

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
B. POMAGIER

) OTA Case No. 21057764
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OPINION

Representing the Parties:

For Appellant:

B. Pomagier

For Respondent:

Kristin K. Yeager, Specialist

C. AKIN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, B. Pomagier (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$3,547, and applicable interest, for the 2016 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 shown error in FTB’s proposed assessment of additional tax for the 2016 tax year which is based on a final federal determination.

FACTUAL FINDINGS

1. Appellant timely filed a 2016 California income tax return on April 15, 2017.
2. Subsequently, the IRS made an adjustment to appellant’s 2016 federal income tax return to include a taxable pension or annuity distribution of \$39,700 from National Financial Services LLC (NFS).
3. The federal adjustment is consistent with appellant’s IRS wage and income transcript which shows that NFS issued an IRS Form 1099-R, Distributions from Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., to

- appellant reporting taxable distributions of \$39,700 for the 2016 tax year. Form 1099-R also indicated that the distribution was an early distribution with “no known exception.”
4. On July 27, 2020, FTB issued a Notice of Proposed Assessment (NPA) based on the IRS’s adjustment. The NPA proposed additional tax of \$3,547, which included an early distribution tax of \$992, calculated at 2.5 percent of the \$39,700 distribution.
 5. Appellant protested the NPA, stating that he did not believe the additional taxes for the 2016 tax year were accurate.
 6. Appellant did not provide any additional information and FTB issued a Notice of Action affirming the NPA.
 7. This timely appeal followed.
 8. On appeal, FTB provides an IRS account transcript dated May 25, 2021, which indicates that the IRS has not cancelled or revised the federal assessment for the 2016 tax year.

DISCUSSION

R&TC section 18622(a) requires a taxpayer to concede the accuracy of federal changes to a taxpayer’s income or state where the changes are erroneous. It is well settled that a deficiency assessment based on a federal audit report is presumed to be correct and the taxpayer 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. (*Ibid.*)

California imposes a tax on every California resident’s entire taxable income. (R&TC, § 17041(a)(1).) R&TC section 17071 incorporates Internal Revenue Code (IRC) section 61, which defines “gross income” as “all income from whatever source derived,” including annuity and pension income. (IRC, § 61(a)(9), (11).) Generally, a distribution from a qualified retirement plan or an individual retirement account is included in income for the year of distribution. (IRC, §§ 402(a), 408(d)(1).)¹ IRC section 72(t)(1) imposes an additional tax of 10 percent of the amount of a distribution made to a taxpayer under the age of 59 ½ unless certain statutory exceptions are met. (See, e.g., IRC, § 72(t)(2).) R&TC section 17085(c)(1) adopts IRC section 72(t) for California tax purposes but reduces the rate of the early distribution tax from 10 percent to 2.5 percent.

¹ California generally conforms to IRC sections 402(a) and 408(d), with modifications not relevant to this appeal. (R&TC, §§ 17501(a), 17504, 17507.)

Appellant has not provided any evidence to show that FTB's determination, which is based on a federal adjustment, is erroneous, and in a review of the record, Office of Tax Appeals (OTA) also finds no error. FTB provides a recent IRS account transcript which indicates that the IRS has not cancelled or otherwise revised the federal adjustment, and the federal adjustment to appellant's 2016 tax year continues to include the \$39,700 distribution from NFS in appellant's federal taxable income. FTB also submits an IRS wage and income transcript for appellant, which shows that appellant received a Form 1099-R from NFS reporting that NFS made a \$39,700 taxable distribution to appellant during the 2016 tax year which was not reported on appellant's original California or federal income tax returns. The Form 1099-R information on the wage and income transcript also indicates that the distribution was an early distribution with "no known exception."

While appellant states that he does not believe FTB's proposed assessment of tax for the 2016 tax year is correct, appellant does not explain why he believes this proposed assessment is incorrect. Appellant does not contend that he did not receive the \$39,700 distribution from NFS during the 2016 tax year. Nor does appellant point to any statute which would exclude this distribution from his federal or California taxable income. OTA finds that the \$39,700 distribution from NFS was properly included in appellant's California taxable income for the 2016 tax year pursuant to IRC sections 61(a), 402(a) and/or 408(d). Additionally, appellant's birthdate on his California income tax returns indicates that he had not yet reached the age of 59 ½ during the 2016 tax year, and appellant does not contend that any of the statutory exceptions to the early distribution tax in IRC section 72(t) apply. Thus, appellant has not shown error in FTB's proposed assessment, including the additional 2.5 percent early distribution tax FTB assessed on the \$39,700 distribution from NFS.

On appeal appellant appears to question the timeliness of FTB's proposed assessment, stating that he paid his taxes in 2016 and does not understand how and why FTB is now requesting an additional payment five years after appellant filed his 2016 taxes. In general, FTB must issue a proposed assessment within four years of the date the taxpayer files his or her California return. (R&TC, §19057(a).) Here, appellant filed his California tax return on

April 15, 2017. Because the NPA was issued on July 27, 2020, less than four years from the date the return was filed, OTA concludes that FTB’s NPA was issued in a timely manner.²

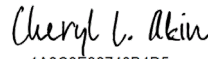
Appellant also asserts financial hardship, noting that he has been unemployed since February 2020, and indicates that he has entered into an offer in compromise with the IRS. While OTA is sympathetic to appellant’s situation, OTA lacks the authority to make discretionary adjustments to the amount of a tax assessment based on a taxpayer’s ability to pay. (*Appeal of Robinson*, 2018-OTA-059P.) Additionally, to the extent appellant similarly wishes to enter into an offer in compromise with FTB, appellant should contact FTB directly.³

HOLDING

Appellant has not established error in FTB’s proposed assessment of additional tax for the 2016 tax year which is based on a final federal determination.

DISPOSITION

FTB’s action is sustained.

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 Cheryl L. Akin
 Administrative Law Judge

We concur:

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 Richard Tay
 Administrative Law Judge

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 Natasha Ralston
 Administrative Law Judge

Date Issued: 9/14/2022

² R&TC sections 19059 and 19060 provide special statutes of limitations for FTB assessments based on final federal determinations. However, because the NPA was issued within the general four-year statute of limitations pursuant to R&TC section 19057(a), R&TC sections 19059 and 19060 will not be discussed further in this Opinion.

³ See <https://www.ftb.ca.gov/forms/misc/4045.html> for information, regarding FTB’s offer in compromise program.