

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)
G. SCHMIERER) OTA Case No. 240817217
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OPINION

Representing the Parties:

For Appellant: G. Schmierer
For Respondent: Kasey Lewallen, Attorney

H. FAMULARO, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, G. Schmierer (appellant) appeals an action by the Franchise Tax Board (respondent) proposing additional tax of \$5,998 and applicable interest for the 2018 tax year.

Appellant waived the right to an oral hearing; therefore, the matter was submitted to the Office of Tax Appeals (OTA) on the written record pursuant to California Code of Regulations, title 18, section 30209(a).

ISSUE

Whether appellant has established error in respondent’s proposed assessment of additional tax for the 2018 tax year, which is based on a final federal determination.

FACTUAL FINDINGS

1. Appellant received distributions from his retirement account in the amounts of \$3,138.64 and \$52,401.36 (totaling \$55,540) on January 29, 2018, and January 31, 2018, respectively.
2. Appellant received a 2018 Form 1099-R, Distributions from Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc., reflecting that he received a taxable gross distribution from a qualified retirement plan in the amount of \$55,540 as an early distribution with no known exception (2018 early pension distribution) and California tax withheld in the amount of \$62.77.

3. Appellant filed a timely Form 540NR, California Nonresident or Part-Year Resident Income Tax Return for the 2018 tax year, reporting tax of \$5,344, withholdings of \$5,242, and tax due of \$102, which appellant paid on March 30, 2019. Appellant did not report the 2018 early pension distribution of \$55,540 as income on his 2018 California return.
3. The IRS audited and determined adjustments to appellant's 2018 tax year based on appellant's failure to report the 2018 early pension distribution on his 2018 federal return. Appellant did not file an amended 2018 California return to report the additional income adjustments or notify respondent of the IRS's determination.
4. On January 14, 2022, respondent received information from the IRS that it had proposed adjustments to increase appellant's federal taxable income by \$55,540 for the 2018 early pension distribution and assess additional tax, penalties, and interest.¹
5. On August 9, 2023, respondent issued a Notice of Proposed Assessment (NPA) in accordance with the IRS's determination, proposing: (1) an increase to income of \$58,872, comprised of pension or annuity income of \$55,540 and a corresponding reduction to itemized deductions of \$3,332; (2) "Other Tax: Early Distribution – Pension" of \$1,389; (3) additional tax of \$5,998; and (4) applicable interest.
5. Appellant filed a timely protest in response to the NPA. In the protest, appellant conceded that he did not report the 2018 early pension distribution on his 2018 tax return. Appellant, however, asserted that he should only be liable for one-sixth of the proposed total additional tax and applicable interest attributable to the 2018 early pension distribution because he only resided in California for the first two months in 2018 and was a resident of Missouri for the remainder of 2018. Appellant enclosed documentation with his protest to support his assertion, including a 2018 Form 1098 Mortgage Interest Statement (2018 Form 1098) issued to appellant at a Missouri address reporting a mortgage origination date of March 1, 2018, and appellant's March 2018 bank statement reflecting the same Missouri address.
6. By letter dated May 29, 2024, respondent responded to appellant's protest. Respondent stated that the proposed adjustments in the NPA are correct because the IRS's audit

¹ The IRS provided respondent with a CP 2000, which reported an adjustment to appellant's taxable income in the amount of \$55,540 from appellant's retirement plan. The IRS also provided respondent a 2018 federal Account Transcript for appellant, which reflected that the IRS assessed additional tax, an accuracy-related penalty (ARP), and interest. Because respondent did not propose an ARP against appellant, OTA does not further address it in this opinion.

was closed without modification and the IRS assessed the determined amounts.²

Respondent requested that appellant provide “support documents that show when and where did [appellant] withdraw the pension” to determine whether appellant’s 2018 early pension distribution of \$55,540 should be prorated between California and Missouri.

Appellant did not respond to respondent’s request for additional documentation.

7. On August 13, 2024, respondent issued a Notice of Action affirming the NPA.
8. Appellant then filed this timely appeal. Appellant attached documents to his appeal, including a payment history from his retirement account reflecting that appellant received retirement account distributions in the amounts of \$3,138.64 and \$52,401.36 on January 29, 2018, and January 31, 2018, respectively; a loan estimate dated February 22, 2018, for a 30-year conventional home loan for property located in Missouri; and a signed loan document with a copy of a cashier’s check reflecting a personal loan made to appellant by a third party relating to appellant’s purchase of the Missouri property.

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 respondent’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 respondent’s proposed assessment is incorrect, it must be sustained. (*Appeal of Bracamonte*, 2021-OTA-156P.) 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 his case. (*Appeals of Kwon, et al.*, 2021-OTA-296P.)

R&TC section 17041(a) imposes a tax “upon the entire taxable income of every resident of this state” R&TC section 17071 generally incorporates Internal Revenue Code (IRC) section 61, which defines “gross income” as “all income from whatever source derived,” including pension income. (IRC, § 61(a)(11).) Therefore, California residents who receive pension income must include these amounts in taxable income for California purposes. (R&TC, §§ 17041(a), 17071; IRC, § 61(a)(11).)

² Appellant’s 2018 federal Account Transcript, dated May 6, 2024, does not show that the federal adjustments have been adjusted or cancelled.

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, unless one of the exceptions enumerated in IRC section 72(t)(2) applies.

Respondent proposed additional tax based on adjustments made to appellant's federal income. Appellant's 2018 federal Account Transcript, dated May 6, 2024, does not show that the federal adjustments have been adjusted or cancelled. The federal assessment is therefore final. Respondent's proposed assessment based on this final federal assessment is presumed correct. (See *Appeal of Valenti, supra.*)

Appellant does not dispute that he received an early distribution in the amount of \$55,540 from his pension account in 2018 but argues on appeal that some or all the pension income is not taxable in California for several reasons. First, appellant appears to argue that none of the 2018 early pension distribution is taxable in California because appellant paid tax on the distribution to the IRS and Missouri. Next, appellant contends that he should not be subject to California income tax on the 2018 early pension distribution after he moved out of California beginning in March 2018. This argument appears to relate to appellant's assertion in his protest that he should only be liable for California tax on one-sixth of the tax on the 2018 early pension distribution because during 2018 when he received the distributions, he resided in California for the first two months in 2018 and was a resident of Missouri for the remainder of 2018. Finally, appellant appears to argue that he should not be subject to California tax on his 2018 early pension distribution because he took a "hardship withdrawal" from his retirement account in 2018 to purchase a home in Missouri in March 2018.

Appellant's first argument appears to be that he should not owe California tax on the 2018 early pension distribution because he already paid tax on the distribution to the IRS and Missouri. Appellant's 2018 federal Account Transcript reflects that appellant paid the IRS an additional tax assessment (including the federal early distribution tax). However, appellant's payment of federal income tax on his 2018 early pension distribution does not affect whether appellant is liable for California income tax on the distribution. There is no evidence in the record that appellant paid Missouri income tax on the 2018 early pension distribution, but regardless of whether that allegation is true, it does not establish appellant's residency at the

time he received the early pension distributions in 2018 for purposes of whether he owed income tax to California.³

Appellant next argues that he should not be subject to California income tax on the 2018 early pension distribution after he moved out of California beginning in March 2018. Appellant is correct. Appellant would be liable for California income tax on the pension plan distributions in 2018 only if he were a California resident when he received them. (See R&TC, §§ 17041(a), 17071, 17952.5; IRC, § 61(a)(11).) If, for example, appellant were a California resident when he received the January 29, 2018 distribution and a Missouri resident when he received the January 31, 2018 distribution, California income tax liability would only be imposed on the January 29, 2018 distribution. (*Ibid.*)

Appellant provides compelling evidence that he became a Missouri resident starting in March 2018 (e.g., the 2018 Form 1098 issued to appellant at a Missouri address that reflects a mortgage origination date of March 1, 2018, and appellant's March 2018 bank statement reflecting the same Missouri address). (See *Appeal of Mazer, supra* [providing nonexclusive factors used to assist in determining whether a taxpayer was a resident of California, which includes the location of the taxpayer's residential real property and the state of the taxpayer's bank and savings accounts].) However, appellant did not provide utility bills, mortgage or lease statements, or any evidence responsive to respondent's May 29, 2024 letter that requested appellant provide "support documents that show when and where did [appellant] withdraw the pension." Appellant's failure to provide these documents within his control gives rise to a presumption that such documents are unfavorable to his case. (*Appeals of Kwon, et al., supra.*)

Furthermore, the evidence in the record supports respondent's determination that appellant was a California resident when he received the 2018 early pension distribution. Appellant conceded in his protest that he resided in California for the first two months of 2018 when his retirement plan payment history reflects he received the two retirement account distributions totaling \$55,540 in January of 2018. Moreover, on appeal, appellant admits he used the 2018 early pension distribution as a "hardship withdrawal" to purchase his home in Missouri in March 2018. Therefore, appellant has not established error in respondent's determination that he was a California resident when he received the 2018 early pension distribution, and appellant must report this income as taxable for California purposes. (See R&TC, §§ 17041(a), 17071; IRC, § 61(a)(11); *Appeal of Valenti, supra.*)

³ The payment of a net income tax to another state may result in a resident tax credit that may be claimed to reduce California tax under R&TC section 18001.


Lastly, appellant argues he took a “hardship withdrawal” from his retirement account in 2018 to purchase his Missouri home in March 2018. Financial hardship is not one of the exceptions to the early distribution tax enumerated in IRC section 72(t)(2) applicable to appellant’s 2018 early pension distribution.⁴ (See *Arnold v. Commissioner* (1998) 111 T.C. 250, 255.) In addition, appellant has not established his entitlement to exclude \$10,000 for purposes of calculating the early distribution tax as a qualified first-time homebuyer. (IRC, § 72(t)(8).) Therefore, appellant has failed to carry his burden of proving that the proposed assessment, which is based on a final federal determination, is incorrect.

HOLDING

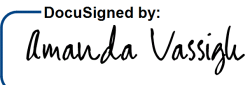
Appellant has not established error in respondent’s proposed assessment of additional tax for the 2018 tax year, which is based on a final federal determination.

DISPOSITION

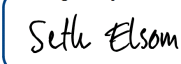
Respondent’s action is sustained.

Signed by:

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 Hans Famularo
 Administrative Law Judge

We concur:
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 Amanda Vassigh
 Administrative Law Judge

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 Seth Elsom
 Hearing Officer

Date Issued: 11/19/2025

⁴ IRC section 72(t)(2)(I) exempts certain withdrawals made for emergency expenses from the additional tax made after December 31, 2023. It is not applicable to the early pension distribution appellant received in 2018.