

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
S. MOORE

) OTA Case No. 21078150
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OPINION

Representing the Parties:

For Appellant: Karl Zufelt, Attorney at Law

For Respondent: Joel Smith, Tax Counsel III

A. KLETTER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, S. Moore (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$48,196.91 for the 2005, 2006, 2008, 2010, and 2011 tax years (collectively, Years at Issue).

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

ISSUE¹

Whether OTA has jurisdiction to consider appellant’s due process and hardship claims for the Years at Issue.

FACTUAL FINDINGS

2005 and 2008 tax years

1. Appellant filed tax returns on which he claimed a Head of Household (HOH) filing status for the 2005 and 2008 tax years.
2. FTB issued an HOH questionnaire to appellant for each tax year but did not receive a response. FTB issued a Notice of Proposed Assessment (NPA) for each tax year, which

¹ In his opening brief, appellant took issue with FTB’s garnishment of his pension distributions, contending that they were exempt assets, but conceded this issue during briefing.

adjusted appellant's filing status to single, and proposed tax, a demand penalty, and applicable interest. Appellant did not timely protest the NPAs and they went final.

3. Later, FTB issued a second NPA for the 2008 tax year conforming to an IRS adjustment, which proposed additional tax due and applicable interest. Appellant did not timely protest the second NPA for the 2008 tax year and it went final.

2006, 2010, and 2011 tax years

4. FTB received information that appellant earned income from various sources for the 2006, 2010, and 2011 tax years. FTB determined that appellant earned sufficient income for the 2006, 2010, and 2011 tax years to prompt a filing requirement, but appellant had not filed a return for these tax years.

5. FTB issued appellant a Demand for Tax Return for each respective year, and when it did not receive a response, issued an NPA for each respective year. Each NPA estimated appellant's income for the respective tax year based on the income reported. Each NPA and proposed tax, penalties, a filing enforcement fee, and applicable interest.

6. Appellant later filed his 2006, 2010, and 2011 tax returns with balances due, which FTB accepted as filed. However, FTB imposed penalties, fees, and interest.

Collection Action, Claim for Refund, and Appeal – Tax Years at Issue

7. FTB received partial payments for the Tax Years at Issue prior to February 15, 2019. On February 15, 2019, FTB took collection action for the balance of tax, penalties, and interest due for the Years at Issue by issuing an Order to Withhold (OTW) from appellant's financial institution.²

8. On May 25, 2019, appellant objected to the OTW.³ However, a week later, FTB received payment from appellant's financial institution that satisfied the liability.

9. On January 14, 2021, appellant filed a claim for refund of the amounts collected through the OTW. On April 9, 2021, FTB denied the claim for refund.⁴

10. Appellant timely appealed.

² An OTW is an order issued by FTB directing a third party to withhold an amount from the taxpayer's assets (other than wages) for payment of tax.

³ FTB includes appellant's objection that the assets were exempt in its briefing, but the record does not indicate whether FTB responded to the objection.

⁴ Appellant argued in his claim for refund that the funds were exempt but withdrew the contention during briefing on appeal.

DISCUSSION

This appeal arose from FTB’s claim for refund denial. In general, OTA’s jurisdiction over a claim for refund denial is to determine the correct liability for the tax years at issue. An administrative agency’s authority to act is of limited jurisdiction and it “has no powers except such as the law of its creation has given it.” (*Appeal of Moy*, 2019-OTA-057P; *Ferdig v. State Personnel Board* (1969) 71 Cal.2d 97, 105.) Per the Rules of Tax Appeals, OTA has no jurisdiction over “whether the appellant is entitled to a remedy for an Agency’s actual or alleged violation of any substantive or procedural right to due process under the law, unless the violation affects the adequacy of a notice, the validity of an action from which a timely appeal was made, or the amount at issue in the appeal.” (Cal. Code Regs., tit. 18, § 30104.)

Here, appellant makes a due process argument that FTB did not follow its internal procedures manual in issuing the OTW. Appellant refers to the Collection Procedures Manual (CPM), section 7, Involuntary Case Resolution, subsection 7.2.2.1, which concerns procedures for issuing an OTW for personal income taxes.⁵ Appellant cites introductory language in this subsection that FTB employees must determine that the taxpayer has received “due process” as defined under the CPM, Section 3, Case Administration.⁶ Appellant does not allege that FTB employees did not make this determination. Even if appellant implies that FTB failed to do so, appellant does not claim that the alleged violation of appellant’s due process affected the adequacy of any of the collection notices, the validity of FTB’s claim for refund denial, or the amount in dispute. Accordingly, OTA has no jurisdiction to review FTB’s due process determination (or failure to make such a determination). (See Cal. Code Regs., tit. 18, § 30104(d).)

⁵ The CPM is publicly available at <https://www.ftb.ca.gov/tax-pros/procedures/collection-procedure-manual-index.html>. Section 7 was last revised on January 19, 2006.

⁶ Section 3 was last revised on October 25, 2018. CPM section 3.0.3.1, Due Process, states that FTB employees are required to ensure that due process was/is provided, and that due process consists of: (*) Notifying the taxpayer of their balance due, (*) Notifying the taxpayer of possible collection action, (*) Ensuring the taxpayer is provided with the necessary legal language prior to taking involuntary actions (e.g., lien, levy), (*) Disclosing the reasons for collection action, (*) Providing the right to a fair hearing, (*) Advising the taxpayer of the right to further appeal.

Appellant’s argument implicates violations of the Taxpayer’s Bill of Rights. Except for reimbursement claims under R&TC section 21013, OTA has no jurisdiction to decide matters based on alleged violations of the Taxpayer’s Bill of Rights. (*Appeal of Jacqueline Mairghread Patterson Trust*, 2021-OTA-187P.) R&TC section 21013 is not applicable here.

Appellant also argues that the OTW should not be imposed due to financial hardship. Appellant raises the issue of financial hardship on appeal and requests that OTA return the case to FTB's collection division for consideration of hardship. Appellant cites CPM subsection 7.2.2.1 which states that "OTWs should not be levied against the following: [* * *] [r]etirement benefits should not be levied upon if a hardship exists."⁷ OTA is a separate and independent agency from FTB, and OTA has no authority to grant appellant's request to return the case to FTB's collection division. Although FTB in certain instances may waive payment for financial hardship,⁸ there is no statute or provision authorizing OTA's review of FTB's financial hardship determinations. Accordingly, OTA has no jurisdiction to take any action based on appellant's assertion of financial hardship.

⁷ Financial hardship is a different matter than due process. CPM section 7.2.2.3, Release of OTW for Personal Income Tax, provides that "An OTW will be released if the taxpayer provides information to FTB that substantiates a financial hardship or that the OTW was issued in error" and lists "the taxpayer has not received due process" as an example of error.

⁸ For example, R&TC section 19112 states that FTB may waive interest if a taxpayer shows that the taxpayer's inability to pay interest was solely due to extreme financial hardship caused by a significant disability or catastrophic circumstance. FTB may also consider appellant's inability to pay under its payment arrangement or offer-in-compromise programs.

If appellant is experiencing difficulties in paying his liabilities once the decision in this appeal is final, he may contact FTB to discuss payment options. (See <https://www.ftb.ca.gov/pay/if-you-cant-pay/index.html>.)

HOLDING

OTA does not have jurisdiction to consider appellant’s due process and hardship claims for the Years at Issue.

DISPOSITION

FTB’s action in denying appellant’s claim for refund is sustained.

DocuSigned by:
Asaf Kletter
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Asaf Kletter
Administrative Law Judge

We concur:

DocuSigned by:
Amanda Vassigh
7B17E958B7C14AC...
Amanda Vassigh
Administrative Law Judge

DocuSigned by:
John O Johnson
873D9797B9E64E1...
John O. Johnson
Administrative Law Judge

Date Issued: 1/6/2023