

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

In the Matter of the Appeal of:

**J. KIM AND M. KIM**) OTA Case No. 19044683  
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)**OPINION**

Representing the Parties:

For Appellants: Tracy Wu, Tax Appeals Assistance Program

For Respondent: Rachel Abston, Senior Legal Analyst

**K. LONG**, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, J. Kim and M. Kim (appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing \$2,298 of additional tax, and applicable interest, for the 2014 tax year.

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

**ISSUE**

Whether appellants have demonstrated error in FTB's proposed assessment of tax.

**FACTUAL FINDINGS**

1. Appellants timely filed a 2014 joint California Nonresident or Part-Year Resident Income Tax Return (Form 540NR) reporting total tax of \$6,982. After subtracting withholdings totaling \$8,975, appellants claimed a refund of \$1,993, which FTB processed.
2. Subsequently, the Internal Revenue Service (IRS) audited appellants' 2014 income tax return and increased their federal adjusted gross income (AGI) by \$73,936. The adjustments included the following: unreported pension income of \$73,285; unreported nonemployee compensation of \$660; and a self-employment deduction allowance of \$9. The IRS assessed taxes and interest based on this federal adjustment and reported the adjustment to FTB.

3. Based on the IRS information, FTB issued a Notice of Proposed Assessment (NPA), which increased appellants' taxable income by \$73,936. This resulted in a proposed assessment of \$8,712, plus interest.
4. Appellants timely protested the NPA, contending they were California nonresidents in 2014 and lived in the State of New Jersey during that year. Appellants conceded that appellant-J. Kim was employed by a California corporation during 2014 and cited that employment as the reason for filing a Form 540NR. Appellants asserted that the federal adjustment was based on their failure to report income withdrawn from a retirement account and that FTB improperly recalculated appellants' California AGI in the NPA.
5. Thereafter, FTB issued a Notice of Action (NOA) to appellants. FTB accepted that appellants were either nonresidents or part-year residents of California in 2014. The NOA explained that nonresidents and part-year residents are required to report income from all sources. The NOA recalculated the amount of tax due by excluding the federal adjustment of \$73,936 from appellants' California AGI. Instead, the NOA included the federal adjustment of \$73,936 in appellants' AGI from all sources for purposes of calculating a California tax rate of 6.98 percent that was used to determine appellants' California nonresident or part-year income tax. This resulted in a revised additional tax of \$2,298, plus interest. This timely appeal followed.

### DISCUSSION

R&TC section 18622(a) provides that a taxpayer shall report federal adjustments to FTB and either concede the accuracy of a federal determination or state wherein it is erroneous. It is well settled that a deficiency determination based on a federal audit is presumptively correct and that a taxpayer bears the burden of proving that the determination is erroneous. (*Appeal of Brockett* (86-SBE-109) 1986 WL 22731; *Todd v. McColgan* (1949) 89 Cal.App.2d 509.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof with respect to a determination based on a final federal action. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) In the absence of credible, competent, and relevant evidence showing that FTB's determination is incorrect, it must be upheld. (*Appeal of Seltzer* (80-SBE-154) 1980 WL 5068.)

Here, appellants do not specifically dispute the federal adjustment of \$73,936. Instead, appellants merely assert that they do not owe additional tax to California because they were

New Jersey residents during the 2014 tax year. As shown below, appellants have failed to meet their burden on appeal.

Because FTB accepted appellants' contention that they were nonresidents or part-year residents of California during the 2014 tax year, the NOA did not include the unreported income in appellants' California AGI.<sup>1</sup> Instead, the NOA correctly included this additional income in appellants' AGI from all sources solely for the purpose of computing appellants' California tax rate under the "California Method" of computing tax of a nonresident or part-year resident. Under the California Method, the rate of tax that is applied to the income of a nonresident or part-year resident that is subject to California taxation is determined by taking into account the taxpayer's worldwide income for the entire tax year. (*Appeal of Million* (87-SBE-036) 1987 WL 59534.) This method does not tax out-of-state income received while a taxpayer is not a resident of California, but merely takes into account a taxpayer's "entire taxable income" for the year, including income from non-California sources, in determining the applicable tax rate. (R&TC, § 17041(b)(2).) The tax rate so determined is then applied only to income the taxpayer earned while a California resident and to any other California source income the taxpayer might have earned. The purpose of the method is to apply the graduated tax rates to all persons (not just those who reside in California).<sup>2</sup>

Appellants assert that they do not owe additional tax because they were New Jersey residents that only spent 22 days in California. Nevertheless, appellants concede that appellant-J. Kim's employer was a California company. In other words, appellants concede that they received California source income. Accordingly, appellants' California source income is subject to tax. The number of days that appellants were present in this state is irrelevant. As explained above, all of appellants' 2014 income must be reported on their California return, since income from all sources is used to calculate the tax rate that applies to appellants' California-source income. However, the income that appellants earned while they were residents of New Jersey

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<sup>1</sup> California residents are taxed on their entire taxable income (regardless of source), while nonresidents are only taxed on income from California sources. (R&TC, §§ 17041(a), (b), & (i), 17954.)

<sup>2</sup> The fundamental fairness and the constitutionality of using out-of-state income to calculate the rate of tax has been upheld. (*Brady v. New York* (1992) 80 N.Y.2d 596, cert. den. (1993) 509 U.S. 905 (*Brady*).) The court in *Brady* reasoned that similarly-situated taxpayers were those with the same total income. For example, a nonresident earning \$20,000 in New York, but with \$100,000 of reported total income, should be taxed on the \$20,000 of New York-source income at the same tax rate as a New York resident with \$100,000 of total income (and not at the same tax rate as a New York resident with \$20,000 of total income).


(i.e., the pension or annuity income, and the nonemployee compensation) has not been subjected to California tax. Based on the foregoing, we find that appellants have not shown error in either the proposed assessment or FTB's application of the formula set forth in R&TC section 17041(b)(2). Consequently, we find that no adjustments to FTB's proposed assessment of tax are warranted.

### HOLDING

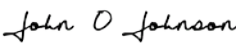
Appellants have not established error in FTB's proposed assessment of tax for the 2014 tax year based on a final federal determination.

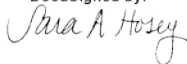
### DISPOSITION

FTB's action is sustained.

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Keith T. Long  
Administrative Law Judge

We concur:

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John O. Johnson  
Administrative Law Judge

DocuSigned by:  
  
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Sara A. Hosey  
Administrative Law Judge

Date Issued: 5/6/2020