

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18093854
KELLY KEITH WEIGEL)
) Date Issued: November 8, 2019
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OPINION

Representing the Parties:

For Appellant: Kelly Weigel, Taxpayer

For Respondent: Angelina Yermolich, Legal Assistant

A. KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19045, Kelly Keith Weigel (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing \$555 in additional tax, plus interest, for the 2013 tax year. This matter is being decided based on the written record because appellant waived the right to an oral hearing.

ISSUE

Whether appellant has established that a \$22,222 distribution from appellant’s qualified retirement plan was not subject to the 2.5 percent early distribution tax.

FACTUAL FINDINGS

1. Appellant contributed funds to a qualified retirement plan, the custodian of which was Merrill Lynch. During the 2013 tax year, appellant received a \$22,222 distribution from his qualified retirement plan. Merrill Lynch withheld \$2,222 in federal income taxes and remitted the tax withholdings to the Internal Revenue Service. No state income taxes were withheld from the distribution.
2. Merrill Lynch issued a Form 1099-R (Distributions from Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.) to appellant for the \$22,222

- distribution. The Form 1099-R reported that the distribution was taxable because it was an early distribution, with no known exception.¹
3. Appellant was 49 years old at the close of the 2013 tax year.
 4. Appellant reported the distribution as being taxable and subject to a federal premature distribution tax of \$2,222 (10 percent of \$22,222) on his 2013 federal income tax return.
 5. On April 18, 2014, appellant filed a 2013 California Resident Income Tax Return. Appellant reported total tax of \$0, \$0 in payments, and \$0 in tax due on the tax return.
 6. On January 11, 2018, FTB issued a Notice of Proposed Assessment (NPA) to appellant, proposing to assess a 2.5 percent premature distribution tax of \$555 on the distribution.
 7. On March 7, 2018, appellant protested the NPA. In the protest letter, appellant did not dispute that tax applies to the early distribution. Instead, appellant contended that he is indigent and FTB must hold the matter in abeyance until he retained an attorney.
 8. On July 25, 2018, and September 7, 2018, respectively, appellant sent a first and second “Cease and Desist” letter directing FTB to hold the matter in abeyance until appellant retained an attorney. In both letters, appellant reaffirmed that he was still indigent.
 9. FTB denied the protest on August 20, 2018. This timely appeal followed.
 10. In his appeal letters,² appellant contends that he is indigent and this matter must be held in abeyance until he retains an attorney. Appellant contends that he is suffering legal damages because this matter is going ahead without an attorney present, and enforcement of the liability will cause him financial duress.

¹ The Form 1099-R reported distribution code 1, which stands for: “1- Early distribution, no known exception.”

² Appellant marked his appeal submissions as “confidential proprietary” and requested “Federal, Military and Industrial oversight with active data protocols.” Appellant further indicated his appeal submissions may only “be distributed . . . on a ‘Need to Know’ basis.” Certain information that is confidential is protected from public disclosure. (See Cal. Code Regs., tit. 18, § 30430(b) [describing information that is not subject to disclosure in response to a California Public Records Act request].) Additionally, the Office of Tax Appeals (OTA) may, on request by a party, redact additional sensitive information in a written decision or seal all or a part of the record. (Cal. Code Regs., tit. 18, § 30432.) There is no evidence in the record of trade secrets or other confidential or sensitive information, which are the criteria for granting such a request. (Cal. Code Regs., tit. 18, § 30432.) To the contrary, appellant’s supporting documentation appears to consist primarily of publicly available information: search results from google.com, entity information from sam.gov/SAM/, entity information from sos.ca.gov, printouts of various websites associated with the Monterey Bay Spaceport, and a letter from the Department of Business Oversight (DBO) informing appellant that DBO did not have jurisdiction to review his complaint and would forward his letter to the Office of the Attorney General to take “any action they deem necessary.” Here, appellant failed to establish a basis for OTA to redact any portion of this decision or to seal the written record. Therefore, this decision is a public record. OTA’s decisions are available on its website: “<www.ota.ca.gov>”.

11. Separately, appellant contends that another person is fraudulently using appellant's information to operate a business with a name similar to his own business, resulting in public confusion and preventing him from obtaining investors or being awarded "Federal Contracting opportunities" for his business. Appellant contends this is relevant to the instant appeal because he is attempting to obtain a federal contract, and allowing FTB to assert a tax liability under these circumstances will "financially disable a Federal Contractor before Contract Award." As such, appellant requests that this matter be deferred pending resolution of his issues with the other person.

DISCUSSION

As a preliminary matter, appellant contends that paying the liability would cause him financial distress, and that we must defer the proceedings until after he resolves his claimed dispute with another individual which is allegedly preventing him from securing financing for his business. FTB has statutory authority to settle disputed liabilities with taxpayers, and to compromise certain final liabilities. (Rev. & Tax. Code, §§ 19442, 19443.) OTA has no statutory authority to settle or compromise a tax liability. Further, we have no jurisdiction over FTB's settlement or offer in compromise programs, and we express no opinion as to whether appellant qualifies for either program. Our function is to determine the correct amount of the taxpayer's California income tax liability. (*Appeals of Fred R. Dauberger, et al.* (82-SBE-082) 1982 WL 11759.) While we are cognizant that a taxpayer's financial situation may ultimately render a liability uncollectible, the question of ability to pay versus that of determining the correct amount of the tax liability are two separate and distinct concepts. We lack authority to make discretionary adjustments to the amount of a tax assessment based on a taxpayer's ability to pay. (*Appeal of Estate of R. Luebbert, Deceased, and V. Luebbert* (71-SBE-028) 1971 WL 2708.) As such, we find no adjustment or deferral is allowable on the basis of appellant's financial circumstances.

Appellant further contends that he is indigent and this appeal may not proceed until after he retains an attorney. Although the Sixth Amendment the United States Constitution grants the accused in a *criminal* proceeding the right to an attorney, there is no comparable right to an attorney in administrative tax proceeding before this agency. Instead, Government Code section 15676 provides that a person may be represented on an appeal by any authorized person or

persons, at least 18 years of age, of the person's choosing, including, but not limited to, an attorney, appraiser, accountant, bookkeeper, employee, business associate, or other person. OTA granted appellant a deferral from the date of his appeal (September 19, 2018) until April 30, 2019, to retain such a representative. Prior to this, appellant has been requesting deferrals to retain an attorney since filing his March 7, 2018 protest letter with FTB. Thus, appellant has had almost two years to retain a representative, and he has failed to do so. Additionally, appellant has had an opportunity to file, and did file, written submissions and supporting documentation fully setting forth his position on appeal before OTA (and, before that, FTB). At this point, appellant's deferral requests, including his cease and desist letters, appear to be intended primarily to delay the proceedings.³ Therefore, we find no basis to further defer these proceedings, and we will issue this decision based on the written record.

Internal Revenue Code (IRC) section 72(t) provides for an additional 10 percent tax for an early distribution from a qualified retirement plan, unless an exception applies. Those exceptions include, but are not limited to, distributions which are: made on or after the date on which the employee attains age 59-and-a-half; attributable to the individual being unable to engage in any substantial gainful activity due to any medically determinable physical or mental impairment which can be expected to be of a long-continued and indefinite duration; or paid to an employee after separation from service after reaching age 55 with the employer (the age 55 exception). (IRC, § 72(t)(2)(A), (m)(7).) The age 55 exception does not apply in the case of a distribution from an individual retirement plan. (IRC, § 72(t)(3).) RTC section 17085 conforms to IRC section 72(t), with the exception that for state income tax purposes the amount of the additional tax imposed on an early withdrawal is 2.5 percent (instead of the 10 percent applied for federal purposes). (Rev. & Tax. Code, § 17085(c)(1).)

Here, absent an exception, the premature distribution tax applies because appellant was only 49 years old during the tax year in which he received a distribution from his qualified retirement plan. Appellant does not dispute that he received this distribution. Further, appellant does not contend, and there is no evidence to suggest, that there is an applicable exception to the 2.5 percent early distribution tax.

³ Pursuant to California Code of Regulations, title 18, section 30217(b)(5) we hereby place appellant on notice that if OTA determines that a franchise or income tax appeal is frivolous or has been filed or maintained primarily for the purpose of delay, OTA may impose a frivolous appeal penalty, and that appellant's appeal history, including this appeal, may be taken into consideration in determining whether to impose such a penalty and the amount of the penalty. (See Rev. & Tax. Code, § 19714.)

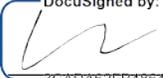
In fact, appellant reported the distribution as being taxable on his federal income tax return for 2013 and he reported and paid (through withholdings) the federal premature distribution tax of \$2,222 on the distribution. Therefore, we find that appellant failed to establish a basis for adjustment or that an exception to the premature distribution tax applies.

HOLDING

Appellant failed to establish that any portion of the \$22,222 distribution was not subject to a 2.5 percent early distribution tax.

DISPOSITION

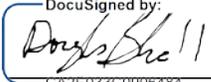
FTB’s action denying appellant’s protest for the year 2013 tax year is sustained in full.

DocuSigned by:

3CAD762FB4864CB
Andrew J. Kwee
Administrative Law Judge

We concur:

DocuSigned by:

5E9822FB81BA41B
Jeffrey I. Margolis
Administrative Law Judge

DocuSigned by:

CA2E033C0906484
Douglas Bramhall
Administrative Law Judge