OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19095240
J. DAVIS	)
	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant: J. Davis

For Respondent: Melisa Recendez, Legal Assistant

C. AKIN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, J. Davis (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing $649 of additional tax, plus applicable 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 established error in FTB's computation of his tax liability for the 2014 tax year based upon a final federal determination.

FACTUAL FINDINGS

1. Appellant filed a timely 2014 California Resident Income Tax Return (Form 540 2EZ), reporting total tax of $5,324. After applying withholdings of $4,812, appellant reported tax due of $512, which he paid with his return.
2. Subsequently, the Internal Revenue Service (IRS) audited appellant's 2014 income tax return and increased his federal adjusted gross income (AGI) by $25,106 to include unreported taxable pension or annuity income paid to appellant. 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 to appellant a Notice of Proposed Assessment (NPA), which increased his 2014 California taxable income by the $25,106 of unreported pension or annuity income. This resulted in proposed additional tax of $2,332, plus interest.
4. Appellant timely protested the NPA, contending he was a California nonresident in 2014, he "worked [in California] and paid tax on income received in [California]," the $25,106 reflected in the NPA "was not taken" in California, and he was a resident of Texas at the time.
5. Thereafter, FTB issued a Notice of Action (NOA) to appellant. FTB accepted that appellant was either a nonresident or part-year resident of California in 2014. The NOA explains that nonresidents and part-year residents are required to file nonresident tax returns (California Form 540NR). The NOA revised the calculation of tax due by excluding the $25,106 from appellant's California AGI based on FTB's determination that it was derived from Texas, not California, sources. Instead, the NOA included the $25,106 in appellant's AGI from all sources for purposes of calculating a California tax rate of 7.04 percent that was used to determine appellant's California nonresident or part-year income tax. This resulted in a revised additional tax of $649, plus interest, which was lower than the $2,332 of proposed additional tax shown in the NPA.
6. This timely appeal followed.

DISCUSSION

IRS Assessment

R&TC section 18622(a) provides that a taxpayer shall 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.)

Appellant does not specifically contend the federal adjustment of $25,106 related to unreported taxable pension or annuity income is erroneous. Instead, appellant merely states that he does not really believe he owes the additional tax, with no explanation provided as to which part of FTB's assessment or tax computation he disagrees with. As such, appellant has not established error in FTB's determination based on the final federal action. (See *Appeal of Brockett*, *supra*; *Appeal of Magidow*, *supra*.) Rather, the evidence demonstrates that the upward adjustment to his income resulted from appellant's failure to report pension or annuity income to both the state and the IRS, and that the payor of this income reported to the IRS that the income was paid to appellant during the 2014 tax year. Appellant has not argued (or provided any evidence showing) that he did not receive pension or annuity income in the amount of $25,106 during the 2014 tax year, as determined by the IRS. Therefore, appellant did not meet his burden of proving that FTB's proposed assessment, which is based on the federal adjustment, is erroneous.

The California Method

Because FTB accepted appellant's contention that he was a nonresident or part-year resident of California during the 2014 tax year, the NOA did not include the $25,106 of pension or annuity income in appellant's California AGI.[1] Instead, the NOA correctly included this additional income in appellant's AGI from all sources solely for the purpose of computing appellant's 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 the income the taxpayer earned while a California resident and to any other California source

[1] 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.) Part-year residents are taxed on their income (regardless of source) while residents of this state, as well as all income derived from California sources while nonresidents. (R&TC, § 17041(b) & (i).)

income the taxpayer might have earned. The purpose of the method is to apply the graduated tax rates to all persons (not just to those who reside in California).[2]

While appellant states that he does not really believe he owes the additional tax, as explained above, all of appellant's 2014 income must be reported on his California return, since his income from all sources is used to calculate the tax rate that applies to appellant's California-sourced income. However, the income appellant earned while he was a resident of Texas (i.e., the $25,106 pension or annuity income paid to appellant in 2014) has not been subjected to California tax. Based on the above, appellant has not produced any additional information or evidence to show error in either the proposed assessment or FTB's application of the formula set forth in R&TC section 17041(b)(2).

Financial Hardship and Request to Settle the Matter

As previously noted, appellant does not specifically argue that FTB's assessment based upon the final federal determination is erroneous. Appellant instead contends he has limited financial resources and asks the Office of Tax Appeals (OTA) to consider accepting payment of a smaller amount to resolve this matter. FTB has statutory authority to settle disputed liabilities with taxpayers, and to compromise certain final liabilities. (R&TC, §§ 19442, 19443.) OTA, on the other hand, has no statutory authority to settle a disputed tax liability or to compromise a tax liability. Further, we have no jurisdiction over FTB's settlement or offer in compromise programs. Our function is to determine the correct amount of the taxpayer's California income tax liability. (*Appeals of Dauberger, et al.* (82-SBE-082) 1982 WL 11761.) While we are cognizant that a taxpayer's financial situation may ultimately render a liability uncollectible, the question of ability to pay versus that of determining the correct amount of the tax liability are two separate and distinct concepts. We lack authority to make discretionary adjustments to the amount of a tax assessment based on a taxpayer's ability to pay. (*Appeal of Luebbert* (71-SBE-028) 1971 WL 2708.)

[2] 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).

Therefore, based on the evidence presented to us, appellant has not provided a basis upon which we can make any adjustments to the amount of the proposed assessment.

HOLDING

Appellant has not established error in FTB's computation of his tax liability for the 2014 tax year based on a final federal determination.

DISPOSITION

FTB's action is sustained.

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Cheryl L. Akin
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Cheryl L. Akin
Administrative Law Judge

We concur:

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Kenneth Gast
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Kenneth Gast
Administrative Law Judge

DocuSigned by:
DC88A60D8C3E442...
Keith T. Long
Administrative Law Judge

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