OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **M. WADHWA AND** **P. WADHWA**	OTA Case No. 21057752

OPINION

Representing the Parties:

For Appellants: M. Wadhwa and P. Wadhwa

For Respondent: Noel Garcia, Tax Counsel

A. KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, M. Wadhwa and P. Wadhwa (appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax of $3,660.00, plus applicable interest, for the 2014 tax year. On appeal, FTB concedes a portion of the liability and, based on that concession, FTB is now proposing to reduce the proposed assessment from $3,660.00 to $2,831.23 in additional tax, plus applicable interest. In addition, FTB concedes to interest abatement for the period August 18, 2019, through August 18, 2020. Appellants also concede a portion of the liability and paid $1,791.00 in tax on the conceded amount.[1]

Appellants waived the right to an oral hearing; therefore, the Office of Tax Appeals (OTA) decides this matter based on the written record.

ISSUES

1. Whether appellants established that $14,122 in employee benefits received during the 2014 tax year are excluded from gross income pursuant to R&TC section 17083.
2. Whether appellants established a basis for additional interest abatement.

[1] Appellants deducted $22,077 pertaining to an employer's contribution for healthcare, and this deducted amount was not included in appellants' reported wages. On appeal, appellants concede this subtraction was in error.

FACTUAL FINDINGS

1. Appellant P. Wadhwa (appellant-wife) worked for Amgen USA Inc. (Amgen) during the 2014 tax year.
2. Appellant-wife received employee benefits for the period September 8, 2014, through December 22, 2014, in the amount of $23,029.
3. Appellant-wife did not contribute to State Disability Insurance (SDI) during the 2014 tax year because her employer participated in a Voluntary Plan (VP) approved by the Employment Development Department (EDD) to provide coverage in place of SDI coverage. (See Un. Ins. Code, § 3251 et seq.) The VP was administered by Matrix Absence Management (Matrix).
4. The $23,029 in benefits appellant-wife received consisted of three types of paid leave: (1) $8,907 in Pregnancy Disability Leave (PDL) paid under the VP; (2) $6,296 in Paid Family Leave (PFL) to bond with a new child paid under the VP; (3) and $14,122 in "Salary Continuation" benefits which were not paid from an EDD-approved VP.
5. The PDL and PFL benefits provided appellant-wife with 60 percent of her weekly salary during her absence from work. The $14,122 in Salary Continuation benefits boosted her weekly benefits an additional amount from 60 percent to 100 percent of her weekly salary during her absence (three months).
6. The $23,029 in combined benefits were reported on appellant-wife's Form W-2 by Amgen because Matrix provided notification to Amgen of the benefits paid to appellant-wife pursuant to California Unemployment Insurance Code section 931.5.
7. Amgen reported the $14,122 in Salary Continuation benefits as taxable income on appellant-wife's Form W-2, box 1 (federal wages) and box 12 (state wages). In addition, the Salary Continuation benefits were not reported as third-party sick pay under Box 13 of the Form W-2.
8. Appellants self-prepared and filed a California Resident Income Tax Return (Form 540) for the 2014 tax year on October 15, 2015. On the California return, appellants subtracted the PDL, PFL, and Salary Continuation benefits from their reported wage income, by claiming it as a California adjustment.

9. As relevant to this appeal,[2] FTB determined that the PDL, PFL, and Salary Continuation benefits were taxable and issued a Notice of Proposed Assessment to appellants on September 24, 2018. Appellants timely protested, and FTB issued a Notice of Action dated March 30, 2021, conceding the $6,296 in PFL benefits for baby bonding is nontaxable (See *Appeal of Jindal*, 2019-OTA-372P) and otherwise affirming the NPA.
10. Appellants timely appealed FTB's action to OTA on April 29, 2021.
11. On appeal, FTB now concedes that the $8,907 in PDL for pregnancy-related disability is nontaxable. As a result, only the Salary Continuation benefits, and interest, remain at issue.

DISCUSSION

Issue 1: Whether appellants established that $14,122 in employee benefits received during the 2014 tax year are excluded from gross income pursuant to R&TC section 17083.

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 Gorin,* 2020-OTA-018P, *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 Bindley,* 2019-OTA-179P.)

California residents are subject to tax on their entire taxable income, regardless of where that income is earned or sourced. (R&TC, § 17041(a).) R&TC section 17071 generally incorporates by reference Internal Revenue Code (IRC) section 61, which defines "gross income" to include compensation for services, including fringe benefits and similar items. Thus, California taxes residents on their employment income, including supplemental pay like vacation and sick pay, regardless of source.

Exceptions to the taxation of employment-related income include PDL and PFL benefits, which are administered and paid by EDD. (See Un. Ins. Code, §§ 2601 & 3301.) For example, under California's Unemployment Insurance Code, PDL and PFL are temporary disability insurance programs that provide wage replacement benefits under specified circumstances, such as in connection with the birth of a child. (See Un. Ins. Code, §§ 2625, et. seq., 3301, et. seq.)

[2] Appellants also deducted $22,077 (see footnote 1) and concede this was in error.

PFL is a component of the state's unemployment compensation disability insurance program and is administered in accordance with the policies of the state disability insurance program. (Un. Ins. Code, § 3300(g).) As such, PFL and PDL benefits are treated as unemployment compensation paid pursuant to a governmental program and are excluded from gross income for California purposes. (R&TC, § 17083.) EDD will issue a Form 1099-G for benefits paid by EDD as a substitution for unemployment benefits.[3] In addition, California law also allows an employer to use an approved VP, a private short-term disability insurance plan, for the payment of PFL and PDL benefits in lieu of participating in the SDI coverage (e.g., PFL and PDL) provided by EDD. (See Un. Ins. Code, § 3251.)

With respect to third-party sick pay, 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. (R&TC, § 17131; IRC, § 105(a).) As an exception, amounts received through accident or health insurance for personal injuries or sickness that are not attributable to contributions paid by an employer may be excluded from gross income. (IRC, § 104(a)(3).) Therefore, if an individual uses his or her own funds to purchase a policy covering 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*.)

First, appellant's statements identify the PFL and PDL benefits as paid pursuant to a qualified VP. However, the Salary Continuation benefits are not identified as being paid pursuant to the VP. Furthermore, appellant's employer reported the Salary Continuation benefits to the IRS and FTB as taxable wages for appellant-wife's Form W-2. Based on the above, OTA finds that appellant's Salary Continuation benefits do not qualify as nontaxable unemployment compensation.

Second, with respect to third-party sick pay, appellant-wife's Form W-2 reports paying appellant-wife no third-party sick pay for the tax year at issue. Instead, the $14,122 is reported

[3] IRC section 85 provides that certain unemployment compensation is taxable at the federal level. California law expressly does not follow IRC section 85. (R&TC, § 17083.)

as taxable wages for state income tax purposes in Box 16 of her Form W-2. Furthermore, appellants provided no evidence that appellants paid or contributed any amount for the Salary Continuation benefits. Based on the above, there is no basis to conclude that the Salary Continuation benefits qualify as nontaxable third-party sick pay.

Issue 2: Whether appellants established a basis for additional interest abatement.

If any amount of tax is not paid by the due date, interest is required to be imposed from the due date until the date the taxes are paid. (R&TC, § 19101(a).) Imposition of interest is mandatory and there is no reasonable cause exception to imposition of interest. (*Appeal of GEF Operating, Inc*., 2020-OTA-057P.) FTB may abate interest related to a proposed deficiency to the extent the interest is attributable in whole or in part to: (1) an unreasonable error or delay (2) by an officer or employee of FTB (3) in performing a ministerial or managerial act (4) which occurred after FTB contacted the taxpayer in writing regarding the proposed assessment, and (5) provided no significant aspect of that error or delay is attributable to the taxpayer. (R&TC, § 19104(a)(1), (b)(1); *Appeal of Kishner*, 99-SBE-007, 1999 WL 1080250.) OTA has jurisdiction to determine whether a failure by FTB to abate interest was an abuse of discretion, and OTA has the authority to abate interest in such cases. (R&TC, §§ 20(b), 19104(b)(2)(B).)

The R&TC does not define what is meant by an "unreasonable error or delay." (R&TC, § 19104(a)(1).) R&TC section 19104(a)(1), California's interest abatement provision for unreasonable error or delay, applies the same standard and uses substantially identical language as IRC section 6404(e), which is the comparable federal statute authorizing interest abatement for unreasonable error or delay. Therefore, it is appropriate to look to federal authority for guidance. (*Douglas v. State* (1948) 48 Cal.App.2d 835, 838; *Appeal of Kishner, supra*.)

Congress only intended abatement of interest in circumstances where the failure to do so would be widely perceived as grossly unfair. (*Franklin v. Commissioner* (2008) T.C. Memo. 2008-13 [citing H. Rept. 99–426, at 844 (1985), 1986–3 C.B. (Vol. 2) 1, 844; S. Rept. 99–313, at 208 (1986), 1986–3 C.B. (Vol. 3) 1, 208].) Thus, the mere passage of time does not establish an unreasonable error or delay. (*Ibrahim v. Commissioner* (2011) T.C. Memo. 2011-215.) Further, to show that the interest accrual is attributable to the tax agency, the taxpayer must show that the tax liability would have been paid earlier but for the error or delay. (*Hull v. Commissioner* (2014) T.C. Memo. 2014-36; *Paneque v. Commissioner*, T.C. Memo. 2013–48.)

Here, appellants contend unreasonable delay because FTB did not contact them until September 24, 2018, almost three years after they filed their 2014 tax return. Furthermore, appellants contend that FTB issued the March 30, 2021 Notice of Action affirming the proposed assessment with a modification prior to responding to their additional information.[4]

First, no interest may be abated for periods prior to FTB first contacting appellants in writing about the proposed assessment. (R&TC, § 19104(b)(1).) Here, FTB first contacted appellants on September 24, 2018, and appellants are disputing the period prior to this date. The law is clear that no portion of this time period is eligible for interest abatement because there was no written contact with FTB. As such, OTA finds that FTB did not abuse its discretion in disallowing interest abatement for this period.

Second, appellants contend that FTB issued the March 30, 2021 Notice of Action affirming the proposed assessment without considering additional evidence appellants submitted on December 12, 2020. However, OTA does not see how this fact, even if true, caused an unreasonable error or delay such that OTA may find that FTB abused its discretion in failing to abate interest for a particular period. As noted above, OTA concluded that the $14,122 in Salary Continuation benefits are not deductible, which is a significant part of the unpaid tax and interest liability at issue in this appeal. Furthermore, FTB's processing and review of appellants' additional information ran concurrently with the appeals process before OTA. During the appeals process, there were four extension requests: two were filed by FTB who received an extra 120 days, and two were filed by appellants who received an extra 150 days. OTA does not find that the parties' participation in OTA's normal briefing process for an appeal constitutes an unreasonable delay by FTB.

[4] The period between issuance of the Notice of Proposed Assessment until the issuance of the Notice of Action is not at issue because FTB concedes interest abatement for delay occurring during this timeframe (from August 18, 2019, through August 18, 2020). The balance of the period was the typical time FTB would spend responding to the protest.

HOLDINGS

1. Appellants failed to establish that $14,122 in employee benefits received during the 2014 tax year are excluded from gross income pursuant to R&TC section 17083.
2. Appellants failed to establish a basis for additional interest abatement.

DISPOSITION

FTB's action is revised to reduce the proposed assessment as conceded by FTB from $3,660.00 to $2,831.23 in additional tax. Furthermore, 12 months of interest is abated pursuant to FTB's concession for the period August 18, 2019, through August 18, 2020. FTB's action is otherwise sustained.

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Andrew J. Kwee
Administrative Law Judge

We concur:

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Daniel K. Cho
Administrative Law Judge

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Ovsep Akopchikyan
Administrative Law Judge

Date Issued: 12/15/2022