

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:)	OTA Case No. 18011752
)	
ANTHONY M. GENBERG AND MELISSA)	Date Issued: August 1, 2018
M. SCHLECT-GENBERG)	
_____)	

OPINION

Representing the Parties:

For Appellant:	Anthony M. Genberg, Taxpayer Melissa M. Schlect-Genberg, Taxpayer
For Respondent:	Rachel Abston, Senior Legal Analyst

N. ROBINSON, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19045,¹ Anthony M. Genberg and Melissa M. Schlect-Genberg (appellants) appeal an action by the Franchise Tax Board (FTB or respondent) on appellants’ protest against a proposed assessment of \$872 in additional tax² and applicable interest for the 2012 tax year. Appellants waived their right to an oral hearing and therefore the matter is being decided based on the written record.

ISSUE

Has appellant established error in respondent’s proposed assessment of additional tax?

FACTUAL FINDINGS

1. Appellants filed a joint 2012 California Resident Income Tax Return (Form 540 2EZ).
2. The Internal Revenue Service (IRS) provided to respondent information showing the IRS adjusted appellants’ 2012 federal return for unreported pension income of \$17,835. The

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

² The proposed \$872 in additional tax includes a 2.5 % premature distribution tax of \$445.

- IRS also assessed a 10% premature distribution tax of \$1,784.³
3. Respondent issued a Notice of Proposed Assessment (NPA) dated June 16, 2016, increasing appellants taxable income by \$17,835 and proposing additional California tax of \$872 plus applicable interest.
 4. On August 15, 2016 appellants protested the NPA claiming that they had already paid taxes on the amount at issue through a payment plan and by offset of a refund due them from the United States IRS for 2015. The documents attached to appellants' protest, however, revealed that the payment plan was with the IRS (not with the FTB) and that the refund offset was applied to amounts appellants owed *to the United States IRS* for 2012. None of the payment amounts referenced in appellants' protest were paid to the FTB with respect to the 2012 *California* tax liability at issue in this appeal.
 5. On June 7, 2017, respondent issued a Notice of Action (NOA) affirming the NPA.
 6. Appellants filed this timely appeal.

DISCUSSION

A proposed deficiency assessment based on federal adjustments to income is presumed to be correct, and the burden is on the taxpayer to prove it is erroneous. (*Appeal of Wing E. and Fay D. Lew*, 78-SBE-073, Aug. 15, 1978; *Appeal of Donald G. and Franceen Webb*, 75-SBE-061, Aug. 19, 1975.)⁴ Section 18622 requires a taxpayer to concede the accuracy of the federal changes or to state wherein the changes are erroneous. California Code of Regulations, title 18, section 30705(c) states that unless there is an exception provided by law, "the burden of proof requires proof by a preponderance of the evidence."⁵

Section 17041 imposes a tax "upon the entire taxable income of every resident of this state." Section 17071 incorporates IRC section 61, which defines "gross income as "all income from whatever source derived," including pension income. IRC section 72(t)(1), imposes a 10 percent tax (in addition to the income tax otherwise imposed) on early distributions from

³ Internal Revenue Code (IRC) section 6103(d) enables the IRS to share tax information with state governmental agencies.

⁴ Published decisions of the Board of Equalization, designated by "SBE" in the citation, are available on that Board's website at: <http://www.boe.ca.gov/legal/legalopcont.htm>.

⁵ 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.)

qualified retirement plans that are includable in gross income. Section 17085(c)(1), adopts IRC section 72(t) for California tax purposes, but reduces the rate of the early distribution tax from 10 percent to 2.5 percent. When respondent received information from the IRS indicating that appellants had been assessed additional tax for the early withdrawal of \$17,835 from a qualified retirement account, it assessed state income tax and an early distribution tax for a combined total of \$872. Appellants have not contested the accuracy of respondent's calculations.

In their appeal letter, appellants refer to documents sent to respondent purportedly showing that the tax debt identified in the NOA was paid. Appellants are apparently referring to their protest letter dated August 15, 2016 and the attached March 21, 2016 IRS CP49 Notice showing that the IRS credited a 2015 federal tax overpayment of \$783.83 to satisfy federal tax owed for 2012. Appellants also entered into a payment plan with the IRS (not with the FTB). Based on the handwriting on the March 21, 2016 IRS CP49 Notice, appellants contend they made payments of \$60 per month from October 2015 to May 2016 to the IRS on account of their IRS tax liability for 2012.

The California FTB and the United States IRS are separate tax agencies that administer separate taxes for separate sovereigns. Payments made to satisfy a tax liability owed to the United States IRS do not satisfy a tax liability owed to the California FTB, even when the taxes are imposed upon the same transaction. (See generally, *City and County of San Francisco v. Fry* (1883) 63 Cal. 470, 471 [“the inhibition of double taxation only applies to such taxation made by the same State or government”].) Although appellants have produced evidence that their 2012 *federal* tax obligation has been satisfied, they have not produced any evidence that respondent's proposed assessment of additional *California* tax for 2012 is in error or that the California tax amount has been paid.

HOLDING

Appellants have not shown that respondent erred in proposing the assessment of additional tax for 2012.

DISPOSITION

Respondent's action is sustained in full.

DocuSigned by:
Neil Robinson
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Neil Robinson
Administrative Law Judge

We concur:

DocuSigned by:
Michael Geary
1A9B52EF88AC4C7...
Michael F. Geary
Administrative Law Judge

DocuSigned by:
Tommy Leung
0C90542BE88D4E7...
Tommy Leung
Administrative Law Judge