

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:)
D. PEREZ) OTA Case No. 230112347
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OPINION

Representing the Parties:

For Appellant: D. Perez
For Respondent: Camille Dixon, Attorney

A. VASSIGH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, D. Perez (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$2,109, and applicable interest for the 2017 tax year.

Appellant 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, § 30209.05.) Appellant waived the right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUE

Whether appellant has established error in FTB’s proposed assessment of additional tax for the 2017 tax year, which is based on a final federal determination.

FACTUAL FINDINGS

1. In 2017, appellant received early distributions from his pension accounts.
2. Appellant filed a timely California Resident Income Tax Return, for the 2017 tax year. Appellant reported tax before exemption credits of \$136. After taking \$1,173 in exemptions, appellant reported zero total tax, and withholdings of \$258, resulting in an

- overpayment of \$258. After \$167.16 of appellant's claimed income was intercepted by San Bernadino County, FTB refunded \$93.40¹ to appellant.
3. The IRS audited and made adjustments to appellant's 2017 federal return. Appellant did not notify FTB of the adjustments that the IRS had made to his 2017 federal return.
 4. FTB received information from the IRS indicating that the IRS had increased appellant's federal taxable income to include unreported pension income of \$42,707. Based on the federal adjustment, FTB made corresponding adjustments to appellant's 2017 California return. FTB issued a Notice of Proposed Assessment (NPA), which increased appellant's taxable income by \$42,707 due to the unreported pension income. FTB imposed a premature distribution tax of \$1,067 and allowed exemption credits of \$467 and additional withholding credit of \$837 (based on the unreported pension income). FTB proposed an additional tax of \$2,109, plus applicable interest.
 5. Appellant protested the NPA, and FTB issued a Protest Determination Letter on November 8, 2022, which explained that the NPA was based on federal adjustments, and that FTB considered its assessment correct.
 6. On December 29, 2022, FTB issued a Notice of Action affirming the NPA.
 7. Appellant then filed this timely appeal.
 8. Appellant's 2017 federal Account Transcript, dated February 14, 2023, does not show that the federal adjustments have been modified, altered, withdrawn, cancelled, or rescinded.

DISCUSSION

R&TC section 18622(a) provides that a taxpayer shall either concede the accuracy of a federal determination or state where it is erroneous. It is well settled that FTB's proposed assessment based on a federal determination is presumed to be correct and a taxpayer bears the burden of proving that the determination is erroneous. (*Appeal of Valenti*, 2021-OTA-093P.) Unsupported assertions are insufficient to satisfy a taxpayer's burden of proof. (*Appeal of Mazer*, 2020-OTA-263P.) In the absence of credible, competent, and relevant evidence showing that FTB's proposed assessment is incorrect, it must be sustained. (*Appeal of Bracamonte*, 2021-OTA-156P.)

¹ FTB does not provide an explanation for the additional \$2.56 that it sent to appellant (\$258 minus \$167.16 equals \$90.84) but based on the record, it appears this amount is interest that FTB refunded to appellant.

R&TC section 17041(a) imposes a tax “upon the entire taxable income of every resident of this state.” R&TC section 17071 incorporates Internal Revenue Code (IRC) section 61, which defines “gross income” as “all income from whatever source derived,” including pension and annuity income. (IRC, § 61(a)(9), (11).) California residents who receive pensions or annuities must include these amounts in taxable income for California purposes. (R&TC, §§ 17041(a), 17071; IRC, § 61(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 to such distributions (the early distribution tax). (IRC, § 72(a)(1), (t).) For California purposes, R&TC section 17085(c)(1) reduces the additional tax rate on early distributions to 2.5 percent. When a first-time buyer uses proceeds of an early distribution to purchase a principal residence within 120 days, \$10,000 of the early distribution will be excluded from calculating the early distribution tax. (IRC, § 72(t)(8).) Here, FTB proposed additional tax based on adjustments made to appellant’s federal income. The record does not show that the federal adjustments have been modified, altered, withdrawn, cancelled, or rescinded. The federal assessment is therefore final. FTB’s proposed assessment based on this final federal assessment is presumed correct. (*Appeal of Valenti, supra.*)

Appellant does not dispute that he received early distributions in the amount of \$42,707 from his pension accounts in 2017. Instead, appellant contends that he already paid the tax including the early distribution tax from withholdings at the time of the distributions. The federal Account Transcript shows that appellant paid the entire federal additional tax assessment (including the federal early distribution tax) through withholding credits for the 2017 tax year. However, appellant did not include this income in his California tax return, and there is no indication in the record in this appeal that he paid California’s early distribution tax. The record does reflect additional, unreported California withholdings of \$837 associated with the unreported pension distributions, which FTB gave appellant credit for on its NPA. FTB reduced the proposed tax for appellant’s unreported withholdings associated with the pension distributions; however, that withholding amount was not sufficient to cover both the California regular tax and the early distribution tax on the distributions.

Appellant also argues that he used the distributed funds as a down payment on the purchase of a home. As explained above, \$10,000 of an early distribution will be excluded from

calculating the early distribution tax if a first-time buyer uses the proceeds to buy a home *within 120 days*. (IRC, § 72(t)(8).) Appellant provides documentation showing a residence sold by his mother in 2018, but he has not provided any documentation showing his ownership of the residence, the purchase date of the residence, or that the early distributed funds were used for the purchase of any residence. Appellant would also need to show that he was a first-time homebuyer and that the property was his principal residence. (*Ibid.*) Appellant has not provided OTA with such evidence. As a result, appellant has not established his entitlement to the \$10,000 exclusion for the purposes of calculating the early distribution tax, and FTB properly imposed the early distribution tax on the full amount of the distributions during the 2017 tax year. Accordingly, appellant has failed to carry his burden of proving that the proposed assessment, which is based on a final federal determination, is incorrect.

Appellant also expresses concern regarding his ability to pay the liability because he suffers from financial hardship and contends with other difficulties. Appellant has endured several challenges and although appellant's situation inspires sympathy, 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.) OTA's function in the appeals process is to determine the correct amount of the taxpayer's California income tax liability. (*Ibid.*) Appellant may seek an installment agreement or offer in compromise with FTB at the conclusion of this appeal.²

² FTB has an installment payment program and an offer in compromise program, which appellant may consider applying for at the conclusion of this appeal. In its brief, FTB mentions its collection programs that address a taxpayer's concerns of financial hardship, and provides the forms for its installment agreement and an offer in compromise programs as Exhibits L and M, respectively.

HOLDING

Appellant has failed to establish error in FTB's proposed assessment of additional tax for the 2017 tax year, which is based on a final federal determination.

DISPOSITION

FTB's action is sustained.

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Amanda Vassigh
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Amanda Vassigh
Administrative Law Judge

Date Issued: 1/23/2024