

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18063351
ELIZABETH ACIERNO)
) Date Issued: October 14, 2019
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OPINION

Representing the Parties:

For Appellant: Elizabeth Acierno

For Respondent: Rachel Abston, Senior Legal Analyst

For Office of Tax Appeals: William J. Stafford, Tax Counsel III

S. HOSEY, Administrative Law Judge: Pursuant to California Revenue & Taxation Code (R&TC) section 19045, Elizabeth Acierno (appellant) appeals an action by the respondent Franchise Tax Board (FTB) proposing \$2,680.36 in additional tax, plus applicable interest, for the 2014 tax year.

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

ISSUE

Whether appellant has shown error with the proposed assessment, which was based, in part, upon federal adjustments.

FACTUAL FINDINGS

1. Appellant filed a 2014 California income tax return, reporting a California taxable income of \$25,835.
2. Subsequently, FTB received information via a CP 2000 report, showing that the Internal Revenue Service (IRS) increased appellant’s 2014 federal adjusted gross income (AGI) by \$28,417 to account for the following amounts: pension/annuity distribution income of \$25,000; taxable wages of \$3,140; and interest of \$277.

3. On August 17, 2017, FTB issued a Notice of Proposed Assessment (NPA) that conformed to the federal adjustments above by adding \$28,417 to appellant's 2014 California taxable income. In addition, the NPA included an adjustment for a denied miscellaneous deduction of \$568.¹ The NPA also included a 2.5 percent premature distribution tax of \$625.00, for a total additional tax of \$2,680.36, plus applicable interest.
4. In response, appellant filed a timely protest, asserting that she used \$10,000 of her pension distribution to purchase her first home and that the remaining \$15,000 was timely rolled over into her Individual Retirement Account (IRA).
5. After reviewing the matter, FTB affirmed the NPA in a Notice of Action. In response, appellant filed this timely appeal.

DISCUSSION

A taxpayer must report federal changes to income or deductions to the FTB within six months of the date the federal changes become final. (R&TC, § 18622(a).) The taxpayer must concede the accuracy of the federal changes or prove that those changes, and any California deficiency assessment based thereon, are erroneous. (R&TC, § 18622(a); *Appeal of Sheldon I. and Helen R. Brockett* (86-SBE-109) 1986 WL 22731; *Appeal of Aaron and Eloise Magidow* (82-SBE-274) 1982 WL 11930.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*)

R&TC section 17071 incorporates Internal Revenue Code (IRC) section 61, which defines "gross income" as including "all income from whatever source derived" including pensions. Generally, a distribution from a qualified retirement plan or an IRA is included in income for the year of distribution. (IRC, §§ 402(a) & 408(d).)²

On appeal, FTB concedes that appellant timely rolled over all but \$10,000 of the \$25,000 distribution. Further, FTB concedes that appellant is not subject to the 2.5 percent premature distribution tax. Accordingly, the only issue remaining on appeal is whether the \$10,000 amount not rolled over is subject to tax. Appellant has not shown why the remaining \$10,000 early

¹ On appeal, appellant does not dispute the following adjustments: taxable wages of \$3,140; interest of \$277; and the miscellaneous deduction of \$568.

² R&TC sections 17501 and 17504 incorporate, in relevant part, IRC section 402. R&TC sections 17507 and 17508 incorporate, in relevant part, IRC section 408.

withdrawal is not subject to tax. Therefore, appellant must pay tax on the \$10,000 early withdrawal, as is customary for withdrawals from qualified retirement plans and IRAs. (IRC, §§ 61, 402(a), 408(d).)

HOLDINGS

FTB’s action is modified, as conceded by FTB on appeal, such that all but \$10,000 of the \$25,000 distribution was timely rolled over. Of the \$25,000 distribution, only the \$10,000 amount not timely rolled over is includable in appellant’s income, and appellant is not subject to the 2.5 percent premature distribution tax on that amount. FTB has indicated that, as a result of its concessions, its proposed tax deficiency for 2014 will be reduced from \$3,122 to \$795, plus interest.

DISPOSITION

FTB’s action is modified, as conceded by FTB on appeal, in accordance with the holdings above.

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Sara A. Hosey
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Sara A. Hosey
Administrative Law Judge

We concur:

DocuSigned by:
John O. Johnson
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John O. Johnson
Administrative Law Judge

DocuSigned by:
Michael F. Geary
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Michael F. Geary
Administrative Law Judge