

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:

**ANTHONY SOLANO**

) OTA Case No. 18011754  
)  
) Date Issued: December 14, 2018  
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)

**OPINION**

Representing the Parties:

For Appellant: Anthony Solano

For Respondent: Rachel Abston, Senior Legal Analyst

S. HOSEY, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19045,<sup>1</sup> Anthony Solano (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) proposing \$21,205 of additional tax, plus applicable interest, for the 2012 tax year.

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

**ISSUE**

Has appellant shown error in FTB’s proposed assessment which was based on a federal determination?

**FACTUAL FINDINGS**

1. Appellant filed a joint 2012 California Resident Income Tax Return (Form 540).<sup>2</sup>
2. The Internal Revenue Service (IRS) provided to respondent information showing the IRS adjusted appellant’s 2012 federal income tax return for unreported income from pensions/annuities of \$155,041, and rents/royalties of \$30,048.
3. Respondent issued a Notice of Proposed Assessment (NPA) applying the federal

<sup>1</sup> Unless otherwise indicated, all statutory (“section” or “§”) references are to sections of the Revenue and Taxation Code (R&TC) for the tax year at issue.

<sup>2</sup> Appellant filed a joint return with his spouse but filed this appeal in his name only.

adjustments to appellant's California taxable income and proposed additional tax of \$21,205 plus applicable interest. The additional tax included a 2.5% premature distribution tax of \$3,876 for the early withdrawal of pension income.

4. Appellant protested the NPA, stating that the IRS adjusted his income by \$155,041 for a pension/annuity final payout for a distribution received in 2012. Appellant argued that this distribution was from income earned from 2006 through 2010 before appellant was a resident of California. Appellant also stated that the rental income was from rental property owned in Colorado and that the income should not be subject to California taxes.
5. FTB was provided information from the Employment Development Department (EDD) reflecting the pension distribution was reported to California as being received while appellant was a resident of California.
6. Respondent issued a Notice of Action (NOA) affirming the NPA.
7. Appellant 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 Faye D. Lew*, 78-SBE-073, Aug. 25, 1978; *Appeal of Donald G. and Franceen Webb*, 75-SBE-061, Aug. 19, 1975.)<sup>3</sup> 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."<sup>4</sup>

Section 17041(a) 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 and annuity

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<sup>3</sup> 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>>.

<sup>4</sup> 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.)

income, as well as rental income. (IRC, § 61(a)(5), (9), (11).)<sup>5</sup> California residents who receive pensions, annuities or rental income from real estate must include these amounts in taxable income for California purposes. (§ 17071.) While appellant may have earned the income that was placed in the pension/retirement account while he lived in Hawaii, appellant does not dispute that the pension distribution income was received during the 2012 tax year, when he was a California resident. Appellant also does not dispute that the rental income received from the Colorado Property was received during the 2012 tax year. Therefore, the pension, annuity and rental income must be included in his California taxable income for the 2012 tax year.

If the pension income is an early withdrawal from a qualified retirement plan, a premature distribution tax is also assessed. IRC section 72(t)(1) imposes a 10 percent tax (in addition to the income tax otherwise imposed) on early distributions from 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 appellant was assessed additional tax for unreported rental income and the early withdrawal of \$155,041 from a qualified retirement account, it assessed state income tax and an early distribution tax for a combined total of \$21,205 plus applicable interest. Appellant has not shown that the early distribution tax was improper.

#### HOLDING

Appellant did not show error in FTB's proposed assessment of additional tax based on a federal determination for the 2012 tax year.

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<sup>5</sup> For the 2012 tax year, R&TC section 17024.5, subdivision (a)(1)(O), provides that for Personal Income Tax Law (PITL) purposes, California conforms to the January 1, 2009, version of the IRC. Thus, references herein to the IRC are to that version.

DISPOSITION

Respondent's action is sustained in full.

DocuSigned by:  
*Sara A Hosey*  
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Sara A. Hosey  
Administrative Law Judge

We concur:

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

DocuSigned by:  
*Kenneth Gast*  
FD75A3136CB34C2...  
Kenneth Gast  
Administrative Law Judge