OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **MELANIE PHUONG-MAI HA AND MIKELL CRUTHIRD**	OTA Case No. 18010998 Date Issued: October 31, 2018

OPINION

Representing the Parties:

For Appellants: Melanie Phuong-Mai Ha
Mikell Cruthird

For Respondent: Donna Webb, Staff Operation Specialist

A. VASSIGH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045[1], Melanie Phuong-Mai Ha and Mikell Cruthird (appellants) appeal an action by the Franchise Tax Board (FTB or respondent) in proposing an assessment of $4,537 in additional tax, plus applicable interest, for the 2011 tax year.

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

ISSUE

Whether appellants established error in FTB's proposed assessment of tax, which is based on federal changes.

FACTUAL FINDINGS

1. Appellants filed their 2011 California tax return reporting federal adjusted gross income (AGI) of $4,248, California AGI of $6,608, and zero taxable income.
2. Subsequently, respondent received federal tax information from the Internal Revenue Service (IRS) showing appellant's federal AGI (as accepted by the IRS) as $126,813.

[1] All further undesignated statutory ("section" or "§") references are to sections of the California Revenue and Taxation Code.

3. Respondent then reviewed appellants' California tax return and determined that appellants had understated their income by $122,565 (i.e., appellants' AGI of $4,248 reported on Form 540 was lower than appellants' AGI of $126,813, as reported by the IRS). Based on the federal information, respondent issued a Notice of Proposed Assessment (NPA) on March 27, 2015, that increased appellant's California AGI by $122,565, to a taxable income of $104,952. The NPA proposed additional tax of $4,537, plus applicable interest.
4. Appellants timely protested the NPA by means of a letter dated June 19, 2015, in which they stated that they filed an amended joint federal return for the 2011 tax year, reporting federal AGI of $7,920. Appellants provided with their protest a copy of an amended joint federal tax return for 2011 and a federal Form 4852 (Substitute for Form W-2, Wage and Tax Statement, or Form 1099-R, Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc.) in which appellant Melanie Phuong-Mai Ha (appellant-wife) reported zero wages. In answer to the question of how she determined the amount she listed as her wages, she explained, "Since I worked for my employer in the non-federal private business sector, in 2011 I received no wages as defined in IRC sections 3401 & 3121. So wages listed . . . are corrected to 0 . . . ." Appellant-wife also stated that the 2011 Form W-2 issued by her employer erroneously reported her wages.
5. In response to appellants' protest, respondent asked appellants to provide, by September 29, 2016, an updated certified copy of their 2011 IRS transcript to verify that the amendments to their 2011 federal tax return were accepted by the IRS. When appellants failed to respond within the deadline, respondent issued a Notice of Action (NOA) affirming the NPA.
6. The NOA proposed additional tax in the amount of $4,537, plus interest. Appellants timely filed the instant appeal of FTB's NOA for the 2011 tax year.
7. The 2011 IRS Wage and Income Transcript for Ms. Ha shows that Palo Alto Medical Foundation reported that it paid appellant-wife $40,592 in wages and IHSS Recipients reported that it paid her $6,607 in wages that year.
8. The 2011 IRS Wage and Income Transcript for Mikell Wayne Cruthird shows that Therma reported that it paid him $81,971 in wages and that U.A. Local 393 Health and

Welfare reported that it paid him $1,800 in wages.

9. Appellants' IRS Account Transcript for tax year 2011 (dated August 8, 2017) shows their federal AGI as $126,813.

10. Though the IRS received amended 2011 tax returns on three separate occasions from April 2015 to November 2017, the IRS did not accept these returns or revise appellants' federal AGI.

DISCUSSION

Burden of Proof

A proposed deficiency assessment based on federal adjustments to income is presumed to be correct and the taxpayer bears the burden of proving that respondent's determination is erroneous. (*Appeal of Wing E. and Fay D. Lew*, 78-SBE-073, Aug. 15, 1978; *Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.)[2] Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Aaron and Eloise Magidow*, *supra*.) Section 18622(a) provides that a taxpayer shall either concede the accuracy of a federal determination or state wherein it is erroneous.

Appellants argue in their appeal letter that they have disputed the IRS's assessment of their federal AGI, and that their amended tax return was not processed properly. Appellants filed amended federal tax returns on three occasions, and contrary to appellants' claim, their IRS Account Transcript shows that the returns were received and reviewed but that no change was made to the IRS's tax assessment. The federal AGI upon which the NPA was based has never been adjusted and there is no indication that the IRS is considering revising it. Also, as discussed further below, appellants' IRS Wage and Income Transcripts for 2011 support the federal AGI amount shown in the IRS Account Transcript. Appellants have not provided evidence supporting their contentions that the IRS did not properly process these amended returns or that there is error in respondent's proposed assessment, which is based on the IRS's determination of their federal AGI.

[2] Published decisions of the Board of Equalization (BOE), designated by "SBE" in the citation, are generally available for viewing on the BOE's website: <www.boe.ca.gov/legal/legalopcont.htm>.

Inclusion of Wages in Gross Income

Section 17041(a) provides, in pertinent part, that tax shall be imposed upon the entire taxable income of every resident of California. Sections 17071 and 17072 define "gross income" and "adjusted gross income" by referring to and incorporating Internal Revenue Code ("IRC") sections 61 and 62, respectively. IRC section 61 defines "gross income" as including "all income from whatever source derived," including compensation for services. Income includes any "accessions to wealth." (*Commissioner v. Glenshaw Glass Co.* (1955) 348 U.S. 426, 431.) Wages and compensation for services are gross income within the meaning of IRC section 61. (*United States v. Romero* (9th Cir. 1981) 640 F.2d 1014; *Appeals of Robert E. Wesley, et al.*, 2005-SBE-002, Nov. 15, 2005.)

Appellants' employers reported on federal Forms W-2 that appellants earned wages in 2011. Appellants must include their wages in their gross income for 2011, pursuant to IRC section 61. Appellant-wife's argument that her wages do not constitute income is similar to frivolous arguments which the Board of Equalization, the IRS, respondent, and the courts have consistently and emphatically rejected. (See, e.g., *Appeal of Michael E. Myers,* 2001-SBE-001, May 31, 2001; *United States v. Buras* (9th Cir. 1980) 633 F.2d 1356; *Fox v. Commissioner*, T.C. Memo. 1996-79.)[3] With regard to the contention that wages from private-sector employers are not income, the courts have consistently held that this argument is frivolous and without merit. (See, e.g., *Briggs v. Commissioner*, T.C. Memo. 2016-86; *Sullivan v. United States* (1st Cir. 1986) 788 F.2d 813; *Waltner v. Commissioner*, T.C. Memo. 2014-35.) The IRS has concluded that this argument is based on a misinterpretation of IRC section 3401 and has warned taxpayers that this argument is frivolous.[4]

As held in Revenue Ruling 2006-18, I.R.B. 2006-15, Apr. 10, 2006, "[f]ederal income tax laws do not apply solely to federal employees . . . and any contrary contention is frivolous. The terms 'employee' and 'wages' as used by the Internal Revenue Code apply to all employees, unless specifically exempted by the Internal Revenue Code. The income tax withholding provisions do not affect whether an amount is gross income." Therefore, appellant-wife's

[3] The IRS published a list of identified frivolous positions, including the arguments asserted by appellant, in IRS Notice 2010-33 and the IRS publication, "The Truth About Frivolous Tax Arguments." (See <http://www.irs.gov/Tax-Professionals/The-Truth-About-Frivolous-Tax-Arguments-Introduction>.)

[4] See <https://www.irs.gov/privacy-disclosure/the-truth-about-frivolous-tax-arguments-section-i-a-to-c>.

arguments that her wages are not income have no merit. As such, appellants have not shown that they may exclude wages from their taxable income for the 2011 tax year.

Furthermore, appellants are advised that if they file additional appeals making frivolous arguments, a penalty of up to $5,000 per appeal may be imposed.

HOLDING

Appellants have not shown that respondent's proposed assessment for 2011, which was based on IRS adjustments, is incorrect.

DISPOSITION

Respondent's proposed assessment for the year 2011 is sustained in full.

DocuSigned by:
Amanda Vassigh
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Amanda Vassigh
Administrative Law Judge

We concur:

DocuSigned by:
Neil Robinson
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Neil Robinson
Administrative Law Judge

DocuSigned by:
Jeffrey I. Margolis
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Jeffrey Margolis
Administrative Law Judge