OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **ROBERT J. SHOLTIS**	OTA Case No. 18010884 Date Issued: January 8, 2019

OPINION

Representing the Parties:

For Appellant: Robert J. Sholtis, Taxpayer

For Respondent: Eric R. Brown, Tax Counsel III

NEIL ROBINSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,[1] Robert J. Sholtis (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) denying appellant's claim for refund of $728 for the 2009 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 established error in FTB's denial of his claim for refund for tax year 2009?

FACTUAL FINDINGS

1. Appellant filed a timely 2009 tax return claiming a deduction for $10,100 for alimony paid to his former spouse.
2. Respondent received information from the Internal Revenue Service (IRS) disallowing appellant's $10,100 deduction for alimony.[2] Appellant's taxable income was increased from $21,129 to $31,431 resulting in an increase in federal tax of $1,545.

[1] Unless otherwise indicated, all statutory "section" or "§" references are to sections of the Revenue and Taxation Code (R&TC).

[2] The IRS also disallowed a miscellaneous Schedule A deduction of $202. This disallowance was not contested in the appeal and we do not address it in this opinion.

3. FTB applied the federal adjustments to appellant's California return and, on December 30, 2013, sent a Notice of Proposed Assessment (NPA) to appellant reflecting such adjustments, proposing additional tax of $728 plus interest for 2009.
4. Appellant did not timely respond to the NPA, and appellant's state tax liability became final.
5. Respondent initiated collection efforts. Appellant made some partial payments for 2009 and the liability was paid in full by respondent transferring a 2013 overpayment to his 2009 account. After this transfer, appellant's remaining balance for 2009 was paid in full.
6. Respondent received appellant's August 1, 2014 letter on December 24, 2014, which respondent accepted as a claim for refund. Appellant's letter contests respondent's disallowance of his alimony deduction.
7. A December 12, 2009 Defense Finance and Accounting Service Military Leave and Earnings Statement (military earnings statement) documents payroll deductions for both alimony and child support payments pursuant to a court order during 2009. The Santa Clara County case identifier number 108FL148223 appears on this document.
8. Copies of paid drafts dated April 1, 2009 (for $350), April 30, 2009 (for $435), and two drafts dated June 1, 2009 (for $1230 and $922) document payments made by appellant. The drafts were paid to appellant's former spouse. The draft dated April 1, 2009, has a hand-written notation stating, "For: Spousal Support." The other drafts have the words, "Spousal Support" printed in the "Memo" section.
9. An accounting from Santa Clara County of spousal support paid by appellant from May 2009 (no payments were made until June of 2009) to June 2013 is entitled "Simple Report." In the months between May and December of 2009 this report shows that appellant paid $5,948 in alimony.
10. A June 18, 2009 document entitled "Income Withholding for Support" (wage garnishment) with identifier number "108FL148223," directs the United States Army Reserve to withhold child support and alimony payments from appellant's military pay.
11. On September 3, 2015, respondent acknowledged appellant's August 1, 2014 letter and informed appellant that the NPA was correct. Appellant was asked to provide additional

information before October 5, 2015, showing that the IRS disallowance of his alimony deduction was incorrect.

12. Appellant provided no further information to respondent in response to the September 3, 2015 acknowledgement letter.

13. On October 29, 2015, respondent advised appellant that his claim for refund was denied because he did not provide the information requested in respondent's September 3, 2015 acknowledgement letter.

14. Appellant appealed the denial of the claim for refund timely.

15. In a letter dated December 15, 2017, respondent concedes that appellant is entitled to a deduction of $4,805 for alimony, based on the amount received for alimony payments in 2009 by appellant's former spouse and reported as income on her 2009 return.

DISCUSSION

In an action for refund, the taxpayer has the burden of proof. (*Dicon Fiberoptics, Inc. v. Franchise Tax Bd.* (2012) 53 Cal.4th 1227, 1235; *Apple, Inc. v. Franchise Tax Bd.* (2011) 199 Cal.App.4th 1, 22; *Appeal of Edward Durley*, 82-SBE-154, July 26, 1982.)[3] 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."[4] In a refund action, the appellant must not only prove respondent erred in denying his claim for refund, he must also prove the "correct" amount of tax owed. (*Appeal of Edward Durley, supra*.)

Section 18622 requires a taxpayer to concede the accuracy of changes or corrections to his federal tax return by the IRS or to state where the changes are erroneous. It is well settled that a deficiency assessment based on federal adjustments to income is presumed correct and the taxpayer bears the burden of proving that FTB's determination is erroneous. (*Appeal of Sheldon I. and Helen E. Brockett*, 86-SBE-109, June 18, 1986.) Unsupported assertions are not sufficient to satisfy an appellant's burden of proof with respect to an assessment based on a federal action. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.)

[3] Board of Equalization opinions may be viewed online at: <http://www.boe.ca.gov/legal/legalopcont.htm>.

[4] 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.)

Alimony[5] is deductible from the payor spouse's income, whereas child support payments are not. (Int.Rev. Code, §§ 215 and 71(a)-(c).) California conforms to both Internal Revenue Code (IRC) sections 215 and 71 pursuant to sections 17201 and 17081, respectively. As relevant, IRC section 71, subdivisions (b)(1)(A) and (C), define "alimony" as any payment in cash if the payment is received pursuant to a divorce decree or separation instrument and the payee and payor spouses are not living together at the time the payments are made.[6] IRC section 71(b)(2)(C) defines "divorce or separation instrument" as including "a decree requiring a spouse to make payments for the support or maintenance of the other spouse." Voluntary alimony payments that are not made pursuant to a divorce decree or separation instrument are not deductible. (*Appeal of Donald M. McAllister*, 78-SBE-111, Dec. 5, 1978.)

Respondent contends there is insufficient evidence to prove how much, if any, was paid for alimony in 2009 as opposed to child support. In its letter dated December 15, 2017, FTB conceded that appellant should be allowed a deduction for alimony paid in 2009 for $4,805, the sum of alimony payments received by appellant's former spouse and reported as income on her 2009 return.

First, it is necessary to determine whether appellant paid alimony in 2009 pursuant to a divorce or separation instrument. Neither appellant nor respondent submitted to the Office of Tax Appeals an order from a court requiring appellant to pay alimony to his former spouse. However, appellant did provide a June 18, 2009 wage garnishment order from Santa Clara County directing the United States Army Reserve to withhold child and alimony payments from appellant's military pay. The order requires that monthly alimony in the amount of $1,385, and child support payments be made directly to the California State Disbursement Unit.[7] Furthermore, the order specifies that the identifier number 108FL148223 (the number assigned

[5] IRC section 215 refers to alimony or separate maintenance payments, however, for this analysis the word alimony is sufficient. California Family Code section 142 defines spousal support as "support of the spouse of the obligor." The obligor is the person responsible for paying the spouse entitled to spousal support. Spousal support in California is analogous to the definition of alimony found in IRC section 71(b)(1).

[6] There is no evidence in this record that appellant was living with his ex-spouse in 2009 and respondent did not make this argument. IRC section 71(b)(1)(B) also specifies that if the divorce decree or separation instrument excludes alimony payments from the recipient's income, it is not allowable as a deduction. Neither party submitted evidence making this provision applicable and we do not analyze it here.

[7] Each county is required to maintain a local child support agency that in addition to the collection of child support also enforces spousal support (alimony) orders established by a court of competent jurisdiction. (Fam. Code, §§ 17400 et seq.) The California State Disbursement Unit is a California State Agency established for collecting support obligations. (Fam. Code, § 17309.)

by Santa Clara County to identify this order) was required to be affixed to each wage withholding payment.[8] Appellant also submitted the military earnings statement that verifies payroll deductions for alimony payments in the amount of $1,385 per month from appellant's military pay. The military earnings statement references "Alimony 108FL145223," the same number located on the wage garnishment order. Appellant's alimony payments were being deducted from his military pay in 2009 and sent directly to Santa Clara County.

Santa Clara County's Simple Report shows that appellant paid alimony from June 2009 through December 2009 totaling $5,948.06. The same reference number 108FL148223 that identifies the court order requiring submission of alimony payments to Santa Clara County is found in the Simple Report. The "amount charged" for each month between June and December 2009 is $1,385, the same amount that appears on the wage garnishment order, but the payments recorded by Santa Clara County were less than this amount for every payment except two. Respondent has submitted no evidence refuting the accuracy of the Simple Report, and there is no reason to question the accuracy of this report. Clearly the military earnings statement shows that after June of 2009, when the wage garnishment order was received, appellant's military pay was reduced by alimony payments that were sent to and accounted for by Santa Clara County.

Commonly a wage garnishment order for alimony is issued only if there is a court order requiring appellant to pay alimony. We can reasonably infer the existence of a divorce decree or separation instrument existed on June 18, 2009, when the wage garnishment order issued. Any payments made pursuant to this order for alimony would therefore be in accord with a divorce decree or separation instrument issued by a court. Thus, there is a preponderance of evidence proving that withholding from appellant's military pay for alimony of $5,948, as shown on the Simple Report, accurately represents the deductible alimony paid by appellant in 2009. Whether payments made to appellant's spouse prior to June 18, 2009 were for alimony requires further analysis.

Appellant alleges that he paid alimony of $2,937 from April 1, 2009, to June 1, 2009, and submitted copies of four drafts as proof of these payments. All four drafts state that the payments are being made for "spousal support" (alimony). However, we do not have reliable

[8] The payment of alimony from appellant's military pay pursuant to a court order was affirmed in a June 23, 2009 letter from the Department of Defense, Defense Finance and Accounting Service, Government Operations. This letter states, "Payments of $1,385 . . . will be remitted to Santa Clara County DCSS for case number 108FL148223. Payments will continue until further order of the court."

evidence that these payments were made pursuant to a divorce decree or separation instrument. In his letter dated August 1, 2014, appellant states that he "had been undergoing a divorce since January 8, 2009." Appellant further stated, "Missing are some additional support payment receipts made in cash to my ex-spouse prior to & after the specific court order attached. Previous verbal/written court orders account for the direct payments." Appellant labeled the order, "Court Order to garnish wages related to spousal support (Alimony) of $1385/mo.," referred to in this opinion as the wage garnishment order from Santa Clara County.

As stated above, we conclude that at the time of the wage garnishment order there must have been a divorce decree or separation agreement requiring appellant to pay alimony. There is no evidence in this record when, prior to the wage garnishment order of June 18, 2009, a court order requiring alimony payments existed. Appellant makes vague statements about January 2009 divorce proceedings but supplies no documentation or court order requiring alimony payments prior to the wage garnishment order. Without evidence that appellant's pre-June 18, 2009 payments were compelled by court order and not made voluntarily, we cannot allow a deduction for the draft payments, all of which occurred before June 18, 2009.

Respondent's concession to allow a deduction for alimony in 2009 limited to the amount appellant's former spouse reported as alimony income ($4,805) for 2009 is some evidence of alimony paid by appellant, but not always the most accurate measure. Gross income includes amounts received as alimony. (IRC, § 71(a).) For alimony payments paid to be deductible, they must be "includable" in the recipient spouse's gross income. (IRC, § 215(b).) Whether the recipient spouse actually includes alimony payments in her return is not a limitation on the amount the payor spouse is allowed to deduct for alimony paid.

There may be many explanations why a recipient spouse reports income for alimony received that does not match alimony paid. An ex-spouse may be mistaken about the amounts received for alimony or fail to report all the payment's received for alimony to escape tax due. Some alimony recipients may be confused about the difference between child support payments (which are not income to the recipient) and alimony payments (which are). Thus, the amount of alimony reported as income is not necessarily the best evidence of what is actually paid, especially when there is a preponderance of evidence showing alimony payments that exceed the alimony income reported.

Appellant has proven that he paid deductible alimony in the amount of $5,948 for 2009 to

his ex-spouse pursuant to a divorce decree or separation instrument.

HOLDING

Appellant has established that he is entitled to an alimony deduction of $5,948 for 2009, instead of the $4,805 allowed by respondent.

DISPOSITION

The denial of appellant's claim for refund is modified to allow $5,948 in deductible alimony instead of the $4,805 already allowed by respondent. Otherwise, respondent's disallowance of the balance of alimony payments claimed by appellant in 2009 is sustained.

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Neil Robinson
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Neil Robinson
Administrative Law Judge

We concur:

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Tommy Leung
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Tommy Leung
Administrative Law Judge

DocuSigned by:
Daniel K. Cho
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