

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

In the Matter of the Appeal of: ) OTA Case No. 18042651  
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**JAMIE IBARRA** ) Date Issued: April 3, 2019  
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**OPINION**

Representing the Parties:

For Appellant: Jamie Ibarra

For Respondent: Lyn Gidding-Theobald, Legal Assistant

J. ANGEJA, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19045,<sup>1</sup> Jamie Ibarra (appellant) appeals an action by respondent Franchise Tax Board (FTB) on a proposed assessment of additional tax in the amount of \$106, 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.

**ISSUES**

1. Whether FTB’s assessment is barred by the statute of limitations.
2. Whether appellant has demonstrated error in the proposed assessment.
3. Whether appellant has established that he was not a resident of California and earned no California income in 2012.

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

FACTUAL FINDINGS

1. Appellant filed a timely 2012 California income tax return (Form 540). On the return, appellant reported federal adjusted gross income (AGI) of \$4,244, taxable income of \$403, and tax of zero.
2. Subsequently, under section 6103(d) of the Internal Revenue Code (IRC), FTB received federal information showing that appellant's federal AGI consisted of an early distribution from a qualified retirement plan. Specifically, the Internal Revenue Service (IRS) provided appellant's 2012 Wage and Income Transcript, which shows that Apex Clearing issued appellant a Form 1099-R reflecting a total distribution of \$4,000, and Franklin Templeton Bank issued a Form 1099-R reflecting a total distribution of \$244. The transcript further indicates that the distribution codes used were Code 1 (Apex Clearing) and Code J (Franklin Templeton Bank), which means that the amounts were premature distributions with no known exception.
3. Appellant's 2012 federal income tax return shows that appellant reported the \$4,200 early distributions as well as the applicable federal 10 percent early distribution tax on his federal return. Appellant did not report the corresponding 2.5 percent early distribution tax on his state tax return.
4. Based on the federal information, FTB issued a Notice of Proposed Assessment (NPA) dated December 4, 2015, that proposed additional tax of \$106, plus applicable interest, reflecting the 2.5 percent early distribution tax.
5. Appellant protested FTB's proposed assessment, asserting that he had no California income and was not a resident of California for the 2012 tax year. Appellant provided no evidence in support of his assertions. Appellant also asserted that the statute of limitations expired before the NPA was issued.
6. On October 24, 2017, FTB issued a Notice of Action affirming the NPA.
7. This timely appeal followed.
8. From 2012 through 2018, appellant maintained a Post Office Box in the City of San Diego, California.

## DISCUSSION

1. Whether FTB's assessment is barred by the statute of limitations.

Section 19057(a) allows FTB to issue an NPA within four years after the return was filed. Section 19066 further specifies that a tax return filed before the last day for filing (determined without regard to any extensions) shall be deemed to have been filed on that last day for purposes of calculating the statute of limitations. Pursuant to section 18566, individual calendar year taxpayers are required to file their income tax returns by an original due date that is on or before April 15th. Thus, if a return is filed before April 15th, it is considered timely filed on April 15th. Therefore, the NPA must be mailed within four years of April 15th to be within the statute of limitations for a deficiency assessment.

Here, appellant's tax return for 2012 was timely filed on or before April 15, 2013, the original due date determined without extension. Therefore, the last day for the four-year statute of limitations for a deficiency assessment expired on April 15, 2017. Because the NPA was issued on December 4, 2015, we conclude FTB's NPA was timely issued.

2. Whether appellant has demonstrated error in the proposed assessment.

It is well-settled that once respondent shows that its assessment was reasonable and rational, its determination is presumed to be correct (*Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001),<sup>2</sup> and the taxpayer has the burden of proving error (*Todd v. McColgan* (1949) 89 Cal.App.2d 509). California Code of Regulations, title 18, section 30705, subdivision (c), states that unless there is an exception provided by law, "the burden of proof requires proof by a preponderance of the evidence."<sup>3</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.) A taxpayer's failure to produce evidence that is within her control gives rise to a presumption that such evidence, if provided, would be unfavorable to the taxpayer's case. (*Appeal of Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.)

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<sup>2</sup> Board of Equalization (BOE) opinions are generally available for viewing on the BOE's website: <<http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion>>.

<sup>3</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.)

Unless an exemption applies, pensions are includible in the gross income of all California residents who receive them. (§§ 17071, 17504.) Section 17085 in relevant part conforms to IRC section 72, pursuant to which early distributions from qualified retirement plans are taxable, and a ten percent additional tax applies at the federal level. (IRC, §§ 72(a)(1), 72(t).) For California purposes, section 17085(c)(1) imposes a 2.5 percent additional tax on early distributions.

Here, the evidence establishes that appellant received an early pension distribution, with no known exceptions to the applicable penalty. Appellant properly reported the applicable federal 10 percent early withdrawal penalty, but failed to report the corresponding California 2.5 percent early distribution penalty. Thus, FTB's determination is reasonable and rational. Appellant has not presented any argument or evidence to show error in FTB's determination. Therefore, we conclude that FTB properly assessed the 2.5 percent early distribution penalty.

3. Whether appellant has established that he was not a resident of California and earned no income in California in 2012.

Revenue and Taxation Code section 17014 defines "resident," and the purpose of this definition "is to include in the category of individuals who are taxable upon their entire net income, regardless of whether derived from sources within or without the State, all individuals who are physically present in this State enjoying the benefit and protection of its laws and government, except individuals who are here temporarily . . . ." (Cal. Code Regs., tit. 18, § 17014; *Whittell v. Franchise Tax Bd.* (1964) 231 Cal.App.2d 278, 285.)

In *Noble v. Franchise Tax Bd.* (2004) 118 Cal.App.4th 560, 579, the court found that there existed overwhelming facts of California contacts which demonstrated that the taxpayers were "physically present in this State enjoying the benefit and protection of its laws and government." In *Noble*, one of the facts showing the taxpayers' California contacts was that "they maintained a post office box in California." (*Ibid.*)

Here, appellant maintained a post office box in California. In fact, he maintained it for at least six years, including the appeal year, and his current address of record with the Office of Tax Appeals is that same Post Office Box in San Diego. Appellant's Post Office Box in this state creates a reasonable inference that appellant was a California resident. In addition, appellant filed a California resident return for the 2012 tax year. Appellant has provided no evidence or argument in support of his assertion that he was not a resident of California in 2012. Based on

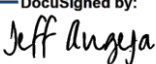
the foregoing, we conclude that appellant has failed to establish that he was not a resident of California for the 2012 tax year.

HOLDINGS


1. FTB’s assessment is not barred by the statute of limitations.
2. Appellant has not shown error in FTB’s proposed assessment.
3. Appellant has failed to establish that he was not a resident of California and earned no California income in 2012.

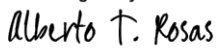
DISPOSITION

FTB’s action is sustained.

DocuSigned by:  
  
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 Jeffrey G. Angeja  
 Administrative Law Judge

We concur:

DocuSigned by:  
  
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 Neil Robinson  
 Administrative Law Judge

DocuSigned by:  
  
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 Alberto T. Rosas  
 Administrative Law Judge