OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 18011231
	)	
JAKEY K. ROBINSON	)	Date Issued: June 18, 2018
	)	
	)	
	)	

OPINION

Representing the Parties:

For Appellants: Jakey K. Robinson, Taxpayer

For Respondent: Donna L. Webb, Staff Operation Specialist

KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19045,[1] Jakey K. Robinson (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in denying appellant's protest of a proposed assessment in the amount of $363 in tax, plus accrued interest, for the 2012 tax year.[2] This matter is being decided based on the written record because appellant waived her right to an oral hearing.

ISSUE

Whether appellant is entitled to claim additional itemized deductions on her California tax return that she reported as nondeductible on her federal return.

FACTUAL FINDINGS

1. On April 16, 2013, appellant timely filed a California Resident Income Tax Return for the 2012 tax year.[3] Appellant reported federal adjusted gross income (AGI) of $74,788

[1] Unless otherwise indicated, all statutory references are to sections of the California Revenue and Taxation Code.

[2] Appellant refers to herself in letters as "Jacklyn K. Robinson," however, her 2012 tax return was filed under the name Jakey K. Robinson, and the Notice of Action was issued to Jakey K. Robinson.

[3] April 15, 2013, was a federal holiday, which, due to conformity, extended the due date for filing a state tax return until April 16, 2013. (§ 18410.)

on that return. Appellant's federal AGI consisted solely of wage income. Appellant claimed no California adjustments to her federal AGI. Therefore, appellant also reported California AGI of $74,788.

2. Appellant itemized $27,808 in deductible and nondeductible expenses on her federal return (Schedule A, itemized deductions). Of this amount, appellant deducted $23,812, consisting of $4,672 in state income taxes paid, $500 in charitable contributions, and $18,640 in miscellaneous deductible expenses. The $3,996 in nondeductible expenses that appellant reported included $2,500 in medical and dental expenses (medical expenses), and $1,496 in miscellaneous itemized expenses. Appellant reported the $2,500 in medical expenses as nondeductible because they did not exceed 7.5 percent of her AGI. Appellant reported the $1,496 in miscellaneous itemized expenses as nondeductible because they did not exceed 2 percent of appellant's AGI.
3. On her California tax return, appellant erroneously reported that she had claimed $27,808 of itemized deductions on her federal return, including the $3,996 in nondeductible expenses. From the $27,808 amount, appellant subtracted the $4,672 in state income taxes paid as a California adjustment, resulting in claimed California itemized deductions of $23,136 (i.e., $27,808 minus $4,672).
4. FTB received the above information from the IRS, reflecting that appellant reported the $3,996 as nondeductible for federal tax purposes. In response, FTB decreased appellant's total itemized deduction for state tax purposes by $3,996 ($2,500 plus $1,496), which increased the amount of California tax due from appellant by $363.
5. On December 4, 2015, FTB issued a Notice of Proposed Assessment (NPA) proposing to assess $363 in additional tax, plus accrued interest, based on the federal information.
6. In response, appellant submitted a protest letter to FTB dated January 28, 2016, claiming that her tax computation was accurate, and that she had a tax professional looking into the matter.
7. Shortly thereafter, on February 4, 2016, FTB received a $392.90 payment from appellant, for the disputed tax amount plus accrued interest.
8. By letter dated March 7, 2016, FTB acknowledged having received appellant's protest of the NPA.

9. On March 19, 2016,[4] FTB erroneously refunded $397.53 to appellant (the total amount appellant paid plus $4.63 in credit interest), instead of holding appellant's payment as a tax deposit to prevent accrual of interest as provided by section 19041.5.[5]

10. On June 28, 2017, FTB issued a Notice of Action (NOA) to appellant, denying appellant's protest of the NPA. The NOA acknowledged that FTB received appellant's payment of $392.90 on February 4, 2016, and asserted that FTB erroneously refunded $397.53 to appellant on March 19, 2016. According to the NOA, the amount at issue in appeal is $363 in tax, plus interest, which had accrued to $50.80 as of June 28, 2017.

11. The NOA also stated that it constituted a notice and demand for repayment of an erroneous refund within the meaning of section 19104(c), governing abatement of interest for erroneous refunds.[6]

12. By letter dated July 21, 2017, appellant timely filed the instant appeal from FTB's June 28, 2017, NOA denying appellant's protest. In the appeal letter, appellant contends that she is not employed, has no income, is unable to pay the liability, will not pay the liability, and considers the matter closed because FTB already refunded the disputed tax amount to her. In support, appellant attached a copy of her January 28, 2017, protest letter and returned a copy of the June 28, 2017, NOA. On the returned copy of the NOA, appellant handwrote that the refund check is hers and she does not need to repay it, the erroneous refund is FTB's problem, and that she will contact an attorney to prevent further harassment by FTB on this matter.

[4] FTB's opening brief states that the refund was issued on June 1, 2016; however, FTB's Notice of Action (NOA) states that FTB refunded the payment on March 19, 2016.

[5] California generally conforms to the federal tax deposit provisions in Internal Revenue Code (IRC) section 6603. (§ 19041.5.) Any payment made to stop the running of interest on a proposed deficiency assessment that has not become final is regarded as a "tax deposit" that stops the running of interest. (IRC, § 6603(b).) The tax deposit converts to a payment of tax under certain circumstances. (See § 19041.5(a).)

[6] Section 19104(c) generally provides for abatement of interest on erroneous refunds until 30 days after the date of the notice and demand for repayment, unless the erroneous refund was caused in any way by the taxpayer. As relevant, FTB has not commenced an action in Sacramento County Superior Court to recover an erroneous refund pursuant to the procedure set forth in section 19411.

DISCUSSION

Gross income means all income from whatever source derived, unless specifically excluded. (§§ 17071, 17085; IRC, §§ 61(a)(8)-(10), 72, 408(d).) The taxpayer bears the burden of establishing entitlement to any deductions claimed.[7] To support a deduction, the taxpayer must establish by credible evidence, other than mere assertions, that the deduction claimed falls within the scope of a statute authorizing the deduction.[8]

California law generally conforms to federal law with respect to itemized deductions for medical expenses and miscellaneous itemized expenses. For the 2012 tax year, IRC section 213 provided, in pertinent part, a deduction for certain medical expenses for the care of the taxpayer to the extent that such expenses exceed 7.5 percent of the taxpayer's AGI. (IRC, § 213 (2012).) Miscellaneous itemized expenses also have an AGI threshold for deductibility, albeit at a different AGI percentage. Specifically, California conforms to IRC section 67, which provides, in pertinent part that, "the miscellaneous itemized deductions for any taxable year shall be allowed only to the extent that the aggregate of such deductions exceeds 2 percent of adjusted gross income." (§ 17076 [incorporating IRC section 67]; IRC, § 67(a) (2012).) In summary, for the 2012 tax year, both federal and state law provide that medical expenses are only deductible to the extent those expenses exceed 7.5 percent of the taxpayer's AGI, and miscellaneous itemized expenses are only deductible to the extent those expenses exceed 2 percent of the taxpayer's AGI.[9]

Here, appellant reported that her $2,500 in medical expenses were nondeductible on her federal tax return, because those expenses did not exceed the applicable 7.5 percent AGI threshold amount of $5,609. We conclude that appellant's medical expenses also are nondeductible on her California tax return because they do not exceed the 7.5 percent AGI

[7] *Appeal of Gilbert W. Janke*, 80-SBE-059, May 21, 1980; *Appeal of J. Walshe and M. Walshe*, 75-SBE-073, Oct. 20, 1975. Pursuant to California Code of Regulations, tit. 18, § 30501(d)(3), precedential opinions of the State Board of Equalization (BOE) that were adopted prior to January 1, 2018, are precedential authority before the Office of Tax Appeals unless a panel removes, in whole or in part, the precedential status of the opinion. BOE's precedential opinions are available for viewing on the BOE's website: http://www.boe.ca.gov/legal/legalopcont.htm.

[8] *New Colonial Ice Co., Inc. v. Helvering* (1934) 292 U.S. 435, 440; *Appeal of Robert R. Telles*, 86-SBE-061, Mar. 4, 1986; *Appeal of A. Magidow and E. Magidow*, 82-SBE-274, Nov. 17, 1982.

[9] We note that in subsequent years, the AGI thresholds for California are different than for federal purposes. (§ 17241 [medical expenses].)

threshold, which is the same for purposes of both her federal and state tax returns.

Appellant also reported $20,136 in miscellaneous itemized expenses, of which appellant reported $18,640 as deductible on her federal return. Appellant reported the balance, $1,496, as not deductible on her federal return because this amount does not exceed two percent of appellant's $74,788 AGI. The applicable AGI threshold for California miscellaneous itemized expenses is the same as the threshold for federal tax purposes. Therefore, we conclude that appellant's allowable miscellaneous itemized deduction for purposes of her California tax return is the same as her federal return amount, $18,640, as was determined by FTB.

In summary, we conclude that appellant failed to establish that she is entitled to deduct the $3,996 in additional medical and miscellaneous expenses on her California return. Appellant reported these amounts as not deductible on her federal return, and California conforms to federal law with respect to both of these AGI thresholds for the 2012 tax year.

Appellant also expressed concern regarding her ability to pay the liability because she lost her job and is suffering medical issues. We are cognizant that a taxpayer's financial situation may ultimately render a liability uncollectible. Nevertheless, the question of ability to pay versus that of determining the correct amount of the tax liability are two separate and distinct concepts. We lack authority to make discretionary adjustments to the amount of a tax assessment based on a taxpayer's ability to pay. (*Appeal of Estate of R. Luebbert, Deceased, and V. Luebbert*, 71-SBE-028, Sep. 13, 1971.) Our function in the appeals process is to determine the correct amount of the taxpayer's California income tax liability.[10] (*Appeals of Fred R. Dauberger, et al.*, 82-SBE-082, Mar. 31, 1982.) Therefore, based on all the evidence and our earlier conclusion that the liability was correctly assessed, we have no legal basis upon which we can make any adjustments to the amount of the assessment.

Appellant also contends that she is not obligated to repay FTB the amount it refunded to her. Here, we are mindful that appellant initially paid the liability in response to the NPA and, through no fault of her own, FTB admittedly erred in refunding the payment to appellant. Nevertheless, the Revenue and Taxation Code authorizes FTB to assess and collect an erroneous refund provided that FTB issues a notice and demand for repayment within two years after the date of the erroneous refund, or within the applicable period within which FTB may timely issue

[10] FTB has its own offer in compromise program, which considers a taxpayer's ability to pay; however, we have no jurisdiction over this program. (See: https://www.ftb.ca.gov/bills_and_notices/OIC.shtml.)

an NPA, whichever period expires later.[11] (§ 19368.) Section 19368 further provides that such a notice and demand is issued pursuant to section 19051, and abatement of interest is governed by section 19104(c).[12] Section 19104(c) provides that FTB shall abate interest from the date of the erroneous refund until 30 days after the date of the notice and demand for repayment, unless the taxpayer caused the erroneous refund. (§ 19104(c).)

Here, the NOA constituted both a notice and demand for repayment of an erroneous refund as well as a denial of appellant's January 28, 2016, protest letter. For the reasons explained above, we reject appellant's deficiency appeal and find that FTB correctly determined a $363 tax deficiency for the 2012 tax year. FTB issued an NPA for the 2012 tax deficiency, which has not yet been satisfied on account of FTB's erroneous refund to appellant. Therefore, the additional tax disclosed in the NPA must still be paid to the state.[13]

In its opening brief, FTB agreed to waive "all interest charged as a result of the erroneous refund." Although FTB claims in its opening brief that FTB refunded the payment to appellant on June 1, 2016, this date conflicts with the date specified in FTB's notice and demand for repayment (i.e., the NOA). The NOA states that FTB refunded the money to appellant at an earlier date, on March 19, 2016. We resolve this factual discrepancy in appellant's favor, and find that section 19104(c) requires interest abatement for the period from March 19, 2016, until July 28, 2017 (30 days after the date of the NOA).

HOLDING

Appellant has not established that she is entitled to claim the itemized deductions disallowed by FTB. Therefore, appellant is liable for a $363 deficiency in her 2012 California income tax, plus interest until the tax liability is satisfied, with interest being abated for the period from March 19, 2016, through July 28, 2017.

[11] Alternatively, in lieu of issuing a notice and demand for repayment, FTB may recover an erroneous refund by filing an action in Sacramento County Superior Court within this time period. (§ 19411.) FTB has not pursued this method.

[12] Regarding the notice and demand, section 19368 provides that the rights of protest and appeal apply if the erroneous refund is assessable as a deficiency (without regard to the running of any period of limitations), notwithstanding that section 19051 provides that there is no right of protest or appeal. (§ 19368(a).)

[13] Of course, FTB is only entitled to recover the liability once, even though FTB asserts two different grounds for recovery, as a proposed deficiency assessment and as an erroneous refund.

DISPOSITION

Respondent's action in denying appellant's protest is sustained except that interest on the $363 deficiency in appellant's 2012 tax year shall be abated for the period from March 19, 2016, through July 28, 2017.

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Andrew J. Kwee
Administrative Law Judge

We concur:

DocuSigned by:
Jeffrey I. Margolis
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Jeffrey Margolis
Administrative Law Judge

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Michael F. Geary
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