

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
F. HAMMER

) OTA Case No. 20096710
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OPINION

Representing the Parties:

For Appellant: F. Hammer

For Respondent: Joel Smith, Tax Counsel III

For Office of Tax Appeals: David Kowalczyk, Tax Counsel

S. HOSEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, F. Hammer (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing \$1,532 of additional tax, and applicable interest, for the 2015 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 established error in FTB’s proposed assessment that was based on a final federal determination for the 2015 tax year.

FACTUAL FINDINGS

1. On April 11, 2016, appellant filed a timely 2015 California Resident Income Tax Return.
2. The Internal Revenue Service (IRS) examined and adjusted appellant’s 2015 federal tax return by increasing appellant’s federal taxable income by \$28,990 (\$25,884 + \$3,106). The IRS increased appellant’s federal taxable income by \$25,884 for unreported taxable dividends of \$2,502, capital gains dividends of \$4,914, pension or annuity income of \$719, and income from the sale of securities of \$17,749. The IRS further increased appellant’s federal taxable income by \$3,106 because the IRS reduced appellant’s

- claimed miscellaneous itemized deductions by \$518 and claimed medical expenses by \$2,588.¹
3. On October 29, 2018, the IRS assessed additional tax, plus interest.
 4. The IRS subsequently provided FTB appellant's 2015 CP2000 Data Sheet detailing the federal adjustments. Based on this information, FTB issued a Notice of Proposed Assessment (NPA) to appellant on June 13, 2019, proposing to assess \$1,532 of additional tax, plus interest, for the 2015 tax year. FTB proposed to increase appellant's California taxable income by \$28,343 (\$25,884 + \$518 + \$1,941). FTB proposed to include \$25,884 of appellant's unreported income, reduce appellant's claimed miscellaneous itemized deductions by \$518, and reduce appellant's claimed deduction for medical expenses by \$1,941.²
 5. Appellant protested the NPA. Appellant argued that FTB violated her constitutional rights because FTB did not substantiate its adjustments. Appellant also argued that FTB's NPA is barred by the statute of limitations on assessments.³
 6. FTB subsequently issued appellant a position letter with the CP2000 Data Sheet stating that it received information from the IRS showing that the IRS increased appellant's federal AGI by \$25,884. FTB explained that it increased appellant's taxable income by \$28,343 instead of \$25,884 because, based on her increased federal AGI, FTB also reduced appellant's claimed medical expenses by \$1,941 and claimed miscellaneous itemized deductions by \$518. At the end of the protest, FTB issued a Notice of Action affirming the NPA.
 7. Appellant timely filed this appeal.

¹ When the IRS increased appellant's federal adjusted gross income (AGI), the IRS reduced appellant's claimed miscellaneous itemized deductions and claimed medical expenses because appellant may deduct only these expenses that are in excess of 2 percent and 10 percent of her federal AGI, respectively. (See Internal Revenue Code (IRC), §§ 67(a), 213(a).)

² FTB reduced appellant's claimed miscellaneous itemized deductions by \$518 because appellant may deduct only these expenses that are in excess of 2 percent of her federal AGI and the IRS increased her federal AGI. (R&TC, § 17076 [incorporating IRC, § 67].) FTB reduced appellant's claimed medical expenses by \$1,941 instead of \$2,588 because she may deduct only these expenses that are in excess of 7.5 percent of her federal AGI under California law, as opposed to 10 percent under federal law. (See R&TC, §§ 17201(b), 17241; IRC, § 213(a).)

³ Even though the record is silent as to when FTB was notified of the federal adjustments, FTB's NPA is not barred by the statute of limitations because FTB issued the NPA within four years of April 11, 2016, when appellant filed her California income tax return. (R&TC, § 19057.)

8. As of October 19, 2020, there are no pending claims or adjustments to the IRS' assessment.

DISCUSSION

A taxpayer shall concede the accuracy of a federal determination to a taxpayer's income or state where the determination is erroneous. (R&TC, § 18622(a).) A deficiency assessment based on a federal adjustment is presumed correct, and a taxpayer bears the burden of proving that FTB's determination is erroneous. (*Appeal of Gorin*, 2020-OTA-018P.)⁴ FTB's determination must be upheld in the absence of credible, competent, and relevant evidence showing that its determination is not correct. (*Appeal of Chen and Chi*, 2020-OTA-021P.)

Here, FTB proposed to assess additional tax based on the federal adjustments detailed in the CP2000 Data Sheet. Appellant has not provided evidence establishing error in FTB's determination. Appellant's federal account transcript also does not indicate that the IRS modified or cancelled its assessment. Therefore, appellant has not met her burden of proof to establish error in FTB's proposed assessment.

Appellant expressed concern regarding her ability to pay the tax liability because she is unemployed. Although we sympathize with appellant's situation, we lack the authority to make discretionary adjustments to the amount of a tax assessment based on a taxpayer's ability to pay. (*Appeal of Robinson*, 2018-OTA-059P.)⁵ Therefore, we have no legal basis to make any adjustments to FTB's proposed assessment based on appellant's ability to pay.

Appellant also argues that FTB's action is a violation of her constitutional rights. Appellant has not described how FTB's action has violated her constitutional rights, besides that the action is "arbitrary and capricious." We note that the California Constitution prohibits an administrative agency, such as OTA, from refusing to enforce a statute based on it being unconstitutional, unless an appellate court has made a determination that such statute is unconstitutional. (Cal. Const., art. III, § 3.5.) OTA does not have jurisdiction to consider whether appellant is entitled to a remedy for FTB's actual or alleged violation of any substantive or procedural right, unless the violation affects the adequacy of a notice, the validity of an action

⁴ Precedential decisions of the Office of Tax Appeals (OTA) may be found on OTA's website at: <https://ota.ca.gov/opinions>.

⁵ FTB has its own offer in compromise program, which considers a taxpayer's ability to pay; however, we have no jurisdiction over this program. (See: <https://www.ftb.ca.gov/pay/if-you-cant-pay/>.)

from which a timely appeal was made, or the amount at issue in the appeal. (Cal. Code Regs., tit. 18, § 30104(d).)

HOLDING

Appellant has not established error in FTB’s proposed assessment for the 2015 tax year.

DISPOSITION

We sustain FTB’s action in full.

DocuSigned by:
Sara A. Hosey
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Sara A. Hosey
Administrative Law Judge

We concur:

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

DocuSigned by:
Andrew Wong
8A4294817A67463...
Andrew Wong
Administrative Law Judge

Date Issued: 6/22/2021