

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 220710838  
M. LABOSSIERE AND )  
P. LABOSSIERE )  
\_\_\_\_\_ )

**OPINION**

Representing the Parties:

For Appellants: M. LaBossiere

For Respondent: Caitlin S. Russo, Tax Technician

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, M. LaBossiere and P. LaBossiere (appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$1,808 and applicable interest for the 2017 taxable year.

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

**ISSUE**

Have appellants established error in FTB’s proposed assessment of additional tax, which is based on a federal adjustment?

**FACTUAL FINDINGS**

1. Appellants filed a timely 2017 California tax return reporting an overpayment, which FTB refunded to them.
2. Subsequently, FTB received information that the IRS had adjusted appellants’ taxable income to include an \$18,447 pension distribution issued by Charles Schwab Bank.

3. Appellants received a gross distribution from Charles Schwab Bank of \$32,431. Of that, Charles Schwab Bank reported \$18,447 as a taxable, early distribution with no known exception from the early distribution tax. Charles Schwab Bank withheld federal tax but did not withhold California tax.
4. FTB issued a Notice of Proposed Assessment (NPA) adding the pension income of \$18,447 to appellant's taxable income and proposing to assess an early distribution tax of \$461, which resulted in total additional tax of \$1,808.
5. Appellants protested the NPA claiming that the pension distribution was from funds rolled over from another tax-paid retirement account.
6. FTB denied the protest, and this timely appeal followed.

### DISCUSSION

R&TC section 18622(a) provides that a taxpayer shall either concede the accuracy of a federal determination or state wherein it is erroneous. It is well settled that a deficiency assessment based on a federal audit report is presumptively correct and that a 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 with respect to an assessment based on a federal action. (*Ibid.*) Unless an exemption applies, pensions are includible in the gross income of all California residents who receive them. (R&TC, §§ 17071, 17504; Internal Revenue Code (IRC), §§ 61, 402(a).) R&TC section 17085 in relevant part conforms to IRC section 72, pursuant to which early distributions from qualified retirement plans are taxable, and a 10 percent additional tax applies at the federal level. (IRC, § 72(a)(1), (t).) R&TC section 17085(c)(1) reduces the percentage of the tax on early distributions to 2.5 percent for California purposes.

Appellants assert that appellant-wife rolled over an IRC section 401(a) retirement account (401(a) account) into an IRC section 457 retirement account. Appellants contend that the 401(a) account held a mix of pre-tax funds and post-tax funds. Appellants claim they rolled over the pre-tax funds and requested a distribution of only the post-tax amount. Appellant-wife states that she sent an email to Charles Schwab Bank requesting distribution of post-tax funds and believes that the distribution amount of \$18,447 was the total of the after-tax funds deposited into her 401(a) account. FTB responds that appellants have not established that the retirement distribution was nontaxable nor have they shown that the IRS revised its assessment.

Appellants received a gross distribution from Charles Schwab Bank of \$32,431. Of that, Charles Schwab Bank reported \$18,447 as a taxable, early distribution with no known exception from the early distribution tax. Charles Schwab Bank withheld federal tax but did not withhold California tax. Appellants were unable to present any evidence that the entire \$32,431 distribution consisted of funds that were deposited by appellant-wife after the tax was paid. OTA presented appellants with an opportunity to obtain documentation to support their position, but appellants conceded that they would not be able to do so. Because appellants' position on appeal is unsupported, OTA finds that appellants have not met their burden of proof to show that the \$18,477 distribution, or any portion of it, was nontaxable.

#### HOLDING

Appellants have not established error in FTB's proposed assessment which is based on a federal adjustment.

#### DISPOSITION

FTB's action is sustained.

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Teresa A. Stanley  
Administrative Law Judge

Date Issued: 3/10/2023