OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	OTA Case No. 18011126
KEITH J. PONTHIEUX	Date Issued: December 27, 2018

OPINION

Representing the Parties:

For Appellant:	Keith J. Ponthieux
For Respondent:	Anne Mazur, Specialist Andrew Amara, Tax Counsel Cynthia Kent, Tax Counsel
For Office of Tax Appeals (OTA)	Andrea Long, Tax Counsel

KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, Keith J. Ponthieux (appellant) appeals actions taken by respondent Franchise Tax Board (FTB) on proposed assessments of: (1) $3,427 in tax, plus interest and penalties for the 2013 tax year; and (2) $3,520 in tax, plus interest and penalties, for the 2014 tax year. These two appeals were jointly heard by OTA Administrative Law Judges Andrew Kwee, Grant Thompson, and Sara Hosey on September 25, 2018, in Sacramento, California. At the conclusion of this hearing, the record was closed and this matter was submitted for decision subject to OTA taking official notice of appellant's prior appeal history with OTA's predecessor, the Board of Equalization (board).[1]

ISSUES

1. Whether appellant established error in the proposed assessments for 2013 and 2014.
2. Whether appellant established a basis for abatement of the late filing penalties, demand penalty, or filing enforcement fee.

[1] R&TC section 20 provides that, unless the context requires otherwise, on and after January 1, 2018, the term "board," with respect to an appeal, means OTA.

3. Whether to impose a frivolous appeal penalty.

FACTUAL FINDINGS

1. Appellant, a California resident, holds a Resident Insurance Producer license. Appellant's insurance license type is valid for "Life-Only" and for "Accident and Health" insurance in California. Appellant has continuously held his California insurance license since August 2, 1990. According to FTB's records, appellant has never filed a California tax return.
2. During 2013 and 2014, appellant was a managing LLC member of Asset Preservation and Associated Insurance Services, LLC (APAIS). According to the records of the California Department of Insurance (CDI), during the tax years at issue appellant was "authorized to transact" insurance on behalf of APAIS, and he was also authorized to sell insurance products on behalf of a number of different insurance companies.
3. An Individual Disclosure Brochure for appellant filed with the United States Securities and Exchange Commission (SEC), dated February 2, 2016, disclosed that appellant has been a Director of APAIS since January 2004. The SEC disclosure also reports that: "Keith James Ponthieux is a licensed insurance agent with [list redacted[2]] and . . . will offer clients advice or products from those activities. Client should be aware that these services pay a commission." A separate document filed with the SEC, and dated February 21, 2017, reports that appellant "spends 50% of his time on marketing for [APAIS.]"
4. Appellant's daughter, Maria Laureen Platon, holds the same type of insurance license as appellant. According to CDI's records, she is not authorized to sell insurance on behalf of any insurance company, and she is also not listed as being authorized to transact insurance on behalf of APAIS, or any other entity. Ms. Platon holds a 98.5 percent share in the profits, losses, and capital of APAIS.
5. Appellant is separately registered as an Investment Adviser Representative with the SEC. According to the SEC's records, appellant passed the Uniform Securities Agent State Law Examination (S63) on November 17, 1988. The SEC's records also indicate that beginning May 2013, appellant "is engaged in teaching adult financial education to

[2] The SEC disclosure lists the names of insurance companies on behalf of whom appellant is authorized to sell insurance products (see factual finding two, above).

seniors through a DBA by the name of 'Norcal Financial Education.' " A separate document filed with the SEC, dated February 21, 2017, reports that appellant "may offer clients advice or products from those activities" of teaching adult financial education to seniors through Norcal Financial Education and "clients should be aware that these services may involve a conflict of interest." The disclosure also explains that "commissionable products conflict with the fiduciary duties of a registered investment adviser."

6. On December 30, 2013, appellant's daughter and son-in-law quitclaimed a single-family residence in Benicia, California, to appellant. Public records, submitted by FTB, report that this was a "non arms-length transaction." Appellant's daughter and son-in-law had purchased the property for $712,000 on September 25, 2006. According to the public records, appellant's daughter currently lives at a residence in Fairfield, California.

Appellant's Appeal for the 2013 Tax Year

7. On June 30, 2015, FTB sent appellant a Demand for Tax Return (Demand) stating that it had no record of receiving his 2013 return. The Demand required appellant to file a 2013 return or explain why he was not required to file a 2013 return.
8. On July 23, 2015, appellant timely responded to the 2013 Demand, stating he did not have a filing requirement because he earned no wages or income in 2013. Appellant stated that he was single, under the age of 65, and he supported himself in 2013 by living with his children and watching his grandchildren. In support, appellant provided a Social Security earnings statement for 2013.
9. FTB issued appellant a Notice of Proposed Assessment (NPA) dated May 9, 2016. The NPA estimated appellant earned taxable income of $64,207 during 2013, based on the average income reported by individuals who held an insurance license in California for that year. The NPA proposed tax of $3,427, a delinquent filing penalty of $856.75, a demand penalty of $856.75, and a filing enforcement fee of $79.00, plus applicable interest.
10. Appellant protested the NPA in a letter dated June 27, 2016. Following protest proceedings, FTB issued a Notice of Action (NOA) dated March 29, 2017, affirming the

NPA. Appellant timely appealed this case to OTA.[3]

Appellant's Appeal for the 2014 Tax Year

11. On January 28, 2016, FTB sent appellant a Demand for 2014. The Demand required appellant to file a 2014 return or explain why he was not required to file a 2014 return by March 2, 2016.
12. On March 16, 2016, appellant untimely responded to the 2014 Demand, stating that he did not have a filing requirement, providing the same explanation as he previously provided in his response to the 2013 Demand, and including a Social Security earnings statement for 2014. Additionally, appellant stated he was unable to timely respond to the 2014 Demand because he just returned home from a three-month vacation.
13. FTB thereafter issued appellant an NPA dated May 9, 2016. The NPA estimated appellant earned taxable income of $65,803 for 2014, based on the average income reported by individuals who held an insurance license in California in that year. The NPA proposed a total tax of $3,520, a delinquent filing penalty of $880, a demand penalty of $880, and a filing enforcement fee of $79, plus applicable interest.[4]
14. Appellant protested the NPA via letter dated May 2, 2016, which FTB denied via NOA dated March 29, 2017. Appellant timely appealed this case to OTA.

Procedural History

15. In his appeals, appellant contended that his Social Security earnings statements prove he had no income for 2013 and 2014, and further contending that he timely responded to the 2013 and 2014 demands. Appellant also contended that FTB discriminated against him, because it previously accepted his Social Security earnings statements as proof of no income for 2000, 2001, 2003, and 2005.
16. By letter dated September 18, 2017, FTB conceded the $856.75 demand penalty and the $79.00 filing enforcement cost recovery fee proposed for 2013, but contended that appellant failed to provide sufficient evidence to establish he earned no income for 2013 or 2014.

[3] The appeal was originally filed with the board, and subsequently transferred to OTA on January 1, 2018.

[4] As relevant, prior to the 2014 filing enforcement action, FTB issued an NPA for 2011 on April 2, 2013, after appellant failed to timely respond to a January 23, 2013 Demand for 2011.

17. Appellant responded by letter dated November 1, 2017, contending that he volunteered his services with APAIS in lieu of receiving a salary, and that in exchange for his help, his daughter provides him housing, food, and transportation.

18. FTB responded by letter dated January 3, 2018, contending that the available evidence contradicts his claims that he has no income.

19. Appellant responded by letter dated May 2, 2018, contending that FTB was racist and discriminated against white Caucasians, and that FTB failed to provide any evidence to show that appellant earned income for 2013 or 2014.

20. At the oral hearing, appellant testified that FTB accepted his position for prior tax years with the same response to FTB's Demand. Appellant further testified that for 2005, 2003, 2001, 2000, and 2012, the FTB "accepted my answer, and they honored it." In further support, appellant submitted FTB "Demands for Tax Return" and what appellant claims are "letters of exoneration" from the FTB for the following tax years: 2000, 2001, 2003, 2005 and 2012. Appellant also submitted copies of social security earning statements submitted to FTB, reporting that the last time appellant paid social security taxes was for the 1994 tax year. In the "letters of exoneration" (which were FTB's initial replies to appellant's documentation for these tax years), FTB states that "[b]ased on the information you provided, [FTB] will take no further action at this time," and that appellant needs to file a return to claim any credits if he made any payments or had any state income tax withheld for those years.[5]

Official Notice - Appellant's Prior Appeal History

21. During the oral hearing, the parties were unable to agree to pertinent facts relevant to appellant's prior appeal history with the board. We indicated that OTA may take official notice of appellant's prior appeal history in lieu of requiring additional briefing from the parties. By letter dated September 25, 2018, we provided a copy of appellant's prior appeal history to the parties, and allowed the parties 30 days to object to any facts contained therein. A timely objection on the basis of relevance was raised and overruled. The objection did not dispute the accuracy of the facts subject to official notice. The

[5] As explained below, we take official notice that for three of the five tax years for which appellant claims he was "exonerated" (i.e., 2000, 2001, and 2003), FTB subsequently proposed assessments for these tax years, appellant appealed the actions to the board, and the board affirmed FTB's actions and added a frivolous appeal penalty.

relevant facts subject to official notice by OTA are summarized in the following two paragraphs.

22. Appellant previously filed appeals that the board determined to be frivolous for 12 prior tax years: 1990, 1991, 1992, 1993, 1994, 1998, 2000, 2001, 2002, 2003, 2004, and 2008.

23. The board imposed frivolous appeal penalties in the following amounts for these prior appeals: $1,062 for 1990;[6] $500 for 1991; $5,000 for 1992; $5,000 for jointly heard appeals proceedings covering 1993 and 1994;[7] $5,000 for 1998; $5,000 for jointly heard appeals proceedings covering 2000 through 2004; and $5,000 for 2008.

DISCUSSION

FTB's proposed tax assessments (2013 and 2014)

California's personal income tax is imposed on the entire taxable income of a California resident. (R&TC, § 17041(a).) Every individual subject to this tax with income over a specified amount must file a tax return with FTB. (R&TC, § 18501(a).) In the case of a single individual under the age of 65, with no dependents, the filing threshold for 2014 was at least $12,838 in adjusted gross income, or $16,047 in gross income, and for 2013 it was at least $12,562 in adjusted gross income, or $15,702 in gross income. (R&TC, § 18501(a), (b).) Except where specifically excluded, gross income means all income from whatever source derived, including income derived from a business. (R&TC, § 17071; Int.Rev. Code, § 61.) Adjusted gross income means gross income, minus specified deductions, such as trade or business expenses. (R&TC, § 17072; Int.Rev. Code, § 62.)

In the case of a failure to file a return, FTB may issue a proposed tax assessment based on an income estimate and may make such estimate using any available information. (R&TC, § 19087(a).) FTB's proposed assessment is presumed correct once FTB shows a reasonable and rational basis for the estimation. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.)[8] The tax agency has wide latitude in

[6] The frivolous appeal penalty was assessed in an amount equal to the proposed tax liability for 1990.

[7] There were two separate appeals, and two separate assessments, covering 1994. A frivolous appeal penalty was imposed with respect to the second appealed assessment covering 1994.

[8] Precedential opinions of the board may be cited as precedential authority to the Office of Tax Appeals unless a panel removes, in whole or in part, the precedential status of the opinion. The board's precedential opinions are viewable on its website: <www.boe.ca.gov/legal/legalopcont.htm>.

estimating income when the taxpayer fails to file a return or to provide the information necessary to ascertain their tax liability. (*Palmer v. Internal Revenue Service* (9th Cir. 1997) 116 F.3d 1309, 1312; *Andrews v. Commissioner*, T.C. Memo. 1998-316 [use of data from the Bureau of Labor Statistics is an acceptable and reasonable method to estimate income]; *Appeal of Walter R. Bailey*, 92-SBE-001, Feb. 20, 1992.)

When a taxpayer fails to report any income, the government may reconstruct the taxpayer's income based on statistics and the evidentiary foundation necessary for the presumption of correctness to attach is minimal. (*Palmer v. Internal Revenue Service*, *supra,* at p. 1313.) Federal courts have held that the taxing agency need only introduce some evidence linking the taxpayer with the unreported income. (See *Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932, 935.) The use of income information from various sources to estimate a taxpayer's taxable income is a reasonable and rational method of estimating taxable income. (See *Palmer v. Internal Revenue Service*, *supra*; *Appeals of Walter R. Bailey*, 92-SBE-001, Feb. 20, 1992; *Appeals of R. and Sonja J. Tonsberg*, 85-SBE-034, Apr. 9, 1985.) A taxpayer's failure to produce evidence that is within his control gives rise to a presumption that such evidence is unfavorable to the taxpayer's case. (*Appeal of Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.)

Here, FTB presented evidence that appellant, as a licensed insurance agent, sold commissionable insurance products on behalf of various insurance companies. Although appellant contends that he volunteered his professional services to the family business (APAIS) in exchange for food, housing, and transportation, he was unable to provide corroborating documentation that he did not earn income aside from his Social Security Earnings statements. This document, by itself, does not prove that appellant did not earn income. Appellant's documentation only shows that appellant was not paid as a W-2 employee, and that appellant did not report or pay any social security taxes to the Internal Revenue Service (IRS). Considering the issue on appeal is appellant's failure to report income to FTB, the Social Security Earnings statements may reasonably support FTB's position on appeal by showing that appellant was, at least, consistent in his failure to report or pay taxes to both state and federal tax agencies. In this respect, we note that appellant also did not file a federal tax return for either of the years at issue.

Furthermore, even if we accept appellant's contention that he voluntarily provided his professional services in exchange for food, housing, transportation, and other benefits, the transactions described would still result in appellant earning gross income. Unless specifically

excluded, gross income means all income from whatever source derived, including compensation for services. (R&TC, § 17071; Int.Rev. Code, § 61.) Gross income is interpreted broadly to include many forms of economic benefit without regard to the form in which it is received, including benefits such as services, meals, accommodations, or other property. (Treas. Reg. § 1.61-1(a); see *Commissioner v. Glenshaw Glass Co.* (1955) 348 U.S. 426, 429-433; *Commissioner v. Smith* (1945) 324 U.S. 177, 181.) Gross income also includes the transfer of property in exchange for the performance of services. (Int.Rev. Code, § 83.)

Where compensation is paid in the form of property, the fair market value of the property must be included in income as compensation. (Treas. Reg. § 1.61-2(d)(1).) If property is transferred as compensation for services for an amount less than its fair market value, the difference between the amount paid for the property and the amount of its fair market value at the time of the transfer is compensation and must be included in income. (Treas. Reg. § 1.61-2(d)(2)(i).) Furthermore, the rent-free use of property in exchange for services constitutes income in the amount of the fair rental value of the property. (*Dean v. Commissioner* (1951) 187 F.2d 1019, 1020; *Chandler v. Commissioner* (1941) 119 F.2d 623; *Western Supply & Furnace Co. v. Commissioner* 18 T.C. Memo. 1959-288.)

Here, appellant admits that he received various benefits such as housing, transportation, food, and other necessities in exchange for his business services, and in support FTB provided evidence that appellant's daughter transferred real property to appellant in other than an arm's length transaction.[9] Additionally, the evidence reflects that, as a licensed insurance agent, appellant sold commissionable insurance products. Appellant has not provided evidence establishing that he did not earn sufficient income to trigger a filing requirement. Therefore, we find there is sufficient evidence to establish that appellant earned income during the years at issue, whether through benefits paid in exchange for services rendered; or otherwise paid to him directly or indirectly, whether in the form of cash or non-cash benefits. We further find that FTB's use of the average income statistics of individuals holding a California insurance license to estimate appellant's taxable income, when appellant failed to file his own returns or provide documentation entirely within his control to demonstrate the amount of his compensation for the years at issue, is both reasonable and rational.

[9] For example, referring to himself in the third person, appellant contends that "Appellant helps his daughter out as much as needed and as a result enjoys several benefits from his daughter . . . housing, food and transportation."

Appellant asserts that he provided a Social Security Administration earnings statement for prior years, which FTB previously accepted for tax years 2000, 2001, 2003, 2005 and 2012. Nevertheless, appellant's testimony, and his purported "letters of exoneration" for those years, are contradicted by the actual appeal history, which reflects that not only was appellant assessed taxes for 2000, 2001, and 2003, but that appellant appealed those determinations to the board and was ultimately assessed frivolous appeal penalties for those three years. Therefore, we question appellant's credibility and whether he was intentionally trying to mislead this panel. Furthermore, even if a taxing agency erroneously accepted a taxpayer's tax treatment of certain items in prior years, it is not precluded from correcting that error in a subsequent year. (*Hawkins v. Commissioner* (8th Cir. 1983) 713 F.2d 347, 351-352 [citations omitted]; see also R&TC, §§ 19801, 19802.)

Therefore, we find that appellant failed to establish error in FTB's proposed assessments for 2013 and 2014.

The failure-to-file penalties (2013 and 2014)

Section 19131 imposes a penalty for the failure to timely file a return, unless it is shown that the late filing is due to reasonable cause and not willful neglect. (R&TC, § 19131(a).) The amount of the penalty is five percent of the tax due, after allowing for timely payments, for every month or fraction of a month that the return is late, up to a maximum 25 percent penalty. (R&TC, § 19131(a).) The penalty will be abated if a taxpayer establishes that the failure to file was due to reasonable cause and not willful neglect. (R&TC, § 19131(a).)

FTB correctly asserts that the failure-to-file penalties applies at the maximum rate of 25 percent of appellant's estimated tax liability, because appellant has not filed a tax return for either year and five or more months have elapsed from the due date of the 2013 and 2014 tax returns. Appellant does not request abatement of the penalty for reasonable cause, and has provided no evidence to show that his failure to file a return was due to reasonable cause. Instead, appellant contends that the estimated tax liability (and thus, the penalty calculated thereon) should be reduced to zero. We sustained FTB's estimated tax assessment above; therefore, we have no basis to find that the penalty was improperly imposed or calculated, or to abate the penalty.

The demand penalty (2014)

California imposes a penalty for the failure to file a return upon notice and demand, unless the failure is due to reasonable cause and not willful neglect. (R&TC, § 19133.) The penalty is 25 percent of either: the total tax assessed pursuant to section 19087 (pertaining to a failure to file a return or the filing of a false or fraudulent return), or of any deficiency tax assessed by FTB concerning the assessment for which the return was required. (R&TC, § 19133; Cal. Code Regs., tit. 18, § 19133(a).)[10] With respect to a failure to file a personal income tax return, Regulation 19133 provides that the demand penalty will only be imposed by FTB if:

> (b)(1) the taxpayer fails to timely respond to a current Demand for Tax Return in the manner prescribed, and
>
> (2) the FTB has proposed an assessment of tax under the authority of Revenue and Taxation Code section 19087, subdivision (a), after the taxpayer failed to timely respond to a Request for Tax Return or a Demand for Tax Return in the manner prescribed, at any time during the four-taxable-year period preceding the taxable year for which the current Demand for Tax Return is issued.

(Cal. Code Regs., tit. 18, § 19133(b).)

First, appellant failed to respond to the FTB's January 28, 2016, Demand for the tax year at issue: 2014. Second, FTB issued an NPA to appellant for the 2011 tax year on April 2, 2013, after appellant failed to respond to the 2011 Demand. Although appellant contends he was travelling on a three-month long vacation, appellant offers no supporting documentary evidence, and has not shown that his failure to respond to the Demand was due to reasonable cause. Therefore, we find that appellant failed to sustain his burden of proving that reasonable cause existed for failing to timely respond to the 2014 Demand. (See *Appeal of Michael J. and Diane M. Halaburka*, 85-SBE-025, Apr. 9, 1985; *Appeal of Elmer R. and Barbara Malakoff*, 83-SBE-140, June 21, 1983.) Therefore, we find FTB properly imposed a demand penalty in the amount of 25 percent of the tax liability that FTB estimated pursuant to section 19087 for 2014, and appellant failed to establish a basis for abatement of this penalty.[11]

[10] All subsequent "regulation" references are to title 18 of the California Code of Regulations unless otherwise indicated.

[11] We note that FTB also issued Demands and NPAs for other tax years. Based on our finding that the Demand penalty was properly imposed due to the 2011 filing enforcement actions described above, it is not necessary for us to discuss additional filing enforcement actions taken by FTB for other tax years.

The filing enforcement cost recovery fee (2014)

FTB is required to impose a filing enforcement cost recovery fee if a person fails to file a tax return required under the Corporation Tax Law or Personal Income Tax Law within 25 days after FTB mails to that person a formal legal demand to file a return. (R&TC, § 19254(a)(2).) There is no exception for reasonable cause. (See *Appeal of Michael E. Myers, supra*.) Here, our inquiry is limited to determining whether FTB complied with the statutory notice requirements for imposing the fee. FTB mailed the Demand on January 28, 2016, and to date appellant has not filed a return or established that he was not required to file a return. Under these facts, imposition of the filing enforcement cost recovery fee is mandatory and we have no authority to abate the fee.

The frivolous appeal penalty

The law provides that a frivolous appeal penalty shall be imposed when OTA finds that an appeal before OTA was instituted or maintained primarily for delay, or that the taxpayer's position is frivolous or groundless. (R&TC, §§ 20, 19714; Cal. Code Regs, tit. 18, § 30502(a).) We may consider any relevant factors in determining whether an appeal is frivolous or is maintained primarily for delay. (Cal. Code Regs, tit. 18, § 30502(c).) The following non-exclusive list includes some of the factors that may indicate a frivolous appeal penalty is warranted: (1) whether appellant is making arguments that have been previously rejected by the OTA in a precedential opinion, by the BOE in a Formal Opinion, or by the courts; (2) whether appellant is repeating arguments that he advanced unsuccessfully in prior appeals; (3) whether appellant filed the appeal with the intent of delaying legitimate tax proceedings or the legitimate collection of tax owed; and (4) whether appellant has a history of filing frivolous appeals or failing to comply with California's tax laws. (Cal. Code Regs., tit. 18, § 30502(b), (c).)

The Revenue and Taxation Code, and existing regulations promulgated thereunder, do not specifically define what is meant by "frivolous or groundless" or "instituted or maintained by the taxpayer primarily for delay." (R&TC, § 19714.) Nevertheless, section 19714, California's frivolous or groundless position penalty, applies the same standard and uses substantially identical language as IRC section 6673(a)(1)(A)-(B), which is the comparable federal statute authorizing a frivolous appeal penalty. Therefore, it is appropriate to look to federal authority for guidance. (*Douglas v. State* (1948) 48 Cal.App.2d 835, 838.)

Existing federal authorities explain that the purpose of the frivolous appeal penalty is not to compensate the government for time spent handling frivolous appeals; instead, the purpose is to penalize taxpayers who raise frivolous claims. (*Sauers v. Commissioner* (1985) 771 F.2d 64.) A position maintained by the taxpayer is frivolous, and thus warrants imposition of a frivolous appeal penalty, where it is contrary to established law and unsupported by a reasoned, colorable argument for change in the law. (*Coleman v. Commissioner* (1986) 791 F.2d 68, 71; *Jensen v. Commissioner,* T.C. Memo. 2004-120.)

With respect to whether a taxpayer instituted or maintained an appeal primarily for delay, the courts have generally looked to actions taken by the taxpayer indicating that the taxpayer is more interested in delaying the proceedings than in resolving the appeal. (See *Waltner v. Commissioner,* T.C. Memo. 2014-35.) For example, appeals have been considered instituted or maintained primarily for delay where a taxpayer "exhibit[s] total disinterest in presenting or proving the merits of their case," raises unfounded arguments, submits tampered documents as evidence, continually refuses to produce documents, refuses to substantiate claimed deductions from gross income, or fails to file requested briefing for the case and then fails to appear for the case. (*Voss v. Commissioner*, T.C. Memo. 1989-238 [disinterest in proving case]; *Garber v. Commissioner*, T.C. Memo. 2012-47 [unfounded arguments]; *Beard v. Commissioner* (1984) 82 T.C. 766 [tampered documents]; *Sandvall v. Commissioner* (1990) 898 F.2d 455 [document production]; *Rollercade, Inc. v. Commissioner* (1991) 97 T.C. 113; *Sinele v. Commissioner*, T.C. Memo. 2004-137 [failing to file briefing or appear].)

First, appellant's primary argument is that he has no income because he merely provides his services voluntarily in exchange for benefits conferred. It is well-settled that this argument is groundless. In this respect, the courts have concluded that "the term 'income' includes the compensation a taxpayer receives in return for services rendered." (*Funk v. Commissioner* (1982) 687 F.2d 264, 265; Int.Rev. Code, § 61.) Additionally, the courts have concluded that the "argument that wages received for services are not taxable as income is clearly frivolous." (*Funk v. Commissioner, supra,* 687 F.2d at p. 265.) Similarly, the IRS identifies this as a frivolous argument. (See Rev. Rul. 2007-19, IRS Notice 2010-33.) For example, the IRS concluded that positions that are the same as or similar to the following are frivolous: "Wages, tips, and other compensation received for the performance of personal services are not taxable income." (IRS Notice 2010-33 [discussing specified frivolous submissions for purposes of IRC §

6702(b)(2)(B)].) Similarly, in Revenue Ruling 2007-19 (2007-14 I.R.B. 843), the IRS explains that the courts have universally rejected the argument that labor can be exchanged for wages or other compensation in a nontaxable transaction. Therefore, we find that appellant's primary argument is a frivolous argument which has been rejected by the courts.

Second, appellant's prior appeal history reflects that not only was appellant unsuccessful in his appeals of at least 12 prior actions by the FTB, but he was also sanctioned with a frivolous appeal penalty for all 12 of those prior tax years. When we asked appellant if he was raising the same arguments as in his prior appeals, appellant admitted on the record that "I've made pretty much similar identical arguments for all [prior] years."

Third, appellant has a close to 30-year long history of failing to file required tax returns, dating back to the 1990 tax year. During this timeframe, appellant has not filed a single California tax return, and all 12 of his prior appeals to the board were determined to be frivolous. Based on the record, we do not find appellant's contention credible that, despite being a continuously licensed insurance agent and in a position of authority with companies engaged in the business of selling commissionable insurance products, he has not earned any reportable income during the last 30 years.

In addition to the three factors described above, we also take into consideration the fact that appellant attempted to obfuscate and delay the proceedings by providing misleading testimony and evidence. (See *King v. Commissioner*, T.C. Memo. 2000-124.) Notably, appellant submitted "letters of exoneration" in support of his testimony under perjury at the oral hearing that FTB honored his position in appeals for five prior tax years (specifically, "for 2005, 2003, 2001, 2000, 2012") when in reality, not only did FTB assess a liability for at least[12] three out of five of those years, but appellant was also assessed frivolous appeal penalties for 2000, 2001, and 2003.

Apparently, the imposition of a penalty for appealing actions of the FTB in 12 prior tax years has not deterred appellant from advancing the same frivolous and groundless positions over the course of almost 30 years. Accordingly, we hereby impose a $5,000 frivolous appeal penalty. If appellant "persists in raising frivolous arguments . . . wasting time and resources that should be devoted to taxpayers with genuine controversies, and continues to refuse to shoulder

[12] Appellant's prior appeal history with FTB is not a part of the record, except with respect to FTB actions that appellant subsequently appealed to the board.

his fair share of the tax burden, we will not hesitate in the future to impose" the frivolous appeal penalty. (*Mooney v. Commissioner*, T.C. Memo. 2011-35.)

HOLDINGS

1. Appellant did not establish error in FTB's proposed assessment for tax year 2013 or tax year 2014.
2. Appellant did not establish a basis for abatement of the late filing penalties, demand penalty, or filing enforcement fee.
3. A frivolous appeal penalty against appellant is imposed in the amount of $5,000.

DISPOSITION

FTB's action for the 2013 tax year is modified, as conceded by FTB on appeal, such that the $856.75 demand penalty and the $79.00 filing enforcement fee are abated for the 2013 tax year. FTB's actions are otherwise sustained for 2013 and 2014. In addition, we hereby impose a frivolous appeal penalty of $5,000.

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Andrew J. Kwee
Administrative Law Judge

We concur:

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Grant S. Thompson
Administrative Law Judge

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