OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 18011328
	)	
ERNIE AGUILAR	)	Date Issued: June 26, 2018
	)	
	)	
	)	

OPINION

Representing the Parties:

For Appellant: Ernie Aguilar

For Respondent: Rachel Abston, Senior Legal Analyst

A. ROSAS, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19045,[1] Ernie Aguilar ("Appellant") appeals an action by the Franchise Tax Board ("FTB" or "Respondent") determining additional tax due for the 2011 tax year in the amount of $1,404[2] plus interest.

Appellant waived his right to an oral hearing, and therefore we decide this matter based on the written record.

ISSUES

1. Did Appellant establish that Respondent improperly calculated his 2011 tax liability?
2. Did Appellant establish a basis for interest abatement in excess of the amount already allowed by Respondent?

FACTUAL FINDINGS

1. In early 2011, Appellant and his spouse, Nicole Aguilar ("Mrs. Aguilar"), lived in the State of Texas, and Appellant worked for Apple, Inc. ("Apple").

[1] Further undesignated statutory references are to the California Revenue and Taxation Code.

[2] As discussed in this opinion, Respondent revised the additional tax to $1,059.

2. Appellant and Mrs. Aguilar moved to California on or about April 1, 2011. Appellant and Mrs. Aguilar spent a total of 273 days in California during 2011. After moving to California, Appellant continued to work for Apple.

3. In early 2012, Apple issued Appellant a Form W-2 for 2011, which reflected the following: total wages, tips, and other compensation of $162,541 (box 1); total California wages, tips, etc., of $116,023 (box 16); and California income tax withholding of $6,051 (box 17). Of the total Apple wages earned in 2011, Appellant earned $46,518 prior to moving to California and $116,023 after his move.[3]

4. Appellant and Mrs. Aguilar filed a timely joint California Nonresident or Part-Year Resident Income Tax Return (Form 540NR) and reported an overpayment of $319.

5. On or about April 9, 2012, Respondent refunded the reported overpayment of $319 via direct deposit to Appellant's bank account.

6. After auditing their 2011 Form 540NR, Respondent sent Appellant and Mrs. Aguilar a Notice of Proposed Assessment ("NPA"). A side-by-side comparison of the relevant information on the Form 540NR and the NPA is set forth below:

	Form 540NR	NPA
California AGI from all sources	$ 121,906	$ 155,003
California taxable income	$ 114,368	$ 116,252
California tax rate	5.19 %	6.27 %
California tax liability (before exemption credits)	$ 5,936	$ 7,289
Tax liability	$ 5,732[4]	$ 7,136
Tax withholdings	$ 6,051	$ 6,051
Overpayment or tax amount due	($ 319)[5]	$ 1,404[6]

7. Appellant and Mrs. Aguilar protested the NPA via a letter dated September 17, 2015.

[3] The Form W-2 and the California Employment Development Department confirmed these amounts.

[4] This $5,732 amount is referred to below as Appellant's "original tax liability."

[5] California withholding of $6,051 minus original tax liability of $5,732 equals $319.

[6] After taking into account Appellant's $6,051 of tax withholdings and his receipt of a $319 tax refund, the remaining tax amount due was $1,404, plus interest.

8. On February 22, 2017, Respondent sent correspondence to Appellant and Mrs. Aguilar, explaining Respondent's position and requesting a response. Appellant and Mrs. Aguilar did not respond to Respondent's position letter.[7]
9. On April 3, 2017, Respondent mailed a Notice of Action ("NOA") to Appellant and Mrs. Aguilar. The NOA affirmed the additional tax of $1,404, plus additional accrued interest.
10. Appellant filed this timely appeal.[8]
11. During the appeal, Respondent reduced the amounts it had determined as Appellant's California taxable income and total tax to $110,642 and $6,791, respectively. As a result, Respondent also decreased the tax deficiency from $1,404 to $1,059.[9] Appellant no longer disputes this tax determination. Instead, Appellant claims he only owes $740 of additional tax because he does not recall having received the California tax refund of $319.
12. During the appeal, Respondent agreed to abate five months of interest because Respondent stated that it took approximately five months longer than it should have taken to issue its position letter to Appellant.

DISCUSSION

Issue 1 - Did Appellant establish that Respondent improperly calculated his 2011 tax liability?

The Franchise Tax Board's determination is presumed correct and a taxpayer has the burden of proving it to be erroneous. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514.) In taxing nonresidents or part-year residents, California law takes into account a taxpayer's "entire taxable income" for the year, including income from non-California sources, in determining the applicable tax rate. (§ 17041(b)(2).) Generally speaking, the tax rate is applied to "all items of gross income and all deductions, regardless of source" for any part of the year during which the taxpayer was a California resident, and to the "gross income and deductions derived from sources within this state" for any part of the year during which the taxpayer was not a California resident. (*Ibid.*)

[7] There is a factual dispute as to whether Appellant and Mrs. Aguilar received this letter.

[8] Appellant filed this appeal with the Office of Tax Appeals' predecessor-in-interest, the State Board of Equalization. Only Appellant submitted and signed the appeal dated April 18, 2017. Mrs. Aguilar did not appeal.

[9] Revised California total tax of $6,791 minus original tax liability $5,732 equals $1,059.

During the first three months of 2011, Appellant lived in Texas and earned approximately $46,518 from Apple. Respondent has not taxed appellant's Apple wages earned while he was a resident of Texas. Rather, Respondent simply included all of Appellant's wages from Apple ($162,541), including those earned while he resided in Texas, in determining the graduated tax rate that applies to his California income. (§ 17041(b)(2), (i).)

However, Appellant and Mrs. Aguilar committed several errors in preparing their 2011 California Form 540NR. On Column B of their Schedule CA (California Adjustments – Nonresidents or Part-Year Residents), they incorrectly subtracted taxable wages of $40,365, apparently on the ground that this amount was earned outside of California. However, Column B adjustments are for showing differences between California and federal law; Column B is not for sourcing that income. Column E of Schedule CA shows the California source income. Additionally, Appellant and Mrs. Aguilar erroneously overstated the amount of their California AGI, indicating it was $121,906 instead of $116,023. Because of these errors, they arrived at the incorrect California tax rate of 5.19 percent and an incorrect California original tax liability of $5,732.

The mistakes were not one-sided. Respondent also made its share of calculation errors. The NPA indicated Appellant and Mrs. Aguilar's total California tax (after prorated exemption credits) was $7,136, less the original tax of $5,732, for a total additional tax due of $1,404, plus interest. During this appeal, using California taxable income of $116,023[10] and a 6.27 percent California tax rate, Respondent reduced the California total tax due to $6,791 and, therefore, also reduced the amount of additional tax due to $1,059.

Appellant did not meet his burden of proving the revised additional tax due of $1,059 was erroneous. Moreover, it appears Appellant agrees the revised additional tax amount is correct. Appellant simply argues Respondent should reduce the additional tax by $319 because he does not recall receiving the $319 refund.

Respondent provided a printout of his computer records indicating Respondent deposited $319 into Appellant's bank account on or about April 9, 2012. Appellant did not refute

[10] Appellant's Form W-2 from Apple indicated Apple paid Appellant total California wages, tips, etc., of $116,023 (box 16). It is unclear why Appellant reported a California AGI of $121,906. It is also unclear why Respondent, in the NPA, determined a California taxable income of $116,252.

Respondent's evidence by providing a copy of his April 2012 bank statement.[11] Thus, the evidence shows Appellant did in fact receive the $319 refund.

In conclusion, Appellant did not establish that Respondent's determination of additional tax due from Appellant for 2011, in the sum of $1,059, was improper. Moreover, Respondent need not reduce the additional tax by $319, because that amount was refunded to Appellant and no longer is available as a credit in Appellant's 2011 tax account.

Issue 2 - Did Appellant establish a basis for interest abatement?

Interest is charged upon deficiencies of tax due. Tax is due on the original due date of the return without regard to an extension to file. (§ 18567.) If the tax is not paid by the original due date, the law provides for the charging of interest on the balance due, compounded daily. (§ 19101.) FTB's imposition of interest is mandatory, and FTB is not allowed to abate interest except where authorized by law. (*Appeal of Amy M. Yamachi*, 77-SBE-095, June 28, 1977.) Interest is not a penalty; it is compensation for the use of money. (*Appeal of Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.)

For interest to be abated, Appellant must qualify under the provisions of Sections 21012, 19112, or 19104. Interest abatement under Section 21012 is not available here, as Respondent did not provide Appellant with any written advice. Neither is interest abatement available under Section 19112, as there is no evidence of extreme financial hardship caused by a significant disability or other catastrophic circumstance.

Interest abatement is potentially available under Section 19104, if appellant can establish that interest accrued because of an unreasonable error or delay by an officer or employee of Respondent in performing a ministerial or managerial act. On appeal, we review Respondent's interest abatement determination to determine whether Respondent's determination constitutes an abuse of discretion. (§ 19104(b)(2)(B).) To show an abuse of discretion, a taxpayer must establish that, in refusing to abate interest, respondent exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Woodral v. Commissioner* (1999) 112 T.C. 19, 23.)

[11] If Respondent deposited the $319 directly into Appellant's account, Appellant's April 2012 bank statement should reflect this deposit. Appellant did not produce a copy of this bank statement. Appellant's failure to produce evidence that is within his control gives rise to the presumption that such evidence is unfavorable to his appeal. (*Appeal of Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.)

As stated above, Respondent agreed to abate interest for the period from September 17, 2016, through February 22, 2017, because it took Respondent approximately five months longer than it should have taken (17 months instead of 12 months) to issue its position letter to Appellant.[12] Appellant argues he should only have to pay interest for one year, but he makes no showing of any unreasonable errors or delays in the performance of ministerial or managerial acts by an FTB employee or officer. The examination of Appellant's protest required judgment and discretion; it did not constitute a ministerial act. There is no evidence of a managerial error that would entitle Appellant to additional interest abatement beyond the five months agreed to by Respondent.[13]

Therefore, Appellant did not establish that Respondent acted arbitrarily, capriciously, or without sound basis in fact or law, when it declined to abate interest for any period beyond the five months agreed to by Respondent.

HOLDINGS

1. Appellant did not establish that Respondent's determination of additional tax due for 2011, in the revised amount of $1,059, was improper.
2. Appellant did not establish a basis for interest abatement beyond the five months agreed to by Respondent.

DISPOSITION

Respondent's action in assessing additional tax is sustained in part, subject to the following: the amount of additional tax indicated in the NOA, in the sum of $1,404, is hereby reduced to $1,059; the total amount of interest shall be recalculated and based on the reduced amount of $1,059; and the interest shall be abated for the period from September 17, 2016, through February 22, 2017.

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Alberto T. Rosas
Administrative Law Judge

[12] Respondent based this concession upon an analysis of its workload and processing times for protests of similar complexity during the relevant period.

[13] See Treas. Reg. § 301.6404-2(b), which defines and provides examples of ministerial and managerial errors.

We concur:

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John O. Johnson
Administrative Law Judge

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Grant S. Thompson
Administrative Law Judge