

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

In the Matter of the Appeal of:

**J. GASH**) OTA Case No. 18093703  
)  
)  
)  
)  
)**OPINION**

Representing the Parties:

For Appellant:

J. Gash

For Respondent:

Rachel Abston, Senior Legal Analyst

**K. LONG**, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, J. Gash (appellant)<sup>1</sup> appeals an action by respondent Franchise Tax Board (FTB) proposing to assess additional tax of \$7,448, plus interest, for the 2012 tax year.

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

**ISSUE**

Whether appellant established error in FTB's proposed assessment of additional tax.

**FACTUAL FINDINGS**

1. Appellant filed a 2012 California income tax return (Form 540) reporting taxable income of \$260,041.
2. FTB received information from the Internal Revenue Service (IRS) in the form of a CP2000 Data Sheet, indicating that the IRS made adjustments to appellant's 2012 federal income tax return. As applicable to this appeal, the CP2000 indicated that the IRS made adjustments for unreported income from the sale of securities in the amount of \$65,852

---

<sup>1</sup> Appellant filed a joint tax return with K. Gash; however, because only J. Gash signed the appeal, we refer only to J. Gash in this opinion. We note that actions referred to in this opinion as taken by appellant may have been carried out by K. Gash. However, this distinction does not affect the analysis and determination.

and unreported health savings account distribution income of \$1,858. The IRS also imposed an accuracy related penalty based on appellant's alleged failure to report health savings account distribution income and securities sale income. Appellant did not report the changes to FTB.

3. FTB issued a Notice of Proposed Assessment (NPA) to appellant on June 7, 2016. The NPA increased appellant's reported taxable income consistent with the federal adjustment referenced above. The NPA proposed additional tax of \$7,448, plus interest, and an accuracy related penalty of \$1,489.60.
4. On July 6, 2018, FTB issued a Notice of Action (NOA) for the 2012 tax year, affirming the NPA. This timely appeal followed.
5. By letter dated August 10, 2018, appellant conceded that he failed to report health savings account distribution income of \$1,858.
6. By fax dated August 12, 2019, appellant provided information that the IRS reduced its adjustment for unreported income from the sale of securities from \$65,721 to zero.
7. In its opening brief, FTB conceded that the IRS corrected the federal adjustment and abated the federal accuracy related penalty. FTB conceded that it would follow those IRS adjustments.

### DISCUSSION

A taxpayer shall either concede the accuracy of a federal determination or state wherein it is erroneous. (R&TC, § 18622(a).) A deficiency determination based on a federal audit is presumptively correct, and the taxpayer bears the burden of proving that the determination is erroneous. (*Appeal of Brockett* (86-SBE-109) 1986 WL 22731.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof with respect to a determination based on a federal action. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

R&TC section 17071 incorporates Internal Revenue Code (IRC) section 61, which defines "gross income" as including "all income from whatever source derived." IRC section 223 allows a deduction of certain health savings account distributions from gross income. However, R&TC section 17215.4 provides, "Section 223 of the Internal Revenue Code, relating to health savings accounts, shall not apply."

On appeal, appellant concedes that he failed to report health savings account distribution income of \$1,858. Additionally, FTB concedes that the IRS reduced its adjustment of


appellant's income for the sale of securities from \$65,721 to zero. FTB therefore proposes to revise its NOA and assess additional tax of \$173, plus applicable interest. FTB also concedes that the accuracy related penalty will be abated, based on the fact that the IRS abated the federal accuracy related penalty. As such, there are no unconceded issues remaining on appeal. Therefore, appellant must pay tax on the \$1,858 health savings account distribution for 2012.

### HOLDING


On appeal, appellant has shown error in the proposed assessment to the extent it was based on alleged unreported securities income, as now conceded by FTB. Appellant has not shown error in FTB's proposed assessment of tax of \$173, related to unreported health savings account distribution income.


### DISPOSITION

FTB's action is modified, as conceded by FTB on appeal. FTB's action in proposing additional tax related to unreported health savings account distribution income, plus associated interest, is sustained.

DocuSigned by:  
  
DC88A60D8C3E442  
Keith T. Long  
Administrative Law Judge

We concur:

DocuSigned by:  
  
2D8DE82EB65E4A6  
Elliott Scott Ewing  
Administrative Law Judge

DocuSigned by:  
  
0CC6C6ACCC6A44D  
Teresa A. Stanley  
Administrative Law Judge

Date Issued: 3/2/2020