

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18011033
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MARK EDWIN HOLM) Date Issued: August 10, 2018
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OPINION

Representing the Parties:

For Appellant: Mark Edwin Holm

For Respondent: Brian Werking, Tax Counsel III

For Office of Tax Appeals: Tom Hudson, Tax Counsel III

HOSEY, Administrative Law Judge: Pursuant to California Revenue and Taxation Code sections 19324 and 19045,¹ Mark Edwin Holm (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in denying appellant’s claim for refund and determining a deficiency in tax and penalties with respect to appellant’s 2013 tax year.

Appellant waived his right to an oral hearing and therefore the matter is being decided based on the written record.

ISSUES

1. Has appellant demonstrated any error in the proposed assessment?
2. Is appellant liable for the late-filing penalty?
3. Is appellant liable for the notice and demand penalty?
4. Is appellant liable for the filing enforcement cost recovery fee?
5. Should a frivolous appeal penalty be imposed and, if so, in what amount?

¹ Unless otherwise indicated, all “Section” references are to sections of the California Revenue and Taxation Code.

FACTUAL FINDINGS

1. Appellant has not filed a California income tax return for the 2013 tax year.
2. Respondent received information from the Employment Development Department indicating that appellant received sufficient income in 2013 to create a tax-filing obligation. Respondent's information showed that appellant received wages of \$66,442 from Weco Industries, LLC, and interest income of \$85 from Prudential Insurance Company of America.
3. On April 21, 2015, respondent issued a Demand for Tax Return (Demand), demanding that appellant file a tax return by May 27, 2015, provide evidence that a return already had been filed, or explain why no tax return was required. The Demand advised appellant that if he did not timely respond to the Demand, a 25 percent penalty would be assessed. Appellant did not respond, and respondent issued a Notice of Proposed Assessment (NPA) dated October 19, 2015, that proposed to assess a net tax of \$2,584.00 (after applying withholding credits of \$694.00), as well as a late-filing penalty of \$646.00, a demand penalty of \$819.50, a filing enforcement cost recovery fee of \$79.00, and applicable interest. The NPA explained that appellant's income had been estimated on the basis of the aforementioned income information.
4. On December 7, 2015, appellant protested the NPA by means of a 99-page letter in which appellant contended that he was not a taxpayer, had no tax-filing obligation, was an inhabitant of California but not of the State of California, had no income or wages, and was not an employee (among other similar arguments). Respondent acknowledged appellant's protest by letter dated December 16, 2015.
5. On January 4, 2016, appellant submitted an invalid 2013 California Nonresident or Part Year Resident Income Tax Return (Form 540NR) that reported zero wages, zero adjusted gross income, zero taxable income, etc., to FTB. Appellant's Form 540NR reported zero income tax withheld, but nevertheless requested a refund of "all withheld amounts." Appellant modified the jurat portion of the form (where taxpayers normally declare under penalty of perjury that the information provided is true, correct, and complete) by adding the words, "without the State of California & under the laws of the United States of America." Respondent reviewed appellant's purported return and determined it to be frivolous and invalid.

6. Respondent nevertheless treated the invalid return as a claim for refund of the taxes withheld from appellant's wages and, on February 9, 2016, sent appellant a letter denying the claim.
7. By letter dated March 1, 2016, appellant filed this appeal from respondent's claim denial letter. In his appeal, appellant contended, among other things, that he is a "nonresident alien" under the Internal Revenue Code, he does not earn wages, he has no income, "the Identifying number FTB is using for me is WRONG," he is "NOT a 'taxpayer,'" "FTB Has No lawful delegated authority to Assess me or make me into a 'Taxpayer,'" and "FTB has no statutory authority to impose penalties."
8. On March 29, 2016, appellant's appeal was acknowledged by the California State Board of Equalization (Board).² The Board's acknowledgement letter advised appellant that the Board may impose up to a \$5,000 penalty pursuant to Section 19714 if it determines that appellant's appeal was instituted or maintained primarily for delay, or that appellant's position on appeal was frivolous or groundless.
9. The proceedings in this appeal were held in suspense at respondent's request, to allow appellant's protest of the NPA to conclude. Respondent scheduled a protest hearing, but appellant did not appear.
10. On October 20, 2016, respondent issued a Notice of Action affirming the NPA and informing appellant that a frivolous appeal penalty of up to \$5,000 could be imposed if the appeal were determined to be frivolous.
11. Appellant filed an appeal from the Notice of Action on November 15, 2016.
12. On December 2, 2016, the appeal of the claim for refund was reactivated by the Board.
13. Appellant's two appeals for the same tax year (2013) were joined into a single appeal by the Board.
14. Respondent issued filing enforcement NPAs against appellant for other tax years: 1995, 1996, 1997, 1998, 2002, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, and 2012.³ Those NPAs have all gone final.

² Commencing on July 1, 2017, Section 20(b) was amended to read, "Unless the context requires otherwise, as used in this code or any other code, 'board' with respect to an appeal, means the Office of Tax Appeals."

³ On June 20, 2014, respondent issued a Demand for Return to appellant for the 2012 tax year. When appellant failed to respond, FTB issued an NPA for that year.

15. The Board previously imposed frivolous appeal penalties of \$750 and \$2,500, respectively, against appellant for appeals he filed from NPAs relating to his 2007 and 2008 tax years.⁴

DISCUSSION

Issue 1 - Has appellant demonstrated any error in the proposed assessment?

FTB's determination is presumed correct, and the taxpayer has the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.) Unsupported assertions are not sufficient to satisfy the taxpayer's burden of proof. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) A taxpayer's failure to produce evidence that is within his control gives rise to a presumption that such evidence, if provided, would be unfavorable to the taxpayer's case. (*Appeal of Don S. Cookston*, 83-SBE-048, Jan. 3, 1983.)

Section 17071 incorporates Internal Revenue Code (IRC) section 61, which defines gross income generally as all income from whatever source derived "subject only to the exclusions specifically enumerated elsewhere in the Code." (*United States v. Burke* (1992) 504 U.S. 229, 233.) The sweeping definition of income in IRC section 61 specifically includes, among other things, compensation for services, gross income derived from business, gains derived from dealings in property, interest, rents, royalties, dividends, annuities, and pensions. Income includes any "accessions to wealth." (*Commissioner v. Glenshaw Glass Co.* (1955) 348 U.S. 426, 431; *Appeals of Robert E. Wesley et al.*, 2005-SBE-002, Nov. 15, 2005.) A taxpayer recognizes income if he or she realizes an economic gain, and that gain primarily benefits him or her personally. (*United States v. Gotcher* (5th Cir. 1968) 401 F.2d 118.)

In this appeal, appellant raises questions about the definition of income and argues that his income was not taxable. However, appellant has neither identified the specific nature of his income nor has he demonstrated that the payments he received from Weco Industries, LLC, and the Prudential Insurance Company of America were exempt from taxation. Significantly, the entities that paid those amounts to appellant treated those payments as taxable income. Therefore, appellant has not met his burden of proving an error in respondent's tax assessment.

⁴ *Appeal of Mark E. Holm*, SBE Case No. 554215, Minutes of Board action taken on June 26, 2012; *Appeal of Mark E. Holm*, SBE Case No. 576514, Minutes of Board action taken on Oct. 24, 2012.

Issue 2 - Is appellant liable for the late-filing penalty?

California imposes a penalty for the failure to file a valid return on or before the due date, unless it is shown that the failure was due to reasonable cause and not due to willful neglect. (§ 19131.) The penalty is computed at five (5) percent of the tax due, after allowing for timely payments, for every month that the return is late, up to a maximum of 25 percent. (§ 19131(a).) Here, the late-filing penalty appears to have been correctly calculated and appellant has not shown any error in the computation method.

The burden is on the taxpayer to establish reasonable cause for the failure to timely file. (*Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982.) To establish reasonable cause, the taxpayer “must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinary intelligent and prudent businessman to have so acted under similar circumstances.” (*Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982; *Appeal of Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) Each taxpayer has a personal, non-delegable obligation to file a tax return by the due date. (*United States v. Boyle* (1985) 469 U.S. 241.) Ignorance of the law is not an excuse for failing to file a timely return. (*Appeal of J. Morris and Leila G. Forbes*, 67-SBE-042, Aug. 7, 1967.)

In this appeal, appellant has not demonstrated any sort of reasonable cause for his failure to file a tax return by the deadline. Appellant’s purported beliefs that he is a nonresident alien, is not subject to California tax, and has no taxable income are without a reasonable basis in fact or law. They do not constitute “reasonable cause” that would excuse appellant’s failure to file his tax return. Therefore, appellant is liable for the late-filing penalty.

Issue 3 - Is appellant liable for the notice and demand penalty?

California imposes a penalty for the failure to file a return or provide information upon FTB’s demand to do so, unless reasonable cause prevented the taxpayer from responding to the demand in a timely manner. (§ 19133.) To establish reasonable cause, a taxpayer must show that the failure to respond to a demand occurred despite the exercise of ordinary business care. (*Appeal of Stephen C. Bieneman, supra.*) The taxpayer’s reason for failing to respond must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Elmer R. and Barbara Malakoff*, 83-SBE-140, June 21, 1983.)

Appellant's mistaken beliefs concerning his tax obligations, even if held in good faith, do not constitute "reasonable cause" that might excuse appellant's failure to respond to FTB's notice and demand for a valid tax return.

The demand penalty is 25 percent of the total tax, determined without regard to payments and withholding credits. FTB will only impose the demand penalty for an unfiled return if the taxpayer fails to respond to a current Demand for Tax Return and FTB has proposed an assessment under Section 19087(a) after the taxpayer failed to timely respond to a Request for Tax Return or a Demand for Tax Return at any time during the four taxable years preceding the year for which the current Demand for Tax Return has been issued. (Cal. Code Regs., tit. 18, § 19133(b).) The demand penalty is designed to penalize a taxpayer for failing to respond to a notice and demand, not for failing to pay the proper tax. (*Appeal of W. L. Bryant*, 83-SBE-180, Aug. 17, 1983; *Appeal of Frank E. and Lilia Z. Hublou*, 77-SBE-102, July 26, 1977.)

Here, the demand penalty appears to have been calculated correctly, and it was properly imposed because appellant failed to timely respond to FTB's Demand for Tax Return dated April 21, 2015. Furthermore, FTB proposed an assessment against appellant on April 21, 2010 for tax year 2008, which falls within the four taxable years preceding the year for which the current Demand for Tax Return has been issued. Since appellant has not established reasonable cause for his failure to timely respond to FTB's Demand for Tax Return, he is liable for the demand penalty determined by FTB.

Issue 4 - Is appellant liable for the filing enforcement cost recovery fee?

Section 19254(a)(2) provides that FTB shall impose a filing enforcement cost recovery fee if a person fails or refuses to make and file a tax return within 25 days after a formal legal demand to file the tax return has been mailed to that person by FTB. Appellant does not appear to dispute the amount of the fee, which is set by the Legislature in the annual Budget Act. (§ 19254(b).) FTB has no authority to waive or modify this fee and appellant has not shown that the fee was for any reason invalid or improper. Accordingly, we uphold FTB's imposition of the filing enforcement cost recovery fee.

Issue 5 - Should a frivolous appeal penalty be imposed and, if so, in what amount?

In accordance with Section 19714, this agency may impose a penalty of up to \$5,000 whenever it appears that a proceeding before it has been instituted or maintained primarily for

delay or that the taxpayer's position in the proceeding is frivolous or groundless.⁵ Under the applicable regulation, the following non-exclusive list of factors are considered in determining whether to impose the penalty, and in what amount: (1) whether the taxpayer is making arguments that have been previously rejected by the Office of Tax Appeals in a precedential opinion, by the Board in a Formal Opinion, or by the courts; (2) whether the taxpayer is repeating arguments that he advanced unsuccessfully in prior appeals; (3) whether the taxpayer filed the appeal with the intent of delaying legitimate tax proceedings or the legitimate collection of tax owed; and (4) whether the taxpayer has a history of filing frivolous appeals or failing to comply with California's tax laws. (Cal. Code Regs., tit. 18, § 30502(b)(1-4).)⁶

Here, appellant has made numerous arguments that previously have been rejected by our predecessor agency and the courts, such as his argument that wages are not income.⁷ (See, e.g., *Boyce v. Commissioner*, T.C. Memo. 1996-439, affd. (9th Cir. 1997) 122 F.3d 1069; *Appeal of Robert E. Wesley, et al.*, supra; *Appeal of La Vonne A. Hodgson*, 2002-SBE-001, Feb. 6, 2002; *Appeal of Michael E. Myers*, supra; *Appeal of Alfons Castillo*, 92-SBE-020, July 30, 1992; *Appeal of Walter R. Bailey*, 92-SBE-001, Feb. 20, 1992; *Appeals of Fred R. Dauberger, et al.*, 82-SBE-082, Mar. 31, 1982). In addition, appellant baselessly asserts that he is a "nonresident alien" under the Internal Revenue Code, that he does not earn wages, that he has no income, that "the Identifying number FTB is using for me is WRONG," that he is "NOT a 'taxpayer,'" that FTB has "[n]o lawful delegated authority to Assess me or make me into a 'Taxpayer,'" and that "FTB has no statutory authority to impose penalties."

⁵ Section 19714 refers to proceedings before the "State Board of Equalization," however, Section 20(b) explains that this phrase now refers to the Office of Tax Appeals because the State Board of Equalization's authority to handle income and business tax appeals has been transferred to this agency.

⁶ The Office of Tax Appeals' regulation concerning imposition of the frivolous appeal penalty is virtually identical to its predecessor Board's regulation on this subject. (See Cal. Code Regs., tit. 18, § 5454.)

⁷ Appellant filed an Appeal Letter received March 3, 2016 concerning the denial of his claim for refund (approximately 39 pages), an Appeal Letter received November 16, 2016 concerning the Notice of Action (approximately 1,030 pages), and an Opening Brief received on March 22, 2017 concerning the consolidated appeal (49 pages). In addition, appellant submitted a compact disk containing two publications (3,073 pages in total). To avoid repetition, appellant's contentions from all of three submissions (1,118 pages) and the compact disk (3,073 pages) are summarized here.

We take this opportunity to list the types of issues and arguments Appellant has set forth that are considered frivolous when raised in an appeal to the Office of Tax Appeals:⁸

- Wages, salaries, commissions and compensation received from personal labor/services do not constitute income (see *Appeals of Fred R. Dauberger, et al., supra*);
- Federal reserve notes do not constitute legal tender (*ibid.*);
- There is no legal obligation to file personal income tax returns (*ibid.*);
- An alleged denial of constitutional rights under the 5th, 7th and/or the 14th Amendments to the United States Constitution (*ibid.*);
- The Office of Tax Appeals, Board and/or FTB does not have jurisdiction to administer and/or rule on income tax matters (*ibid.*);
- An appellant is not a “taxpayer” as defined by statute (*ibid.*);
- Personal income tax is an unapportioned direct tax in violation of the U.S. Constitution (*ibid.*);
- Only gold and silver coins are legal tender (see *Appeals of Frank D. and Else O’Neill, 83-SBE-269, Dec. 13, 1983*);
- It would be perjury to sign a tax return (see *Appeals of Walter Bailey, supra*);
- FTB’s protest hearing denied due process rights (*ibid.*);
- Appellant, although living and working in the State of California was not a “resident” subject to taxation by California (see *Appeal of Alfons Castillo, supra*);
- Appellant claimed to be a “citizen” of the “Republic of California,” not a resident of the State of California (*ibid.*);
- Appellant’s California wages were not taxable because appellant was not engaged in a trade/business in California that is subject to taxation (*ibid.*);
- IRC section 871 prevents taxation by California (see *Appeal of Michael E. Myers, supra*);
- IRC section 861 prevents taxation by California (*ibid.*);
- IRC section 911 prevents taxation by California (*ibid.*);

⁸ We note that many of these arguments were described as frivolous in the *Appeals of Robert E. Wesley et al., supra*.

- IRC section 61 restricts tax to income gained only from agricultural activities (*ibid.*);
- Filing a zero return (IRS Notice 2005-30, I.R.B. 2005-14, Mar. 14, 2005);
- Claiming that tax can be avoided by referring to a separate “straw man” entity created by the use of the taxpayer’s name in capital letters in government documents (*ibid.*);
- Claiming the 16th Amendment is invalid (*ibid.*);
- Deducting the value of labor (*ibid.*);
- Misinterpreting the meaning of person or citizen, residents of states, territories, etc., as not being residents of the U.S. (*ibid.*);
- Claiming filing a tax return is voluntary and that no statute requires the filing of a return (*ibid.*);
- Filing documents in lieu of a return (*ibid.*);
- The action of FTB is barred by operation of the Uniform Commercial Code (UCC) (see Rev. Rul. 2004-31, 2004-12 I.R.B., Mar. 22, 2004);
- FTB has not submitted a “verified” or signed tax bill (*ibid.*); and
- Computer-created income information is not valid evidence to support an NPA (*ibid.*).

As discussed in *Appeals of Robert E. Wesley et al., supra*, by no means is this list exhaustive. Furthermore, the IRS publication “The Truth about Frivolous Tax Arguments” (<https://www.irs.gov/privacy-disclosure/the-truth-about-frivolous-tax-arguments-introduction>, updated yearly) lists and elaborates on the frivolous positions providing further explanation and authority for why these positions are frivolous.

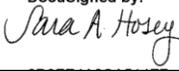
The Board previously imposed a frivolous appeal penalty of \$750 for appellant’s appeal regarding his 2007 tax year. The Board also has imposed a \$2,500 frivolous appeal penalty with respect to appellant’s appeal concerning his 2008 tax year. The record shows that Appellant has demonstrated a pattern of filing frivolous appeals and failing to comply with California’s tax laws. Appellant has failed to file returns for well over a decade and has had two frivolous appeal penalties imposed against him. Appellant was notified when he filed this appeal that if he raised the same frivolous arguments as he has in prior appeals, a penalty of up to \$5,000 under Section 19714 could be imposed. Despite this warning, appellant has pursued this appeal raising the same discredited and frivolous arguments. We find, therefore, that imposition of the frivolous appeal penalty in the maximum amount of \$5,000 is warranted in the circumstances of this case.

HOLDINGS⁹

1. Appellant has failed to demonstrate any error in the proposed assessment.
2. Appellant is liable for the late-filing penalty as determined by FTB.
3. Appellant is liable for the notice and demand penalty as determined by FTB.
4. Appellant is liable for the filing enforcement cost recovery fee of \$79.
5. We impose a frivolous appeal penalty against appellant in the amount of \$5,000 pursuant to Section 19714.

DISPOSITION

Respondent's action is sustained in full and a frivolous appeal penalty of \$5,000 is imposed.

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Sara A. Hosey
Administrative Law Judge

We concur:

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Teresa A. Stanley
Administrative Law Judge

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Jeffrey G. Angeja
Administrative Law Judge

⁹ In reaching our holdings herein, we have considered all arguments made by appellant, and to the extent not mentioned above, we find them to be moot, irrelevant, or without merit.