

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: )  
W. LOUCKA ) OTA Case No. 230914383  
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**OPINION**

Representing the Parties:

For Appellant: W. Loucka  
For Respondent: Cynthia Kent, Attorney Supervisor

C. AKIN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, W. Loucka (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$1,044 and applicable interest for the 2018 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 Office of Tax Appeals (OTA) decides this matter based on the written record.

**ISSUES**

1. Whether appellant has established error in FTB’s proposed assessment of additional tax.
2. Whether appellant has established a basis for interest abatement.

**FACTUAL FINDINGS**

1. Appellant filed a timely 2018 California Resident Income Tax Return (2018 CA Return) reporting total tax of \$5,750. Appellant reported California itemized deductions totaling \$32,804, including \$17,359 in additional California itemized deductions described as investment expenses. The Schedule CA, California Adjustments, filed with appellant’s

- 2018 CA Return reported total investment expenses of \$20,313, reduced by \$2,954, 2 percent of appellant's reported federal adjusted gross income (AGI).<sup>1</sup>
2. Subsequently, FTB received federal tax information from the IRS and determined that the federal AGI appellant reported on his 2018 CA Return was \$936 less than the federal AGI accepted by the IRS, and that appellant reported more itemized deductions on his 2018 CA Return than appellant reported on this 2018 federal return.
  3. On March 30, 2022, FTB issued a Notice of Proposed Assessment (NPA) increasing appellant's AGI by \$936 and disallowing itemized deductions of \$17,359.<sup>2</sup> The NPA proposed additional tax of \$1,701, plus applicable interest.
  4. Appellant timely protested the NPA and provided an amended return increasing his federal AGI by \$936 and reducing his California itemized deductions to \$32,785. The itemized deductions included \$17,340 in additional California itemized deductions for investment expenses. The Schedule CA filed with appellant's amended return, again reported total investment expenses of \$20,313, reduced by \$2,973, 2 percent of the revised AGI reported per the amended return.
  5. In response, FTB requested that appellant substantiate the reported investment expenses totaling \$20,313.
  6. At protest, appellant provided FTB with documentation substantiating investment expenses totaling \$10,010.<sup>3</sup> Based on this information, FTB explained in a letter dated June 6, 2023, that it would allow an additional deduction for investment expenses in the amount of \$7,037 (total substantiated investment expenses of \$10,010 minus \$2,973, 2 percent of the revised AGI). FTB noted that this would reduce appellant's additional tax amount from \$1,701 per the NPA to \$1,044, plus interest.
  7. On June 15, 2023, appellant remitted a payment of \$1,044 to FTB via check.<sup>4</sup>

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<sup>1</sup> See R&TC section 17076 and IRC section 67 allowing certain deductions only to the extent that the aggregate of such deductions exceeds 2 percent of AGI.

<sup>2</sup> The net amount reported on Schedule CA as investment expenses ( $\$20,313 - \$2,954 = \$17,359$ ).

<sup>3</sup> Specifically, brokerage statements from Morgan Stanley, Fidelity Investments, and DWS reflecting fees totaling, \$6,936, \$2,725, and \$349, respectively.

<sup>4</sup> Appellant also remitted a payment of \$84 to FTB with the amended return on May 10, 2022.

8. Appellant's check was erroneously processed for \$4,044. As a result, \$4,044 was debited from appellant's bank account and paid to FTB on or about June 30, 2023.
9. Subsequently, on July 24, 2023, appellant's bank (U.S. Bank) notified appellant that U.S. Bank had credited \$3,000 to appellant's account, noting that an item (i.e., appellant's check to FTB) had been processed as \$4,044 but should have been \$1,044.
10. On September 12, 2023, FTB issued a Notice of Action (NOA) reducing the proposed tax assessment from \$1,701 to \$1,044, plus applicable interest.<sup>5</sup>
11. This timely appeal followed.
12. On appeal, FTB provides evidence establishing that it received an adjustment request from U.S. Bank on or about October 16, 2023. U.S. Bank notified FTB that appellant's check had been erroneously processed as \$4,044, but should have been processed as \$1,044, and requested repayment of \$3,000. FTB remitted payment of \$3,000 (via check) to U.S. Bank on November 17, 2023.

### DISCUSSION

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

#### Burden of Proof

FTB's determinations are generally presumed correct, and the taxpayer bears the burden of proving otherwise. (*Appeal of Vardell*, 2020-OTA-190P.) Additionally, income tax deductions are a matter of legislative grace, and a taxpayer who claims a deduction has the burden of proving by competent evidence that he or she is entitled to the deduction claimed. (*Appeal of Gelpi*, 2024-OTA-072P.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Ibid.*) In the absence of credible and competent evidence showing error in FTB's determination, FTB's determination will be upheld. (*Ibid.*)

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<sup>5</sup> The NOA noted appellant's payment made on June 15, 2023, and indicated that the payment had not yet been applied to the tax and interest reflected in the NOA. The NOA explained that FTB would apply appellant's payment once the NOA became final. Because appellant timely appealed the NOA to OTA, the NOA is not yet final, and the payment has not yet been applied. (See, R&TC, § 19045(a).) On appeal, FTB explains that appellant's payments of \$84 on May 10, 2022, and \$1,044 on June 15, 2023, have been placed in suspense pending the outcome of this appeal. FTB notes that appellant's payments will be applied to appellant's 2018 tax account once this appeal is final, with the dates of payment reflective of the dates the payment were received (i.e. \$84 will be applied effective May 10, 2022, and \$1,044 will be applied effective June 15, 2023).

### FTB's Adjustments to Appellant's AGI and Itemized Deductions

Here, FTB made two adjustments to appellant's 2018 tax year: (1) increasing appellant's 2018 AGI by \$936 to match the federal AGI amount accepted by the IRS, and (2) disallowing \$10,303<sup>6</sup> of appellant's claimed itemized deductions for investment expenses. FTB's adjustments are presumed correct, and appellant has the burden of proving error. (*Appeal of Vardell, supra.*)

California residents are taxed upon their entire taxable income. (R&TC, § 17041(a).) Taxpayers generally must report the same federal AGI on both their California and federal returns. (See R&TC, § 17072(a) [California conforms to IRC section 62 relating to AGI, except as otherwise provided].) Appellant does not contend that he did not receive this income or that this income is not taxable in California, and in fact, self-assessed and reported this additional income on the amended return he provided FTB at protest. Thus, FTB correctly revised appellant's California AGI to equal his federal AGI, and appellant has not met his burden of establishing error in FTB's determination increasing his California income by \$936.

With respect to the investment expenses, appellant claimed total investment expenses (before application of the 2 percent of AGI floor) of \$20,313, but only substantiated investment expenses totaling \$10,010. Thus, FTB properly disallowed the remaining investment expenses claimed by appellant on his original and amended returns. Income tax deductions are a matter of legislative grace, and a taxpayer who claims a deduction has the burden of proving by competent evidence that he or she is entitled to the deduction claimed. (*Appeal of Gelpi, supra.*) Appellant does not argue and does not provide any evidence on appeal to establish that he is entitled to any additional investment expense deductions. Thus, appellant has not met his burden of establishing error in FTB's determination disallowing appellant's remaining investment expense deduction in the amount of \$10,303.

### Appellant's Arguments Regarding the Erroneously Processed Payment

Appellant does not directly contest the above adjustments. Instead, appellant's only contention on appeal is that he has already paid the additional tax and interest reflected in the NOA. Appellant contends that his payment was received by FTB on June 15, 2023, and that the

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<sup>6</sup> Net investment expenses reported per appellant's 2018 CA Return (\$17,359) minus the net investment expenses allowed by FTB at protest (\$7,037).

payment “should have been applied to taxes due” on that date (i.e., on June 15, 2023). Appellant asserts that FTB has held his payment for over four months now and demands that it be applied to the tax and interest due. Appellant further notes that his check for \$1,044 was erroneously processed for \$4,044 and asserts that “compensation by [U.S.] Bank to [appellant’s] account does not change the fact that the FTB received \$4,044 from [his] account.” As a result, appellant appears to contend that \$4,044 (rather than \$1,044) should be applied to the tax and interest assessed for the 2018 tax year, and that the excess balance should be refunded to him.<sup>7</sup>

While appellant is correct that his check for \$1,044 was initially erroneously processed for \$4,044, this error has since been corrected. Appellant received \$3,000 (\$4,044 - \$1,044) from U.S. Bank on or about July 24, 2023, and FTB remitted the same amount to U.S. Bank on or about November 17, 2023. As such, appellant is not entitled to have \$4,044 applied to his 2018 tax year account because \$3,000 of this amount was returned to him. As application of the correct amount (\$1,044) does not result in an overpayment for appellant’s 2018 tax year account, appellant is not entitled to a refund of the “excess.”<sup>8</sup> As the error has been corrected and appellant is not due a refund, there does not appear to be anything left here for OTA to resolve regarding the erroneous processing of appellant’s June 15, 2023 check payment.<sup>9</sup>

Appellant also takes issue with the fact that FTB has not already applied this payment to the 2018 proposed assessment, contending that this payment should have been applied effective June 15, 2023. However, appellant’s June 15, 2023 payment has not been applied to the 2018 proposed assessment because it is not yet a final tax liability since appellant protested the NPA with FTB and subsequently appealed the NOA to OTA. (See R&TC, §§ 19042 [an NPA is final unless protested within 60-days after the mailing of the NPA], 19045(a) [FTB’s action at protest (NOA) is final unless appealed within 30-days after the mailing of the NOA].) As noted by FTB, appellant’s payments will be applied to the 2018 proposed assessment (effective the dates the payments were made) once the 2018 tax liability is final following the conclusion of this

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<sup>7</sup> Specifically, appellant states, “All references and calculations concerning the June payment should be from \$4,044.” Based on this payment amount, appellant contends that he is due an “overpayment refund check” and that such check “should include accrued interest beginning on [June 15, 2023,] thru the date of the refund check.”

<sup>8</sup> See the discussion under Issue 2, below, for FTB’s computation of interest due.

<sup>9</sup> Appellant appears to acknowledge this, stating in his final brief, “Had I been aware of the FTB’s repayment on November 17, 2023, this snafu could have been resolved six months ago.” However, appellant has not requested dismissal of this appeal with OTA.

appeal. FTB has expressly noted that it will apply appellant's payment of \$1,044 to the 2018 proposed assessment effective June 15, 2023.<sup>10</sup> Thus, there does not appear to be any remaining dispute for OTA to resolve regarding the timing of the application of appellant's payments to the 2018 proposed assessment.

Issue 2: Whether appellant has established a basis for interest abatement.

If any amount of tax is not paid by the due date, interest is required to be imposed from the due date until the date the taxes are paid. (R&TC, § 19101(a).) Interest is not a penalty but is compensation for the taxpayer's use of money which should have been paid to the state. (*Appeal of Balch*, 2018-OTA-159P.) Imposition of interest is mandatory, and it can only be abated in certain limited situations when authorized by law. (R&TC, § 19101(a); *Appeal of Balch*, *supra*.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Moy*, 2019-OTA-057P.) To obtain relief from interest, appellant must qualify under R&TC section 19104, 19112, or 21012. (*Ibid*.) However, based on the evidence and appellant's arguments, none of these statutory provisions apply.

Appellant's only argument with respect to interest appears to be that application of the June 15, 2023 payment in the amount of \$4,044, results in an overpayment which should be refunded to him, and that such refund "should include accrued interest beginning on [June 15, 2023,] thru the date of the refund check." However, as noted above, appellant is not entitled to have \$4,044 applied to his 2018 tax year account because \$3,000 of this amount was returned to him. Application of the correct payment amount (\$1,044) does not result in an overpayment for the 2018 tax year.

Rather, FTB provides a computation showing that \$146.52 of interest had accrued on the \$1,044 proposed tax assessment between April 15, 2019 (the due date of the 2018 tax payment), through appellant's first payment of \$84 on May 10, 2022, and an additional \$47.52 of interest accrued between May 10, 2022, and June 15, 2023, after application of appellant's \$84 payment. Thus, appellant's payments of \$84 on May 10, 2022, and \$1,044 on June 15, 2023, were not

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<sup>10</sup> In addition to the \$1,044 payment made on June 15, 2023, appellant also made a payment of \$84 on May 10, 2022. FTB expressly notes that the \$84 payment will be applied to the 2018 proposed assessment effective the date paid (May 10, 2022).

sufficient to cover the entire liability (taxes plus accrued interest) for the 2018 tax year.<sup>11</sup> As there is a balance due, rather than an overpayment, appellant is not entitled to accrued interest on overpayment. (See R&TC, § 19340.)

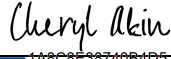
Appellant notes that FTB's holding of the \$3,000 that was erroneously debited from his account "was a benefit to FTB." However, appellant does not point to any statutory or case authority which would permit OTA to abate interest on this basis or direct FTB to pay or credit appellant for interest in these circumstances (i.e., where a check payment is erroneously processed for an incorrect amount and later corrected). Thus, appellant has not established a basis for interest abatement.

### HOLDINGS

1. Appellant has not established error in FTB's proposed assessment of additional tax.
2. Appellant has not established a basis for interest abatement.

### DISPOSITION

FTB's action is affirmed.

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Cheryl L. Akin  
Administrative Law Judge

Date Issued: 8/9/2024

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<sup>11</sup> As of June 15, 2023, accrued interest totaled \$194.04 (\$146.52 + \$47.52), resulting in a total balance due of \$1,238.04 (\$1,044 + \$194.04). Application of appellant's payments of \$84 on May 10, 2022, and \$1,044 on June 15, 2023, results in remaining balance due of \$110.04 as June 15, 2023, (\$1,238.04 - \$84 - \$1,044). Pursuant to R&TC section 19521(b)(1) interest on a balance due is compounded daily.