

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18042676  
MILDRED M. MCMILLAN )  
 ) Date Issued: March 18, 2019  
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**OPINION**

Representing the Parties:

For Appellant: Mildred M. McMillan

For Respondent: Rachael Abston, Senior Legal Analyst

S. HOSEY, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19045,<sup>1</sup> Mildred M. McMillan (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing \$2,311 of additional tax, plus applicable interest, for the 2012 tax year.

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

**ISSUE**

Has appellant shown error in the proposed additional tax for the 2012 tax year?

**FACTUAL FINDINGS**

1. Appellant moved from California to Maryland in May of 2012. After appellant moved, she received \$28,939 of pension income from Vanguard.
2. Appellant filed a 2012 California Nonresident or Part-Year Resident Income Tax Return. She reported a federal adjusted gross income (AGI) of \$124,313, California adjustments of \$2,688, itemized deductions of \$13,470, and total taxable income of \$108,155.

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<sup>1</sup> Unless otherwise indicated, all statutory references (“section” or “§”) are to sections of the California Revenue and Taxation Code.

Appellant reported California taxable income of \$51,250, and, after subtracting prorated exemption credits, calculated California tax of \$3,580.

3. FTB received audit information from the Internal Revenue Service that showed adjustments were made to appellant's return for unreported interest of \$21 and the \$28,939 of pension income received from Vanguard.
4. Based on this information, FTB issued a Notice of Proposed Assessment (NPA) applying the federal adjustments to appellant's California taxable income. The NPA determined a total California tax of \$5,891. As appellant originally reported and paid California tax of \$3,580, the NPA reflected additional tax due of \$2,311.
5. Appellant protested the NPA, stating she already paid taxes on the pension income to a different state, Maryland. Appellant argued that she received the \$28,939 from her retirement account in September of 2012, while a resident of Maryland. She further argued that she was taxed by the State of Maryland on the pension income.
6. FTB then requested that appellant provide documentation to show whether she received the pension income after she became a nonresident. In response, appellant provided an offer of employment letter, dated April 27, 2012, showing a start date of May 7, 2012. Appellant stated that, since more than three years had passed, she could not obtain documentation from Vanguard to show the date of the distribution.
7. After reviewing appellant's protest, FTB issued a Notice of Action stating that without supporting documentation, it could not verify the pension income was received while appellant was a resident of Maryland.
8. Appellant then filed this timely appeal.
9. On appeal, appellant provided documentation showing that the pension distribution occurred on September 28, 2012, and a copy of the May 7, 2012 employment offer. After reviewing this documentation, FTB agreed that the pension income of \$28,939 was received while appellant was a resident of Maryland. FTB excluded this income from appellant's California AGI, but included it in her AGI from all sources to determine the correct rate of tax that should be applied to appellant's California taxable income.<sup>2</sup> As a result, FTB agreed to reduce the additional tax due to \$342.

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<sup>2</sup> FTB treated the \$21 of interest income in the same way (i.e., it also included this income in appellant's total taxable income but not in her California taxable income).

## 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 Lew*, 78-SBE-073, Aug. 25, 1978.)<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 30219(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>

In taxing nonresidents or part-year residents, California law takes into account a taxpayer’s “entire taxable income” for the year, including income from non-California sources, in determining the applicable tax rate. (§ 17041(b)(2).) Generally speaking, the tax rate is applied to “all items of gross income and all deductions, regardless of source” for any part of the year during which the taxpayer was a California resident, and to the “gross income and deductions derived from sources within this state” for any part of the year during which the taxpayer was not a California resident. (§ 17041(i)(1).) California’s method of computing tax liability for part year-residents does not impose a tax on the part-year resident’s income from non-California source income. (*Appeal of Boone*, 93-SBE-015, Oct. 28, 1993.)

In this case, section 17041(b)(2) requires appellant’s non-California source income, the income received while a resident in Maryland, to be part of a formula for computing appellant’s California income tax liability. The Maryland pension income must be included in the total AGI from all sources to determine the correct tax rate that applies to the California source income. Appellant’s revised federal AGI of \$153,273, less California adjustments and itemized deductions, results in total taxable income of \$137,115 and total tax due of \$10,355. The California tax rate is determined by dividing the total tax of \$10,355 by the total taxable income of \$137,115 to arrive at a 7.55 percent tax rate. Applying this tax rate to \$52,478 of California

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<sup>3</sup> Published decisions of the State 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.)

taxable income, and subtracting prorated exemption credits, yields \$3,922 in California tax.<sup>5</sup> As appellant previously paid the tax of \$3,580 that was shown on her return, her revised tax due is \$342.

California’s method of computing a part-year resident’s tax is not the same as taxing non-California source income, but rather uses the taxpayer’s total income from all sources to determine the rate of tax that is applied to income that is taxable by California. Appellant has not shown error in FTB’s revised proposed deficiency assessment using the California method, based on federal adjustments.

HOLDING

Appellant has failed to demonstrate that FTB erred in its determination of proposed additional tax for the 2012 tax year.

DISPOSITION

FTB’s proposed assessment is reduced to \$342 (plus interest), consistent with FTB’s concession described above. In all other respects, FTB’s determination is sustained.

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

We concur:

DocuSigned by:  
*Grant Thompson*  
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Grant S. Thompson  
Administrative Law Judge

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

<sup>5</sup> Appellant’s actual California taxable income is \$52,478, rather than the \$51,250 reported by her. The difference is caused by the addition of the unreported pension and interest income to her total income, which decreased the percentage of deductions she could claim for California purposes.