

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

In the Matter of the Appeal of:

**B. KLINE**

) OTA Case No. 19064926  
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**OPINION**

Representing the Parties:

For Appellant:

B. Kline

For Respondent:

Angelina Yermolich, Legal Assistant

R.TAY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, B. Kline (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing \$1,028 of additional tax, plus applicable interest, for the 2014 tax year.

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

**ISSUE**

Whether appellant has shown that FTB erred in its proposed assessment of additional tax for the 2014 tax year.

**FACTUAL FINDINGS**

1. Appellant received \$41,144 in early distributions from qualified retirement plans in 2014.
2. On his 2014 income tax return, appellant reported the early distributions as income and attached Internal Revenue Service (IRS) Forms 1099-R that also reported such income (the 1099s).
3. According to the 1099s, appellant received \$28,331 from the California Public Employees Retirement System and \$12,813 from State Street Retiree Services for Peace Officers and Firefighters Supplemental Plan. The total state tax withheld and reported on the 1099s was \$823.

4. Appellant also reported on his 2014 California income tax return that his date of birth is August 14, 1973. Thus, in 2014, appellant turned 41 years old.
5. Appellant did not include the early distribution tax attributable to the amounts reported on the 1099s on his 2014 California income tax return. FTB examined appellant's return and issued a Notice of Proposed Assessment, which included a proposed assessment of additional tax in the amount of \$1,028,<sup>1</sup> plus interest, for the early distribution tax. Appellant protested, and FTB affirmed its proposed assessment. This timely appeal followed.

### DISCUSSION

FTB's initial burden is to show why its assessment is reasonable and rational. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Myers* (2001-SBE-001) 2019 WL 1187160.) Once FTB meets its burden, FTB's proposed assessment is presumed correct, and the taxpayer has the burden of proving it to be wrong. (*Todd v. McColgan, supra*, at p. 514.) Here, FTB based its proposed assessment on the 1099s, and has met its initial burden; thus, the burden of proof shifts to appellant.

Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) In the absence of credible, competent, and relevant evidence showing error in FTB's determination, FTB's proposed assessment must be upheld. (*Appeal of Seltzer* (80-SBE-154) 1980 WL 5068.) A taxpayer's failure to produce evidence that is within his or her control gives rise to a presumption that such evidence is unfavorable to his case. (*Appeal of Cookston* (83-SBE-048) 1983 WL 15434.)

Internal Revenue Code (IRC) section 72 governs the taxation of distributions from qualified retirement plans. For distributions made to taxpayers under the age 59½, IRC section 72(t)(1) imposes an additional tax of 10 percent of the amount of a distribution unless the distribution falls within a statutorily provided exception. R&TC section 17085 conforms to, but modifies, IRC section 72, by reducing the rate of tax imposed on an early distribution from 10 percent to 2.5 percent. Thus, if a taxpayer receives a distribution from a qualified retirement

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<sup>1</sup> 2.5 percent of \$41,144, which is approximately \$1,028.

plan before the taxpayer is 59½ years old, California imposes a 2.5 percent additional tax on the distributed amount.<sup>2</sup>

Appellant does not dispute that he received \$41,144 as distributions from qualified retirement plans and does not dispute that he was liable for the early distribution tax in the amount of \$1,028 for 2014. Appellant also does not argue that his distributions fall under any exception. On appeal, appellant argues that the amount of the early distribution tax was withheld before he received his distributions, and therefore, already paid. However, appellant provided no documents to support his assertion. Rather, the documents show that appellant failed to include the early distribution tax on his 2014 California income tax return and failed to pay the tax.<sup>3</sup>

Furthermore, according to the 1099s, appellant's distributions were subject to \$823 of withholding for state income tax purposes, which satisfied a different tax than the early distribution tax at issue here. Other than his withholding, appellant made no other tax payments for 2014, including no payments for the early distribution tax. Moreover, after filing his return, appellant received a refund or offset for the entire amount withheld. Thus, appellant has not provided any evidence to show error in FTB's assessment of the early distribution tax or that appellant already paid the tax. We also find no evidence of error in FTB's assessment and no evidence in the record to prove appellant already paid or can offset the early distribution tax that he should have paid for 2014.

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<sup>2</sup> We note that IRC section 72(t)(10) provides an exception to the 2.5 percent tax for taxpayers who are qualified public safety employees after separating from service after the attainment of age 50. However, appellant has not made arguments or provided evidence to show he qualifies for this exception. In fact, the record shows that appellant did not qualify for this exception because he turned 41 years old in 2014, and thus, had not attained age 50.

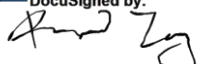
<sup>3</sup> The additional tax would have been reported on line 63 of the California income tax return, with an attached FTB Form 3805P (Additional Taxes on Qualified Plans). Line 63 was left blank on appellant's income tax return.

HOLDING


Appellant has not shown that FTB erred in its proposed assessment of additional tax for the 2014 tax year.


DISPOSITION

FTB's action is sustained.

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Richard Tay  
Administrative Law Judge

We concur:

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Teresa A. Stanley  
Administrative Law Judge

DocuSigned by:  
  
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Elliott Scott Ewing  
Administrative Law Judge

Date Issued: 3/16/2020