OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19095261
P. DAVIS AND	)
M. DAVIS	)
	)
	)

OPINION

Representing the Parties:

For Appellants: P. Davis

For Respondent: Angelina Yermolich, Legal Assistant

For Office of Tax Appeals: Corin Saxton, Tax Counsel IV

D. CHO, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, P. Davis and M. Davis (appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing $2,162 of additional tax and applicable interest[1] for the 2014 taxable year.

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

ISSUES

1. Whether appellants have demonstrated error in FTB's proposed assessment.
2. Whether appellants are entitled to abatement of the applicable interest.

FACTUAL FINDINGS

1. Appellants filed a timely 2014 California Resident Income Tax Return, which, as relevant to this appeal, reported a California subtraction of income of $28,971 from their federal adjusted gross income.

[1] FTB suspended interest accrual from April 17, 2018, through February 21, 2019, pursuant to R&TC section 19116, which is not in dispute in this appeal.

2. After reviewing appellants' return, FTB denied their claimed $28,971 subtraction[2] and proposed additional tax of $2,162, plus applicable interest. FTB issued a Notice of Proposed Assessment (NPA) informing appellants of the proposed additional tax and that the accrual of interest was suspended after April 16, 2018. The NPA also informed appellants that interest would begin to accrue 15 days from the date of the NPA if an outstanding balance remained.
3. Appellants protested the NPA, asserting that the $28,971 subtraction constituted nontaxable disability income.
4. On August 19, 2019, FTB issued a Notice of Action that affirmed the NPA.
5. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellants have demonstrated error in FTB's proposed assessment.

FTB's determination is presumed correct, and a taxpayer has the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.) 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 that FTB's determination is incorrect, it must be upheld. (*Appeal of Seltzer* (80-SBE-154) 1980 WL 5068.)

R&TC section 17071 incorporates Internal Revenue Code (IRC) section 61, which defines "gross income" as "all income from whatever source derived," unless specifically excluded. In general, amounts received by an employee through accident or health insurance for personal injuries or sickness must be included in gross income "to the extent such amounts (1) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (2) are paid by the employer." (IRC, § 105(a).)[3] An exception exists for gross income received through accident or health insurance for personal injuries or sickness that are not attributable to contributions paid by an employer. (IRC, § 104(a)(3); R&TC, § 17131.) Therefore, if an individual uses his or her own funds to purchase a policy covering

[2] Due to the recalculation of appellants' adjusted gross income, FTB also denied a claimed renter's credit, which is not in dispute.

[3] California generally conforms to the IRC provisions relating to specific exclusions from gross income. (R&TC, § 17131.)

personal injuries or sickness, amounts received are excludable from gross income. (Treas. Reg. § 1.104-1(d).) Conversely, when an employer is either the sole contributor to such a fund or is the sole purchaser of a policy for its employees, the exclusion does not apply to any amounts received by an employee under the plan. (*Ibid*.)

Appellants argue that M. Davis's employer paid for the short-term disability insurance premiums through payroll deductions. In support, appellants provided payment stubs from a third-party insurance provider, Sedgwick. Appellants also provided a letter from M. Davis's employer stating that M. Davis was enrolled in the Short-Term Disability Additional Benefit plan in 2014, which provided increased income replacement for participants electing to pay a percentage of their monthly salary through payroll deductions. However, appellants also provided M. Davis's Employee Sequence Registers for pay periods ending March 15, 2014, and December 15, 2014, both of which show that no salary reductions were made for the short-term disability plan. Furthermore, the income at issue was reported as taxable income by M. Davis's employer. The employer did not identify any nontaxable sick-pay that was paid by a third-party and was not includible in income because the employee contributed to the sick pay plan.

The letter from M. Davis's employer and the booklet appellants provided suggest that payroll deductions should have been used to pay for the Short-Term Disability Additional Benefit plan. However, the Employee Sequence Registers do not list any payroll deductions for disability insurance, and the employer reported that M. Davis did not receive payments pursuant to a contributory insurance plan. Therefore, we find that appellants have not shown that M. Davis contributed to the insurance premiums, and appellants have failed to establish that the insurance payments at issue meet the requirements for exclusion under IRC section 104.

Issue 2: Whether appellants are entitled to abatement of the applicable interest.

Imposing interest on a tax deficiency is mandatory. (R&TC, § 19101(a).) Interest is not a penalty but is compensation for the taxpayer's use of money after it should have been paid to the state. (*Appeal of Yamachi* (77-SBE-095) 1977 WL 3905.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Jaegle* (76-SBE-070) 1976 WL 4086.)

Although appellants' opening brief includes interest in the amount of the appeal, appellants have not made a specific argument with respect to interest abatement. To obtain interest abatement, appellants must qualify under one of the following statutes: R&TC section 19104 or 21012. R&TC section 19104 does not apply here because appellants do not

allege, and the evidence does not show, that the interest at issue is attributable, in whole or in part, to any unreasonable error or delay by an officer or employee of FTB when performing a ministerial or managerial act. R&TC section 21012 does not apply because appellants do not allege, and the evidence does not show, that appellants relied on any written advice requested of FTB. Therefore, appellants have not demonstrated that interest abatement is warranted.

HOLDINGS

1. Appellants have not demonstrated error in FTB's proposed assessment.
2. Appellants are not entitled to abatement of the applicable interest.

DISPOSITION

FTB's action is sustained.

DocuSigned by:
Daniel Cho
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Daniel K. Cho
Administrative Law Judge

We concur:

DocuSigned by:
F8E81582726F448...
Richard Tay
Administrative Law Judge

DocuSigned by:
kenneth Gast
FD75A3136CB34C2...
Kenneth Gast
Administrative Law Judge

Date Issued: 7/31/2020