

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)
J. GRECO) OTA Case No. 230412982
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OPINION

Representing the Parties:

For Appellant: J. Greco
For Respondent: Paige Chang, Attorney
Brad Coutinho, Attorney

A. KLETTER, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, J. Greco (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$2,676 and applicable interest for the 2018 tax year.¹

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.) Office of Tax Appeals (OTA) Administrative Law Judge Asaf Kletter held an oral hearing for this matter electronically via Webex, on January 24, 2024. At the conclusion of the hearing, the record was closed and this matter was submitted for an opinion.

ISSUES

1. Whether appellant has shown error in FTB’s proposed assessment of additional tax.
2. Whether appellant is entitled to interest abatement.

¹ FTB’s February 28, 2023 Notice of Action reduced the proposed additional tax from \$6,966 to \$2,676 to account for third-party withholding of \$4,290 made on appellant’s behalf (\$6,966 - \$4,290 = \$2,676). On appeal, FTB concedes interest from April 15, 2019, the due date for filing the return, through November 14, 2022.

FACTUAL FINDINGS

1. On April 15, 2019, appellant timely filed his 2018 California Resident Income Tax Return (return). The return erroneously reported on line 14, a California subtraction equal to appellant's federal adjusted gross income (AGI); however, the return omitted Schedule CA, California Adjustments – Residents, which reports California adjustments to federal AGI. The return's tax calculations also omitted the California subtraction in computing appellant's California AGI and taxable income. The return reported total tax of \$6,966, California income tax withholding of \$7,864, and overpaid tax of \$898. Appellant requested that FTB refund the overpaid tax to him.
2. In May 2019, FTB issued appellant a Notice of Tax Return Change – Refund (Refund Notice) and an Intercept Funds Notice – State Tax Refund (Intercept Notice). The Refund Notice revised appellant's California AGI to zero because appellant made a math error, reduced his withholding from \$7,864 to \$3,574, and calculated total tax of zero and overpaid tax of \$3,574. The Refund Notice and the Intercept Notice informed appellant that \$980.63 was intercepted per another agency's offset request. The Refund Notice determined that the resulting refund was \$2,593.37 (\$3,574 - \$980.63), which FTB refunded to appellant in May 2019.
3. On October 14, 2022, FTB issued appellant a Notice of Proposed Assessment (NPA), which disallowed the California subtraction reported on line 14. Accordingly, the NPA revised appellant's California AGI and taxable income to equal the California AGI and taxable income originally reported on the return and proposed additional tax of \$6,966.
4. Appellant protested the NPA. FTB discussed the adjustment with appellant. On February 28, 2023, FTB issued appellant a Notice of Action (NOA), which revised appellant's income tax withholding to \$7,864, as originally reported on the return, and revised the additional tax to \$2,676.
5. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant has shown error in FTB's proposed assessment of additional tax.

An FTB determination is generally presumed to be correct, and a taxpayer bears the burden of proving otherwise. (*Appeal of Nag and Rudd*, 2023-OTA-150P.) Unsupported

assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing that FTB's determination is incorrect, it must be upheld. (*Ibid.*)

Here, appellant does not contest FTB's adjustment to increase his total tax to \$6,966. Additionally, appellant does not contest that he received a refund of the overpaid tax in May 2019, on which FTB's proposed assessment of additional tax is based.² Rather, appellant argues that FTB should have immediately caught and corrected the erroneous California subtraction because it was an obvious error, no Schedule CA was attached to the return, and the return's tax calculations omitted the erroneous California subtraction. OTA interprets appellant's argument to assert that FTB untimely notified him of the tax liability.

R&TC section 19368(a) provides that if FTB makes or allows a refund or credit that it determines to be erroneous, in whole or part, the amount erroneously made or allowed may be assessed and collected after notice and demand pursuant to R&TC section 19051,³ by the later of: two years after the refund or credit was made or allowed, or during the period within which FTB may mail an NPA. R&TC section 19057(a) generally provides that FTB shall mail a notice of proposed deficiency assessment to the taxpayer within four years after the return was filed. Here, appellant filed the return on April 15, 2019, and FTB issued appellant the NPA on October 14, 2022, within four years of when the return was filed. Thus, the NPA was timely.

Issue 2: Whether appellant is entitled to interest abatement.

Interest must be assessed from the date a tax payment is due through the date that it is paid. (R&TC, § 19101(a).) Imposing interest is mandatory; it is not a penalty, but it is compensation for appellant's use of money after it should have been paid to the state. (*Appeal of Moy*, 2019-OTA-057P.) Generally, to obtain relief from interest, taxpayers must qualify under

² At the hearing, appellant questioned whether FTB's additional assessment of tax should be \$1,695.37 because the return requested a refund of \$898 but he received a refund of \$2,593.37 ($\$2,593.37 - \$898 = \$1,695.37$). However, the Refund Notice calculated that appellant overpaid tax of \$3,574, not \$2,593.37; FTB refunded \$2,593.37 to appellant due to an agency offset of \$980.63. The additional tax of \$2,676 is equal to the difference between \$3,574, the total of the amount refunded to appellant and the amount paid to another agency on appellant's behalf, and \$898, appellant's originally reported refund on the return ($\$3,574 - \$898 = \$2,676$).

³ R&TC section 19051 pertains to mathematical errors. Erroneous refund assessments made under R&TC section 19368 retain protest and appeal rights without regards to the statute of limitations provided within Part 10.2 of the R&TC, concerning the administration of franchise and income tax laws. (R&TC, § 19368(a).)

R&TC sections 19104 or 21012.⁴ (*Ibid.*) R&TC section 19104(c) provides that FTB shall abate the assessment of all interest on any erroneous refund for which an action for recovery is provided under Section 19411 until 30 days after the date demand for repayment is made. R&TC section 19368(a) also provides that abatement of interest on an amount due under that section is governed by R&TC section 19104(c).

On appeal, FTB agrees that, pursuant to R&TC section 19104(c), interest should be abated until November 14, 2022. That date is 30 days after October 14, 2022, when FTB issued to appellant the NPA demanding repayment.⁵

Appellant argues that it is unfair to pay interest on the additional tax beginning from November 14, 2022. However, appellant does not allege, and the evidence does not show, that either statutory provision for interest abatement applies after November 14, 2022. R&TC section 19104 does not apply because appellant does not allege, and the evidence does not show, that interest after November 14, 2022, is attributable, in whole or in part, to any unreasonable error or delay by an FTB employee. R&TC section 21012 does not apply because FTB did not provide appellant with any requested written advice. Therefore, FTB properly imposed interest after November 14, 2022, and OTA has no basis to order further interest abatement.

⁴ Under R&TC section 19112, FTB may waive interest for any period for which FTB determines that an individual or fiduciary is unable to pay interest due to extreme financial hardship. OTA does not have authority to review FTB's denial of a request to waive interest under R&TC section 19112. (*Appeal of Moy, supra.*)

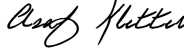
⁵ At the hearing, appellant expressed concern that interest should be calculated based on the NOA's revised additional tax of \$2,676, and not on the NPA's amount. The NOA corrected the NPA to include a withholding credit of \$4,290, and computed interest based on the revised additional tax of \$2,676. See footnote 1, above. Any interest accruing after November 14, 2022, will be computed based on the NOA's revised additional tax of \$2,676.

HOLDINGS

1. FTB’s proposed assessment of additional tax is sustained.
2. Interest is modified to abate interest from April 15, 2019, through November 14, 2022, in accordance with FTB’s concession on appeal. Appellant is not entitled to any further interest abatement.

DISPOSITION

FTB’s action, as modified on appeal to abate interest from April 15, 2019, through November 14, 2022, is sustained.

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Asaf Kletter
Administrative Law Judge

Date Issued: 2/28/2024