# OFFICE OF TAX APPEALS STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18011204
JERRY W. STABLEIN AND	) Date Issued: December 11, 2018
REBECCA S. STABLEIN	}
	)

#### **OPINION**

Representing the Parties:

For Appellants: Jerry W. Stablein and Rebecca S. Stablein

For Respondent: Lyn Gidding-Theobald, Legal Assistant

J. JOHNSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19045, Jerry W. Stablein and Rebecca S. Stablein (appellants) appeal an action by the Franchise Tax Board (respondent) in proposing \$2,972 of additional tax, and applicable interest, for the 2012 tax year.

Appellants waived their right to an oral hearing, and therefore this matter is decided based on the written record.

#### **ISSUE**

Have appellants shown that certain income received in 2012 constitutes Paid Family Leave (PFL), and is therefore exempt from California taxation?

#### FACTUAL FINDINGS

- 1. Appellants filed a timely 2012 California tax return. On their return, they made a California adjustment to subtract from their taxable income \$31,954 that was reported on a Form W-2 (Wage and Tax Statement).
- 2. Respondent originally processed appellants' return as submitted, but subsequently reviewed appellants' return and determined that the \$31,954 adjustment was not correct.
- 3. Respondent issued a Notice of Proposed Assessment (NPA) to appellants, increasing their taxable income by \$31,954, and proposing additional tax of \$2,972, plus interest.

- 4. Appellants protested the NPA, asserting that the deducted income was not wages, but rather PFL or nontaxable disability income. Appellants acknowledged in their protest that they received income from the issuer of the Form W-2 in question, but contended that it was "vacation time" and not wages.
- 5. Respondent replied, acknowledging that PFL is not taxable in California, but only if the taxpayer, and not the employer, was the one to make payments towards it. Respondent determined that the income at issue came from an insurance company and was paid for by appellants' employer, and was therefore taxable third-party sick pay. Respondent noted that PFL would have been reported on a Form 1099-G (Certain Government Payments) issued by the Employment Development Department (EDD).
- 6. Appellants responded, asserting that the income in question was listed as PFL on the Form W-2 and that they followed the tax preparation software's instructions when completing their returns.
- 7. Respondent issued a Notice of Action, affirming the NPA, and appellants filed this timely appeal.

#### DISCUSSION

Respondent's determination is presumed correct, and a taxpayer has the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.)<sup>1</sup> 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.) In the absence of credible, competent, and relevant evidence showing that respondent's determination is incorrect, it must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.)

California residents are subject to tax on their entire taxable income, regardless of where that income is earned or sourced. (Rev. & Tax. Code, § 17041(a).) California generally incorporates by reference Internal Revenue Code (IRC) section 61, which defines "gross income." IRC section 61(a) provides that gross income includes compensation for services, including fringe benefits and similar items. Thus, California taxes residents on their employment income, including supplemental pay like vacation and sick pay, regardless of source.

<sup>&</sup>lt;sup>1</sup> Board of Equalization (BOE) precedential decisions are viewable on the BOE website: <a href="http://www.boe.ca.gov/legal/legalopcont.htm">http://www.boe.ca.gov/legal/legalopcont.htm</a>.

One exception to the taxation of employment-related income is for PFL. California PFL is a temporary disability insurance program which is administered by the EDD and provided to individuals who take time off from work to care for certain family members. (See Unemp. Ins. Code, § 3301.) PFL benefits are taxed at the federal level, but California law excludes these benefits from taxation at the state level. Unemployment compensation exempted under California law, e.g., PFL, has to be paid pursuant to a government program. PFL payments are issued by the EDD and are reported on a Form 1099-G.

The income at issue was reported as taxable income on the Form W-2 issued to appellant-husband for the 2012 tax year. State income tax was withheld from this payment, and was included in appellants' reported withholding amount on their California tax return. There is no indication in the record that this income was for PFL or was otherwise not taxable income. Appellants' 2012 federal wage and income transcript confirms that the income at issue is Form W-2 income, and not Form 1099-G PFL income. Appellants stated at protest that the income reported on the Form W-2 was for vacation time, rather than for wages; however, vacation pay is still taxable income.

Appellants provide an undated letter they assert is an appeal from an EDD determination that appellant-husband was not entitled to benefits for the final few months of 2012. The letter argues that appellant-husband was not receiving wages during that period, but was instead receiving weekly payments from his employer in the form of "special termination" payments based on years of service. Appellants assert that they prevailed in their appeal to the EDD, but did not provide any evidence to support this assertion, and letters from the EDD provided by respondent confirm that no reportable payments, including PFL, were issued to appellant-husband for 2012. Furthermore, any PFL payments appellants would have received as a result of a successful appeal would have been received and reported in years subsequent to the year at issue.

<sup>&</sup>lt;sup>2</sup> IRC section 85 provides that certain unemployment compensation is taxable at the federal level. Treasury Regulation section 1.85-1 clarifies that the compensation contemplated by IRC section 85 is only "unemployment compensation paid pursuant to governmental programs and does not apply to amounts paid pursuant to private nongovernmental unemployment compensation plans (which are includible in income without regard to section 85)." California law specifically does not follow IRC section 85, and therefore excludes from taxation unemployment compensation that is paid pursuant to a governmental program, such as PFL. (Rev. & Tax. Code § 17083.) Therefore, PFL is exempt from California taxation.

<sup>&</sup>lt;sup>3</sup>Like vacation or employer-paid sick leave, pension and other termination payments from an employer are included in the broad definition of gross income under IRC section 61.

Accordingly, the income at issue is not PFL, and is not exempt from taxation.

### **HOLDING**

Appellants have not established that they are entitled to a \$31,954 exclusion from income for the 2012 tax year.

## **DISPOSITION**

Respondent's action is sustained.

-DocuSigned by:

John D Johnson

John O. Johnson

Administrative Law Judge

We concur:

DocuSigned by:

kenneth Gast

Kenneth Gast

Administrative Law Judge

-DocuSigned by:

Teresa A. Stanley

Administrative Law Judge