

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
R. GIRON

) OTA Case No. 21068060
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OPINION

Representing the Parties:

For Appellant:

R. Giron

For Respondent:

Natasha S. Page, Tax Counsel IV

E. LAM, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, R. Giron (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$2,000, 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 demonstrated error in FTB’s proposed assessment, which is based upon a final federal determination.

FACTUAL FINDINGS

1. Appellant filed a timely 2016 California resident return.
2. Subsequently, FTB received information from the IRS, in the form of a CP2000 Data Sheet, indicating that the IRS adjusted appellant’s 2016 federal return by increasing taxable income to account for unreported pension or annuity income of \$11,481,¹ cancellation of debt income of \$11,316 from various banks, and an adjustment to

¹ The unreported pension or annuity income of \$11,481 consists of a \$81 dividend distribution from an Employee Stock Ownership Plan under Internal Revenue Code section 404(k) and an \$11,400 early distribution from a retirement account.

- miscellaneous Schedule A deductions of \$466. These IRS adjustments constituted a final federal determination.
3. Following the final federal determination, FTB issued to appellant a Notice of Proposed Assessment (NPA) for the 2016 tax year that proposed to make conforming state adjustments. The NPA reflected a proposed additional tax of \$2,000, and applicable interest.²
 4. Appellant timely filed a protest of the NPA. FTB issued a Notice of Action affirming the NPA in its entirety.
 5. Appellant filed this timely appeal.

DISCUSSION

R&TC section 18622(a) requires a taxpayer to report federal changes to a return and either concede the accuracy of the federal changes to the taxpayer's income or state where the changes are erroneous. It is well settled that a deficiency assessment based on a federal adjustment to income is presumed to be correct, and a taxpayer bears the burden of proving that FTB's determination is erroneous. (*Appeal of Gorin*, 2020-OTA-018P.) The applicable burden of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof with respect to an assessment based on a federal action. (*Appeal of Gorin*, *supra*.) In the absence of credible, competent, and relevant evidence showing that FTB's determination is incorrect, such determination must be upheld. (*Appeal of Bindley*, 2019-OTA-179P.) A taxpayer's failure to produce evidence that is within the taxpayer's control gives rise to a presumption that such evidence is unfavorable to the taxpayer's case. (*Ibid.*)

Appellant appeals FTB's proposed assessment of additional tax and asserts that (1) he believes that the proposed assessment is incorrect and is confused as to why he owes additional California taxes, but acknowledges that he settled with the IRS for his 2016 federal taxes; (2) he faces financial hardship because he is unemployed with no income and caught the COVID-19 virus; and (3) he wants to settle this matter.

Here, none of appellant's contentions address the correctness of FTB's proposed assessment of additional tax, which is based upon a final federal determination. Therefore,

² The \$2,000 proposed additional tax includes \$285 for the premature distribution tax (i.e., 2.5 percent of the \$11,400 early distribution from appellant's retirement account).

appellant has not met his burden of proving that FTB’s adjustments were incorrect or that the IRS has changed its assessment.

Furthermore, the Office of Tax Appeals (OTA) understands that appellant may be experiencing financial hardship and that he would like to settle this matter, but OTA lacks authority to make discretionary adjustments to the amount of a tax assessment based on a taxpayer’s ability to pay or willingness to settle.³ (*Appeal of Robinson*, 2018-OTA-059P.) Therefore, OTA has no legal basis upon which to make any adjustments to the amount of FTB’s proposed assessment.

HOLDING

Appellant has not demonstrated error in FTB’s proposed assessment, which is based upon a final federal determination.

DISPOSITION

FTB’s action is sustained.

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Eddy Y.H. Lam
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Eddy Y.H. Lam
Administrative Law Judge

We concur:

DocuSigned by:
Natasha Ralston
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Natasha Ralston
Administrative Law Judge

DocuSigned by:
Teresa A. Stanley
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Teresa A. Stanley
Administrative Law Judge

Date Issued: 2/28/2023

³ Although OTA lacks jurisdiction to adjust a final liability based on financial hardship or willingness to settle, FTB may consider appellant’s inability to pay under its payment arrangement or offer in compromise programs when this appeal is final. (See <https://www.ftb.ca.gov/pay/if-you-cant-pay/index.html>.)