

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 19075060
D. DRUMMOND)
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OPINION

Representing the Parties:

For Appellant: D. Drummond
For Respondent: Sarah Fassett, Tax Counsel

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, D. Drummond (appellant) appeals an action by respondent Franchise Tax Board (FTB) in proposing to assess additional tax of \$1,093, plus interest, for the 2014 tax year.

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

ISSUE

Whether appellant has shown error in FTB’s proposed assessment.

FACTUAL FINDINGS

1. On April 15, 2015, appellant timely filed his 2014 California income tax return, reporting federal adjusted gross income (AGI) of \$57,816, a standard deduction of \$3,992, and California taxable income of \$53,824. Appellant reported tax of \$2,512, an exemption credit of \$108, and tax due of \$2,404, which was remitted with the return.
2. FTB failed to record the federal AGI of \$57,816, resulting in taxable income incorrectly calculated as -\$3,991. As a result, FTB erroneously refunded the payment of \$2,404.
3. FTB subsequently received information from the Internal Revenue Service (IRS) indicating appellant’s federal AGI, as accepted by the IRS, was \$58,863.

4. On September 27, 2018, FTB issued a Notice of Proposed Assessment (NPA) that adjusted appellant's taxable income by increasing appellant's federal AGI by \$58,863 and subtracting social security income of \$17,806, which is not taxable in California.¹ The NPA proposed to assess additional tax of \$1,093, plus interest.
5. Appellant protested the NPA, stating that he properly paid his tax of \$2,404. On March 5, 2019, FTB replied that the payment was erroneously refunded because appellant's federal AGI was not included in his taxable income. FTB stated that, therefore, the NPA is correct. FTB also requested that appellant provide "substantial documentation" that supports his claim, or the NPA would be affirmed.² Thereafter, FTB affirmed the NPA in a Notice of Action (NOA) dated June 18, 2019. This timely appeal followed.

DISCUSSION

FTB's determination of tax is presumed to be correct, and a taxpayer has the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow, supra.*) FTB's determinations cannot be successfully rebutted when the taxpayer fails to provide credible, competent, and relevant evidence as to the issues in dispute. (*Appeal of Seltzer* (80-SBE-154) 1980 WL 5068.)

Pursuant to R&TC section 17072(a), California conforms to Internal Revenue Code section 62, defining federal AGI, except as otherwise provided. Thus, subject to California-specific addition and subtraction modifications, such as the exclusion from California gross income of certain social security benefits under R&TC section 17087(a), taxpayers generally must report the same federal AGI on both their federal and California returns.

FTB incorrectly processed appellant's return using a federal AGI of zero, even though appellant reported a federal AGI of \$57,816. FTB provides a copy of appellant's federal account transcript from the IRS, which confirms that appellant's federal AGI is \$58,863. Therefore, because taxpayers must report the same federal AGI on both their federal and California returns, FTB properly calculated appellant's California taxable income to include federal AGI of

¹ Under R&TC section 17087, subdivision (a), social security benefits are excluded from California taxable income.

² Appellant paid the balance due, which is being held in suspense until the conclusion of this appeal.

\$58,863. FTB also properly subtracted social security income of \$17,806 from appellant's California taxable income, pursuant to R&TC section 17087(a). Therefore, FTB properly adjusted appellant's taxable income, and the proposed assessment is correct.

As noted above, appellant initially paid the liability of \$2,404 with his tax return, and FTB admittedly erred by refunding that payment after improperly calculating his tax due. Nevertheless, the R&TC authorizes FTB to assess and collect an erroneous refund provided that it issues a notice and demand for repayment within two years after the date of the erroneous refund, or within the applicable period within which it may timely issue an NPA, whichever period expires later. (R&TC, § 19368.) Within the applicable period of four years,³ FTB both timely issued an NPA proposing to assess an amount which included the erroneous refund, and sent the March 5, 2019 letter acknowledging the erroneous refund and asserting that the NPA was correct. Therefore, FTB properly issued a notice and demand for repayment of the erroneous refund.⁴

Appellant questions why he received the NOA after paying the proposed assessment of \$1,093.00 and interest of \$118.56 as indicated on the NPA. It appears that the NOA was issued because FTB's March 5, 2019 letter requested that appellant provide "substantial documentation" to support his claim, or the NPA would be affirmed in an NOA. Because appellant provided a check but no other documentation, an NOA was issued. However, to appellant's benefit, FTB states it will abate the entire amount of interest on the additional tax assessment, pursuant to R&TC section 19104, and refund/credit appellant with the interest paid of \$118.56 at the conclusion of this appeal.

³ R&TC section 19057(a), generally provides that an NPA shall be mailed to the taxpayer within four years after the return was filed. Here, appellant filed his 2014 tax return on April 15, 2015. Therefore, the applicable period within which FTB could timely issue an NPA was April 15, 2019. Accordingly, FTB had until April 15, 2019, to issue a notice and demand for repayment.

⁴ FTB states that it agrees to abate interest on the erroneous refund, pursuant to R&TC section 19104(c).

HOLDING

Appellant has not shown error in FTB’s proposed assessment.

DISPOSITION

FTB’s action is modified to abate interest. FTB’s action is otherwise sustained.

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Josh Lambert

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Josh Lambert
Administrative Law Judge

We concur:

DocuSigned by:
Kenny Gast

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Kenneth Gast
Administrative Law Judge

DocuSigned by:
Andrea L.H. Long

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Andrea L.H. Long
Administrative Law Judge

Date Issued: 2/20/2020