but reduces the rate of the early distribution tax from 10 percent to 2.5 percent.

Here, the amount of the early distribution tax in the proposed assessment is correct. Appellant has not met his burden to show any error in the proposed assessment based on the early distribution tax, but rather, concedes that he owes this tax and the applicable interest. Therefore, we have no reason nor any legal basis to overturn the FTB's assessment.

Appellant's argument is that he had been audited and assessed this proposed tax amount in retaliation for an earlier, unanswered claim for refund, apparently involving the 2012 tax year. Appellant's position is that FTB used the wrong address for its correspondence concerning the 2012 tax year. Appellant contends that his earlier claim for refund is based on respondent's failure to send correspondence to the address shown on his 2012 tax return. However, the 2012 tax year is not the subject of this appeal.³

It is well established that the only power that this agency has is to determine the correct amount of appellant's California income tax liability for the year on appeal. (*Appeals of Fred R. Dauberger, et al.*, 82-SBE-082, Mar. 31, 1982.) Our regulations confirm that we have no jurisdiction to determine "[w]hether the appellant is entitled to a remedy for the Franchise Tax Board's actual or alleged violation of any substantive or procedural right, unless the violation affects the adequacy of a notice, the validity of an action from which a timely appeal was made, or the amount at issue in the appeal. (Cal. Code Regs., tit. 18, § 30102(b)(5).) The tax year on appeal in this case is 2010, and this agency has no jurisdiction or authority to resolve unrelated disputes involving appellant's 2012 tax year.

HOLDING

Appellant failed to establish that the early distribution tax proposed was incorrectly imposed or calculated, or that he is eligible for an exception to the early distribution tax.

³ FTB indicates that appellant's correspondence concerning the 2012 tax year was forwarded "to the appropriate department for review." This agency has no information about the current status of that review, which is not relevant to this appeal.


DISPOSITION

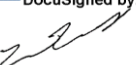
Respondent's action is sustained in full.

DocuSigned by:

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Amanda Vassigh
Administrative Law Judge

We concur:

DocuSigned by:

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Neil Robinson
Administrative Law Judge

DocuSigned by:

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Tommy Leung
Administrative Law Judge