OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18073479
SARA CAMACHO	) Date Issued: July 8, 2019

OPINION

Representing the Parties:

For Appellant: Sara Camacho

For Respondent: Donna L. Webb, Staff Operation Specialist

For Office of Tax Appeals: Sarah Fassett, Tax Counsel

T. LEUNG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324,[1] Sara Camacho[2] (appellant) appeals an action by the Franchise Tax Board (respondent) denying appellant's claim for refund of $1,060.04[3] for the 2011 tax year.

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

ISSUES[4]

1. Whether sick pay received in 2011 was taxable.
2. Whether the collection cost recovery fee can be abated.

[1] All section references are to sections of the R&TC that were in effect during the 2011 taxable year.

[2] Appellant filed a joint return with her spouse but filed this appeal in her name only.

[3] This amount includes $704.00 additional tax, $266.00 collection cost recovery fee, and $90.04 in interest.

[4] Appellant's claim included a request for a refund of interest. However, appellant did not provide a specific contention regarding interest abatement for the 2011 tax year, and we find no apparent grounds for interest relief under the facts.

FACTUAL FINDINGS

1. On their 2011 California Resident Income Tax Return (Form 540), appellant and her spouse subtracted $7,545 from federal adjusted gross income to compute their California taxable income. The $7,545 was described as "third-party sick pay" and reported on a Form W-2 (Wage and Tax Statement) issued to appellant.
2. Respondent subsequently examined appellant's and her spouse's joint return and determined that the $7,545 California adjustment was not correct. Respondent determined that the $7,545 in income came from an insurance policy which appeared to be paid for by appellant's employer and was therefore taxable third-party sick pay. Thus, respondent issued a Notice of Proposed Assessment (NPA) which increased the couple's taxable income by $7,545, and proposed additional tax of $704, plus applicable interest.
3. Appellant and her spouse did not timely protest the NPA; therefore, the assessment became final. Subsequently, respondent issued a number of billing and collection notices, including the following: an April 11, 2016, Notice of State Income Tax Due; a May 24, 2016, Income Tax Due Notice; a July 5, 2016, Final Notice Before Levy and Lien; a July 27, 2016, Notice of State Income Tax Due; a September 8, 2016, Income Tax Due Notice; and an October 24, 2016, Final Notice Before Levy and Lien.
4. Respondent received an untimely protest letter dated October 28, 2016, from appellant in which she requested an itemized letter explaining the NPA and changes to the couple's 2011 tax account and asserted that she did not believe the proposed assessment was correct.
5. Appellant paid $1,060.04 on January 17, 2017, which satisfied the 2011 outstanding liability.
6. On March 29, 2018, respondent issued a position letter, which explained that because appellant paid the 2011 balance in full, it was treating her protest letter as a claim for refund. The position letter also explained that the NPA was issued to disallow the $7,545 of third-party sick pay that appellant and her spouse subtracted on their 2011 Form 540. Respondent requested appellant to provide any new information which supports her position within thirty days.
7. Appellant did not respond, and respondent issued a letter which denied appellant's claim for refund by letter dated May 17, 2018.

8. Appellant filed this timely appeal.

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) 1982 WL 11831; *Appeal of Gilbert W. Janke* (80-SBE-059) 1980 WL 4988.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. *(Appeal of Aaron and Eloise Magidow* (82-SBE-274) 1982 WL 11930.) If a taxpayer fails to present competent and credible evidence relevant to the determination, respondent's determination cannot be successfully rebutted. (*Appeal of James C. and Monablanche A. Walshe* (75-SBE-073) 1975 WL 3557.) Additionally, it is well settled that income tax deductions are a matter of legislative grace and a taxpayer who claims a deduction has the burden of proving that he or she is entitled to that deduction. (See *New Colonial Ice Co. v. Helvering* (1934) 292 U.S. 435, 440.) In order to carry that burden, a taxpayer must point to an applicable statute and show by credible evidence that the transactions in question come within its terms. (*Appeal of Robert R. Telles* (86- SBE-061) 1986 WL 22792.)

Proposed Assessment

R&TC section 17041(a) provides, in pertinent part, that tax shall be imposed upon the entire taxable income of every resident of California. R&TC section 17071 incorporates Internal Revenue Code (IRC) section 61, which defines "gross income" as including "all income from whatever source derived." IRC sections 104 and 105 pertain to the exclusion or inclusion of third-party sick pay from gross income. In general, IRC section 104 excludes third-party sick pay from gross income when the premiums are paid by an employee; however, IRC section 105 provides that third-party sick pay is includable in gross income to the extent the accident or health insurance premiums for personal injury or sickness are paid by an employer.

The income at issue was reported as taxable income on a Form W-2 issued to appellant for the 2011 tax year from Hartford Life Insurance Company. The W-2 indicates that the income is third-party sick pay. There is no indication in the record that this income is excludable. Respondent provides a copy of appellant's federal wage and income transcript, which shows that the income at issue is in fact Form W-2 income and the Internal Revenue Service considered the income to be taxable. Appellant argues that she has received little information from respondent,

other than the claim for refund denial letter, and because the facts are unknown to her, she is appealing all amounts imposed for 2011. Appellant was provided opportunities to submit documentation substantiating that she paid the insurance premiums. However, appellant did not provide evidence supporting her contention that there is error in respondent's proposed assessment. Accordingly, the income at issue is taxable because appellant did not establish that she is entitled to a $7,545 exclusion from income.

Collection Cost Recovery Fee

R&TC section 19254(a)(1) provides that respondent shall impose a collection cost recovery fee if a person fails to pay an amount of tax, interest, penalty, or other liability imposed under the Corporation Tax Law or Personal Income Tax Law after respondent mails a notice to the person advising the person that continued failure to pay the amount due may result in collection action, including imposition of a collection cost recovery fee. There is no reasonable cause defense to the imposition of the fee; thus, our inquiry is limited to determining whether respondent complied with the statutory notice requirements for imposing the collection cost recovery fee.

Here, respondent provided four separate notices, dated April 11, 2016, July 5, 2016, July 27, 2016, and October 24, 2016, all of which informed appellant that failure to pay the liability may result in collection action and imposition of a collection cost recovery fee. The collection cost recovery fee was required to be imposed by R&TC section 19254 because appellant failed to pay the liability after receiving notice that continued failure to pay the liability may result in imposition of the fee. Appellant did not make payment until January 17, 2017. Respondent has no authority to abate or modify this fee and appellant did not show that the fee was for any invalid or improper reason.[5] Therefore, we sustain respondent's imposition of the collection cost recovery fee.

[5] Appellant does not appear to dispute the amount of the fee either, which is set by the Legislature in the annual Budget Act. (R&TC, § 19254(b)(1).)

HOLDINGS

1. Appellant did not show she was entitled to exclude sick pay under IRC section 104.
2. Appellant did not establish a basis for abatement of the collection cost recovery fee.

DISPOSITION

Respondent's action in denying appellant's claim for refund is sustained in full.

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Tommy Leung
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Tommy Leung
Administrative Law Judge

We concur:

DocuSigned by:
Daniel K. Cho
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Daniel K. Cho
Administrative Law Judge

DocuSigned by:
Neil Robinson
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Neil Robinson
Administrative Law Judge