

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
M. COOK

) OTA Case No. 21129191
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OPINION

Representing the Parties:

For Appellant: M. Cook

For Respondent: Topher Tuttle, Tax Counsel III

C. AKIN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, M. Cook (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$1,877, plus applicable interest, for the 2017 tax year.

Appellant elected to have this appeal determined pursuant to the procedures of the Small Case Program. Those procedures require the assignment of a single administrative law judge. (Cal. Code Regs., tit. 18, § 30209.1.) 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 for the 2017 tax year.

FACTUAL FINDINGS

1. Appellant timely filed a California Resident Income Tax Return (Form 540). On the return, appellant made a state adjustment by subtracting appellant's wages earned outside of California. As a result, appellant reported tax of \$0, income tax withheld of \$2,037, and requested a refund of overpaid tax of \$2,037.
2. FTB processed appellant's return and refunded \$2,037 to appellant on April 10, 2018.

3. FTB subsequently examined appellant's return, and on March 23, 2021, issued a Notice of Proposed Assessment (NPA) to appellant. The NPA informed appellant that based on the information provided on appellant's Form 540, it appeared that appellant filed Form 540 in error. The NPA noted that individuals who move into or out of California during a tax year are part-year residents and should file a Form 540NR, California Nonresident or Part-Year Resident Income Tax Return. The NPA recalculated appellant's 2017 tax on a Form 540NR by applying the California method to appellant's reported California taxable income.¹ The NPA proposed California tax of \$2,270, plus applicable interest.
4. Appellant timely protested the NPA, stating that he mistakenly filed Form 540 and he only lived in California from January 1, 2017, through February 28, 2017. Appellant provided a Form 540NR, which computed appellant's tax for the 2017 tax year to be \$1,877. From the \$1,877 of tax, appellant subtracted income tax withheld of \$2,037, and reported overpaid tax of \$160 (\$1,877 - \$2,037).
5. FTB issued a Notice of Action (NOA) revising appellant's California tax to \$1,877, as reported on appellant's Form 540NR provided during the protest.
6. This timely appeal followed.

DISCUSSION

FTB's determination is presumed correct, and the taxpayer has the burden of proving error. (*Appeal of Morosky*, 2019-OTA-312P.) Unsupported assertions cannot satisfy a taxpayer's burden of proof. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing an error in FTB's determination, FTB's determination must be upheld. (*Ibid.*)

On appeal, appellant states that he agrees with the calculation of tax and interest on the NOA; however, appellant states that the NOA does not provide any credit for the amount of

¹ The California method uses a taxpayer's total taxable income (from all sources) to compute the applicable tax rate, which is then applied to the taxpayer's California source taxable income only. (R&TC, § 17041(b)(2).) It also provides computations for prorating the taxpayer's itemized or standard deduction and exemption credits between California and other jurisdictions. (R&TC, §§ 17304 [prorating itemized or standard deduction], 17055 [prorating exemption credits].) Use of the California method preserves the progressive nature of California's tax system, such that taxpayers with similar income amounts from all sources (not just California) are taxed at the same rate on their California source income. (See, e.g., *Brady v. New York* (1992) 80 N.Y.2d 596, cert. den. (1993) 509 U.S. 905.) The Board of Equalization, our predecessor agency, has consistently held that this method does not result in an assessment of tax on income from out-of-state sources. (See *Appeal of Million* (87-SBE-036) 1987 WL 59534; *Appeal of Boone* (93-SBE-015) 1993 WL 460748.)

California income tax withheld. Appellant provides a copy of his Form W-2 reflecting California wages and California income tax withholding of \$2,037 (rounded).

While the evidence in the record clearly establishes that \$2,037 was withheld from appellant’s California wages, the record also establishes that amount was refunded to appellant on April 10, 2018, after appellant filed his original Form 540 reporting \$0 in California tax. Because this amount has already been refunded to appellant, it is no longer available to offset the California tax of \$1,877 as reported on appellant’s Form 540NR provided to FTB at protest and as also reported on FTB’s NOA. Therefore, FTB’s NOA must be sustained.

HOLDING

Appellant has not established error in FTB’s proposed assessment for the 2017 tax year.

DISPOSITION

FTB’s action is sustained.

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Cheryl L. Akin
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Cheryl L. Akin
Administrative Law Judge

Date Issued: 5/19/2022