

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
LUCIUS CLARK

) OTA Case No. 18114026
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OPINION

Representing the Parties:

For Appellant: Ryan Enriquez, Tax Appeals Assistance Program (TAAP)¹

For Respondent: Freddie C. Cauton, Legal Analyst

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Lucius Clark (appellant) appeals an action by the respondent Franchise Tax Board (FTB) proposing \$712 of additional tax, and applicable interest, for the 2014 taxable year.

The matter is being decided based on the written record because appellant waived his right to an oral hearing.

ISSUE

Is appellant entitled to a reduction of the proposed additional tax liability?

FACTUAL FINDINGS

1. Appellant, who turned 59 and one-half years of age during 2014, timely filed a California Resident Income Tax Return (Form 540) for the 2014 taxable year, reporting federal adjusted gross income (AGI) of \$26,780 and tax due, after application of his withholding credit, of \$318.

¹ TAAP provides free legal assistance to taxpayers on qualified appeals before Office of Tax Appeals. Law students represent appellants under the supervision and direction of attorneys in FTB’s Taxpayers’ Rights Advocate’s Office.

2. FTB learned that the Internal Revenue Service (IRS) adjusted appellant's federal AGI by adding unreported pension or annuity income of \$15,152.
3. An IRS "Wage and Income Transcript" (transcript) for appellant's 2014 taxable year shows IRS Forms 1099-R reporting pension or annuity payments to appellant during 2014 totaling \$28,174.
4. Appellant's 2014 Form 540 does not report pension or annuity payments made by Merrill Lynch or Bank of America (B of A) totaling \$15,152 (\$13,424 and \$1,728, respectively).
5. On January 30, 2018, FTB issued appellant a Notice of Proposed Assessment (NPA) showing a revised federal AGI of \$41,932 and additional tax due of \$712.
6. Appellant filed a protest, arguing that the payor misreported the distribution, which was \$9,220, or \$5,932 less than it reported to the IRS. Appellant stated in the protest that he would obtain and submit evidence in support of his contentions.
7. On April 24, 2018, FTB acknowledged the protest, and by letter dated July 17, 2018, FTB informed appellant that he must submit his evidence by August 17, 2018.
8. Appellant did not submit additional evidence, and information obtained by FTB from the IRS did not indicate that there was a reduction or cancellation of the federal increase.
9. On October 12, 2018, FTB issued a Notice of Action affirming the NPA.
10. This timely appeal followed.

DISCUSSION

R&TC section 18622 requires a taxpayer to concede the accuracy of the federal changes or to state wherein the changes are erroneous. It is well established in California that a proposed deficiency assessment based on federal adjustments to income is presumed to be correct, and the burden is on the taxpayer to prove it is erroneous. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Brockett* (86-SBE-109) 1986 WL 22731.) Unsupported assertions are not sufficient to satisfy the taxpayer's burden of proving FTB's deficiency assessment was in error. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) Generally, California conforms to the definition of "gross income" contained in section 61 of the Internal Revenue Code (IRC).² Gross income is defined as "all income from whatever source derived," unless specifically excluded.

² See R&TC section 17071.

(IRC, § 61(a).) Gross income specifically includes annuity and pension payments. (IRC, § 61(a)(9) and (11).)

In his protest, appellant argues that his pension from Wells Fargo should be \$9,220. Appellant also alleged in his protest that his tax preparer informed him that someone had already filed taxes under his name for the 2015 taxable year. In his November 13, 2018 appeal to the Office of Tax Appeals, appellant argues that the administrator for his retirement plan incorrectly reported distributions during 2014 totaling \$14,000, and he stated that he would obtain a corrected Form 1099-R and provide that to us. We have not received any additional evidence from appellant.

Here, the evidence shows that appellant received retirement income from three sources: Merrill Lynch, Wells Fargo, and B of A, the last two reporting both early and normal distributions to appellant.³ Appellant reported both Wells Fargo distributions and the early distribution from B of A but did not report the normal distribution from B of A (\$1,728) or the normal distribution from Merrill Lynch (\$13,424). FTB has established that it correctly based the proposed assessment on the federal adjustment, and appellant has not shown that the federal adjustment was reversed, further adjusted, or erroneous.

³ An “early” distribution in this context means a distribution before appellant reached the age of 59 and one-half years old.

HOLDING

Appellant is not entitled to a reduction of the proposed additional tax liability

DISPOSITION

We sustain FTB’s action.

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

We concur:

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

DocuSigned by:
Tommy Leung
0C90542BE88D4E7...
Tommy Leung
Administrative Law Judge

Date Issued: 1/14/2020