

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

B. YEH

) OTA Case No. 20086418
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OPINION

Representing the Parties:

For Appellant:

Michael Carpenter

For Respondent:

Angelina Yermolich, Legal Assistant

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, B. Yeh (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$18,081 plus applicable interest for the 2015 taxable year.

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

ISSUE

Has appellant shown that distributions from retirement accounts were properly excluded from gross income for the 2015 taxable year?

FACTUAL FINDINGS

1. Appellant and appellant’s spouse (W. Yeh) filed a joint California Resident Income Tax Return for 2015, reporting retirement distributions of \$20,683.¹
2. FTB received information that the Internal Revenue Service (IRS) had increased appellant and W. Yeh’s retirement distributions to \$194,971. The total was based on Forms 1099-R (Distributions from Pensions, Annuities, Retire or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.) in appellant’s name and in W. Yeh’s name. After

¹ Appellant’s joint filer, W. Yeh, did not sign the appeal, and therefore we refer only to B. Yeh as appellant. All amounts related to the 2015 tax return and adjustments thereto reflect both appellant and W. Yeh’s joint income.

- reducing the \$194,971 by the \$20,683 already reported, the IRS increased appellant's adjusted gross income (AGI) by \$174,288 and made other adjustments not at issue here.
3. FTB issued a Notice of Proposed Assessment (NPA) and, as relevant to this appeal, increased appellant's California AGI by \$174,288, which reflected the amount reported by the IRS as taxable pensions/annuities. The NPA proposed to assess \$18,081 of additional tax, plus applicable interest. In addition, the NPA proposed additional tax of \$2,228 (2.5 percent of the distributions) for early withdrawal of retirement distributions.
 4. Appellant and W. Yeh were separated on November 1, 2015. A Judgment of Dissolution of Marriage (Judgment) was entered on June 22, 2016. A Marital Settlement Agreement was incorporated into the Judgment, which states in paragraph II.1.4 that W. Yeh is to receive the "North American annuity, account no. ending 4242" as part of W. Yeh's share of the community property. Although appellant was awarded several Roth IRAs and other retirement accounts, the accounts were confirmed as appellant's separate property; not awarded as part of appellant's share of community property.
 5. FTB denied the protest and issued a Notice of Action confirming its NPA.
 6. Appellant filed this timely appeal.
 7. The Office of Tax Appeals requested additional briefing from appellant; namely, that appellant provide a) a copy of a Qualified Domestic Relations Order (QDRO) ordering payment of retirement monies from appellant to W. Yeh, and b) documents showing that appellant made a qualified rollover of \$55,000 received from Pershing LLC. Appellant provided a complete copy of the Judgment but did not provide any other documents by the original due date or by the extended due date.

DISCUSSION

When the IRS makes changes or corrections to an individual's tax return and the changes increase the amount of California tax owed, the taxpayer must report the federal changes and either concede the accuracy of the federal determination or prove that the federal adjustments are erroneous. (R&TC, § 18622(a).) An FTB deficiency assessment that is based on a federal audit report is presumed to be correct, and appellant bears the burden of proving that the determination is erroneous. (*Appeal of Gorin*, 2020-OTA-018P.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof with respect to an assessment based on a federal action. (*Ibid.*)

Internal Revenue Code (IRC) section 61, to which California generally conforms per R&TC section 17071, includes income from whatever source derived, including pensions, annuities, and income from life insurance contracts. (IRC, § 61(a)(8)-(10).) Unless an exemption applies, income from pensions, annuities, and life insurance contracts is includible in the gross income of California residents who receive them. (*Ibid.*) R&TC section 17085, in relevant part, conforms to IRC section 72, pursuant to which early distributions from qualified retirement plans are taxable, and a 10 percent additional tax applies at the federal level. (IRC, § 72(a)(1), (t).) R&TC section 17085(c)(1) reduces the percentage of the tax on early distributions to 2.5 percent for California purposes.² California also generally conforms to IRC section 408(d), which states that retirement distributions are taxable when received in income. (R&TC, § 17501(a).)

On appellant's Wage and Income Transcript, submitted by FTB, the Forms 1099-R reported that appellant and W. Yeh had received taxable retirement distributions totaling \$194,971. Appellant has the burden to show that this was nontaxable income. (*Appeal of Gorin, supra.*) Appellant alleges herein that a) appellant should not be subject to the 2.5 percent additional tax because the distributions were made "incident to a divorce," and b) some of the distributed annuities "were reinvested in the amount of \$55,000."

The 2.5 percent additional tax will not apply to early distributions of retirement when payments are made to an alternate payee pursuant to a QDRO within the meaning of IRC section 414(p)(1). (IRC, § 72(t)(2)(C), as modified by R&TC, § 17085(c)(1); *Hawkins v. Commissioner* (10th Cir. 1996) 86 F.3d 982.) IRC section 414(p)(1) defines a QDRO as, among other things, a Judgment that approves a property settlement agreement and which recognizes the existence of an alternate payee's right to receive all or a portion of the benefits.

The Judgment appellant submitted recognizes W. Yeh's right to receive the benefits in the North American annuity account with a number ending in 4242. Thus, the Judgment may constitute a QDRO (for tax purposes) with respect to that account if the plan participant is appellant and W. Yeh is the alternate payee. Because appellant and W. Yeh each contributed to one or more North American annuity accounts, we have no way of knowing on the record before us who was the participant and who was a potential alternative payee. Moreover, the

² Premature distributions are those a taxpayer receives prior to reach 59-1/2 years of age. (IRC, § 72(t).) Appellant does not allege that this provision applies to the distributions at issue.

distributions at issue were made in 2015 while the Judgment recognizing W. Yeh's right to distributions from the account ending in 4242 was not entered until June 22, 2016, *after* the distributions at issue. Furthermore, we twice invited appellant to produce a QDRO that would apply to the 2015 distributions and did not receive anything in response. Therefore, we conclude that the 2015 early distributions were not excludable from gross income based on a transfer between spouses subject to a QDRO.

Likewise, we requested that appellant provide support for his contention that some of the retirement distributions were rolled over to another qualified account and are therefore not taxable. The amount of a retirement distribution will generally be taxed to the recipient in the year it is received. (IRC, § 402(b)(2).)³ However, the distribution maybe excluded from income if 1) it is paid as an eligible rollover distribution, or (2) such distribution is paid by the recipient to an eligible retirement plan (rolled over within 60 days of receipt).⁴ (IRC, § 402(c)(1)(A)-(B).)

The evidence (Forms 1099-R) shows that each of the distributions totaling \$194,971 were paid to appellant or to W. Yeh in 2015. Appellant alleges, but failed to support, that any of that amount was rolled over by the plan administrator, by appellant, or by W. Yeh into another qualified account within 60 days. We therefore have no basis to conclude that the distributions were nontaxable as qualified rollovers and the distributions are therefore considered taxable.

Appellant has failed to show either that the 2015 distributions were exempt from the premature distribution tax or that any of the distributions were excludable from gross income.

³ California conforms to IRC section 402 with modifications. (R&TC, § 17504.)


⁴ A third exception not at issue here applies when property rather than money is distributed. (IRC, § 402(c)(1)(C).)

HOLDING

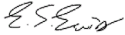
Appellant has not shown that certain distributions from retirement accounts were properly excluded from gross income for the 2015 taxable year.

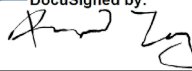
DISPOSITION

FTB’s action is sustained.

DocuSigned by:

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Teresa A. Stanley
Administrative Law Judge

We concur:

DocuSigned by:

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Elliott Scott Ewing
Administrative Law Judge

DocuSigned by:

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Richard Tay
Administrative Law Judge

Date Issued: 8/3/2021