

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

In the Matter of the Appeal of:  
**PHILIP L. KENNEDY**

) OTA Case No. 18010936  
)  
) Date Issued: March 27, 2019  
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)

**OPINION**

Representing the Parties:

For Appellant: Philip L. Kennedy

For Respondent: Rachel Abston, Senior Legal Analyst

S. HOSEY, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19045, Philip Kennedy (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$4,071, including a premature distribution tax of \$955, plus 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**

Whether appellant has demonstrated error in the proposed assessment.

**FACTUAL FINDINGS**

1. Appellant filed a timely 2012 California nonresident or part-year resident tax return (FTB Form 540NR), which required him to first compute a tax on all his income for the entire tax year, regardless of where earned or sourced (i.e., as if he were a California resident for the full year). Thus, he reported federal adjusted gross income (AGI) of \$153,935, and California adjustments (subtractions) of \$1,925, for a California AGI from all sources of \$152,010. After claiming the standard deduction of \$7,682, appellant reported total taxable income of \$144,328. To determine how much tax he owed on just his California source income, appellant then computed a California tax rate of 6.69 percent by dividing

his California tax on all his income of \$9,661 by total taxable income from all sources of \$144,328. He multiplied this percentage by his California source income of \$83,649, to derive his California tax before exemption credits of \$5,596.

2. Appellant reported on his Schedule CA (540NR) that he moved to California from Florida on October 8, 2012.
3. FTB received information that showed the Internal Revenue Service (IRS) adjusted appellant's 2012 federal taxable income for unreported pension income of \$38,200.
4. FTB issued a Notice of Proposed Assessment (NPA) dated December 9, 2015, that increased appellant's taxable income from all sources by \$38,200, from \$144,328 to \$182,528, and proposed additional tax of \$4,071, including a 2.5 percent premature distribution tax on the \$38,200 distribution of \$955, plus interest.
5. In a letter dated February 5, 2016, appellant protested the NPA, arguing that he received the pension income while he was living in Florida and the pension income should not be taxed by California.
6. In a letter dated January 27, 2017, FTB acknowledged appellant's protest and requested documentation from the financial institution stating when the pension income was distributed and bank statements or other documentation showing that the pension distribution was received before appellant became a California resident. After appellant failed to respond to FTB's January 27, 2017 letter, FTB sent him a letter dated July 7, 2017, which stated that information recently received from the IRS does not show that the federal assessment was cancelled or reduced. FTB informed appellant that it will affirm the NPA if appellant did not provide a revised IRS report or any additional information by August 7, 2017.
7. After appellant failed to respond to FTB's July 7, 2017 letter, FTB issued a Notice of Action dated August 28, 2017, affirming the NPA. This timely appeal followed.
8. With his appeal letter, appellant provided copies of a 2012 IRS Form 1099-R that Fidelity Investments (Fidelity) issued to him, showing a gross pension distribution of \$38,200 and federal income tax withholdings of \$1,420, and statements from his Bank of America account from February 2012, March 2012, and May through September 2012, showing deposits of various amounts from Fidelity. Appellant also provided a schedule listing a net early pension distribution of \$36,780 (gross distribution of \$38,200 less federal

income tax withholding of \$1,420) and nine transfers of various amounts from his Fidelity account to his Bank of America account between February 9, 2012, and September 11, 2012, for a total of \$36,780. The schedule states, “All money received via distribution in February 2012 and moved out of Fidelity account while resident in FL [i.e., Florida].”

9. On appeal, FTB concedes that the pension income at issue was received while appellant was a Florida resident. As reflected on the corrected 2012 FTB Form 540NR attached to FTB’s brief, FTB deleted the 2.5 percent premature distribution tax and reduced the proposed assessment of tax to \$611, plus interest.
10. Appellant has not responded to FTB’s opening brief or otherwise indicated his position with respect to FTB’s remaining adjustment (involving the proper computation of his California tax liability).

### DISCUSSION

R&TC section 18622(a) requires a taxpayer to concede the accuracy of a federal change to a taxpayer’s income or to state where the change is erroneous. It is well-settled that a deficiency assessment based on a federal adjustment to income is presumed to be correct and a taxpayer bears the burden of proving that FTB’s determination is erroneous. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Sheldon I. and Helen E. Brockett*, 86-SBE-109, June 18, 1986.)<sup>1</sup> Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof with respect to an assessment based on a federal action. (*Appeal of Magidow*, 82-SBE-274, Nov. 17, 1982.)

In taxing 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. (R&TC, § 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 (R&TC, § 17041(i)(1)(A)), 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. (R&TC, § 17041(i)(1)(B).) Importantly, California’s method of computing tax liability for part-year residents does not impose a tax on

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<sup>1</sup> The Board of Equalization’s precedential opinions are viewable on its website: <http://www.boe.ca.gov/legal/legalopcont.htm>.

the part-year resident's income from non-California sources. (*Appeal of Louis N. Million*, 87-SBE-036, May 7, 1987; *Appeal of Dennis L. Boone*, 93-SBE-015, Oct. 28, 1993.)

For the year at issue, California law requires the calculation of three ratios to be applied in determining (1) a part-year resident's prorated deductions, (2) tax rate applicable to the taxpayer's California taxable income, and (3) allowable credits, as follows:

1. Prorated Deductions. To calculate the percentage of itemized deductions or prorated standard deduction allowable, a taxpayer must divide California AGI by total AGI. The resulting ratio is then applied to the itemized deductions or standard deduction to determine the prorated allowable amount. (R&TC, § 17304.)
2. Tax Rate. To calculate the tax rate for California, the tax on the total taxable income is calculated as if the taxpayer was a California resident, and then divided by the taxpayer's total taxable income. The resulting rate is then applied to the taxpayer's California taxable income to determine the California tax. (R&TC, § 17041(b)(2).)
3. Prorated Credits. To calculate the percentage of credits allowed on a part-year resident's California return, the California taxable income is divided by the total taxable income. The resulting ratio is then applied to the total exemption amount to determine the prorated exemption credit. (R&TC, § 17055.)

In reviewing FTB's calculations on the corrected 2012 FTB Form 540NR it prepared for this matter (which resulted in tax due of \$611), we find the calculations are consistent with the law described above. In this case, R&TC section 17041(b)(2) requires appellant's non-California source income (i.e., the income received while a resident of Florida), to be part of a formula for computing appellant's California income tax liability. The non-California source 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 California AGI from all sources is increased from the reported amount of \$152,010 to \$190,210 to account for the unreported pension income of \$38,200. After subtracting the standard deduction of \$7,682, appellant has a revised total taxable income of \$182,528 and total tax of \$13,213. The California tax rate is determined by dividing the total tax of \$13,213 by the total taxable income of \$182,528 to arrive at a 7.24 percent tax rate, which is applied to appellant's California taxable income of \$84,543 to calculate California tax of \$6,121. This amount is then reduced by

prorated exemption credits of \$346 (.4632 x \$746) and the \$5,164 of tax paid with appellant's California tax return to arrive at the revised tax due of \$611.

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. After conceding that appellant received the pension income while living in Florida, FTB did not tax the pension income, but instead used it to determine the tax rate that applies to appellant's California-source income.

HOLDING

Appellant has failed to demonstrate error in the revised proposed assessment, which is based on a federal determination.

DISPOSITION

FTB's proposed deficiency is reduced to \$611 (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:

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*Kenneth Gast*  
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Kenneth Gast  
Administrative Law Judge

DocuSigned by:  
*Andrew J. Kwee*  
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Andrew J. Kwee  
Administrative Law Judge