

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18011784  
ANDRE JACKSON ) Date Issued: March 25, 2019  
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\_\_\_\_\_)

**OPINION**

Representing the Parties:

For Appellant: Andre Jackson

For Respondent: Samantha Q. Nguyen, Tax Counsel

N. ROBINSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, appellant appeals an action by the Franchise Tax Board (FTB) proposing tax of \$9,603, a late-filing penalty of \$2,400.75, a demand penalty of \$2,400.75, a filing enforcement fee of \$81, and applicable interest, for 2014.

Appellant originally requested an oral hearing but by failing to respond to the December 14, 2018 notice of oral hearing, appellant waived his right to an oral hearing and therefore the matter is being decided based on the written record.<sup>1</sup>

**ISSUES**

1. Has appellant demonstrated error in the proposed tax assessment for the 2014 tax year?
2. Has appellant established reasonable cause to abate the late-filing penalty?
3. Has appellant established reasonable cause to abate the demand penalty?
4. Has appellant shown that the filing enforcement cost recovery fee should be abated?
5. Should a penalty be imposed against appellant under R&TC section 19714 for instituting and maintaining a proceeding based on a frivolous or groundless position?

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<sup>1</sup> California Code of Regulations, title 18, section 30209(a) states, “If the appellant does not request an oral hearing under regulation 30401, or if appellant does not timely respond to a notice of oral hearing, appellant waives the right to an oral hearing and the appeal may be submitted for decision based upon the written record and without an oral hearing.”

FACTUAL FINDINGS

1. Appellant has not filed a return for 2014.
2. Appellant is a resident of California.
3. FTB obtained information from EDD indicating that appellant earned wages in 2014 of \$135,193.83.
4. On April 20, 2016, FTB sent to appellant a Demand for Tax Return requesting that appellant submit a valid return for 2014 (or return a reply form explaining if he had no filing requirement or had filed previously) on or before May 25, 2016.
5. FTB sent to appellant Demands for Tax Return, requesting that appellant submit a valid return (or return a reply form explaining if he had no filing requirement or had filed previously), on January 24, 2012 for 2010, February 6, 2013 for 2011, February 11, 2014 for 2012, and January 14, 2015 for 2013. A Notice of Proposed Assessment (NPA) was issued for each of these tax years because appellant failed to file a valid return as requested by FTB.
6. The Board of Equalization (BOE) issued to appellant Summary Decisions on October 14, 2014 for tax year 2007, October 25, 2016 for tax year 2011, and June 20, 2017 for tax year 2012, imposing a frivolous appeal penalty of \$750, \$2,500, and \$5,000, respectively.
7. On October 23, 2017, the California Department of Tax and Fee Administration (CDTFA) issued a letter to appellant informing him that his appeal involved “many of the same arguments” that appellant had presented in previous income tax appeals before BOE. This letter advised appellant that if his arguments in the current appeal were found to be frivolous, he may be fined up to \$5,000.
8. Appellant responded to the Demand for Tax Return for tax year 2014 by returning the Reply Form and attaching a copy of his 2014 Form W-2 and a statement declaring that he is not a resident of California or the United States and is thus not subject to their laws. In his statement, he asked that his response be treated as his 2014 tax return.
9. FTB issued two letters to appellant on June 28, 2016, further explaining to appellant that the documents submitted by appellant did not constitute a valid return. The letters also explained California’s taxing power.

10. Appellant replied to FTB's June 28, 2016 letters with two letters of his own, dated July 6, 2016, that reiterated the contentions previously stated by appellant. On September 19, 2016, appellant issued a Notice of Proposed Assessment (NPA) for 2014 based on estimated total income of \$135,194 and taxable income of \$131,202 after allowing the standard deduction of \$3,992. FTB proposed tax of \$9,603, a late-filing penalty of \$2,400.75, a demand penalty of \$2,400.75, and a filing enforcement fee of \$81, plus interest.
11. On October 6, 2016, appellant protested the NPA for 2014, arguing that he is not a resident of California or the United States, is not a taxpayer, and that his wages are not taxable by either the state or federal government.
12. On March 24, 2017, FTB acknowledged appellant's protest and informed appellant that his protest was a frivolous submission that must be withdrawn within 30 days or a frivolous submission penalty would be imposed.
13. On April 6, 2017, appellant withdrew "any frivolous position" in his protest but requested to know specifically which position in his protest FTB considered frivolous.
14. FTB issued a May 5, 2017 Protest Clarification Follow-Up letter requesting appellant specify alternative non-frivolous positions in support of his protest or FTB would consider his October 6, 2016 correspondence as his protest and impose a frivolous submission penalty.
15. In response, appellant sent FTB a letter dated May 19, 2017, stating, among other contentions, that the materials he submitted with his response to the Demand for Tax Return constituted a valid 2014 tax return.
16. On June 29, 2017, FTB issued a Notice of Action (NOA) affirming the NPA.
17. Appellant filed a timely appeal in response to the NOA.

### DISCUSSION

#### Issue 1. Has appellant demonstrated error in the proposed assessment for the 2014 tax year?

After FTB shows that its assessment was reasonable and rational, its determination is presumed to be correct, and a taxpayer has the burden of proving error. (*Appeal of Michael E.*

*Myers*, 2001-SBE-001, May 31, 2001;<sup>2</sup> *Todd v. McColgan* (1949) 89 Cal.App.2d 509.) California Code of Regulations, title 18, section 30219(c), states that unless there is an exception provided by law, “the burden of proof requires proof by a preponderance of the evidence.”<sup>3</sup> Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Appeal of Michael Scanlon and Devon Scanlon*, 2018-OTA-075P, July 25, 2018.)

When a taxpayer does not file a return, FTB may estimate a taxpayer’s income due based on “any available information” and propose to assess the amount of tax, interest and penalties due. (R&TC, § 19087.) FTB obtained information from EDD that appellant had wages of \$135,193.83 for 2014. The information from EDD also identified appellant’s employer during 2014 as the County of San Mateo. FTB has clearly shown a legal, reasonable and rational basis for the calculation of tax based on the EDD wage information. Thus, the burden is on appellant to demonstrate why he does not owe tax for 2014.

In his response to FTB’s April 20, 2016 Demand for Tax Return, appellant states a variety of reasons why he allegedly was not required to file returns and pay state income tax, including that he was not a citizen of the United States or California and thus was not required to file returns or pay tax, that his wages were not income within the meaning of the Internal Revenue Code (IRC) and R&TC, and that FTB has not stated a factual or legal basis for requiring appellant to pay tax for 2014. In this appeal, however, appellant claims that FTB has not shown that appellant’s representations are false, that FTB misuses terms such as “person,” “individual,” “resident” and “the State,” and FTB has not proven that it has jurisdiction over appellant. Appellant also vaguely alleges a violation of his due process rights.

California residents are taxed upon their entire taxable income (regardless of source) while non-residents are only taxed on income from California sources. (R&TC, § 17041.) As used in R&TC section 17041, a California resident includes every individual who is in this state for other than a temporary or transitory purpose, or every individual domiciled in California who is outside California for a temporary or transitory purpose. The key factor in the definition of a

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<sup>2</sup> Precedential opinions of the State Board of Equalization, designated by “SBE” in their citation, are available for viewing on that board’s website: <<http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion>>. Precedential opinions of the Office of Tax Appeals (OTA) are available for viewing on OTA’s website: <<http://www.ota.ca.gov/opinions>>.

<sup>3</sup> A preponderance of evidence means that the taxpayer must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 622.)

resident is whether the person is present or absent from California for a temporary or transitory purpose. (*Appeal of Stephen D. Bragg*, 2003-SBE-002, May 28, 2003.) This determination cannot be based solely on the individual's subjective intent, but must instead be based on objective facts. (*Appeal of Anthony V. and Beverly Zupanovich*, 76-SBE-002, Jan. 6, 1976.)

Appellant's claim that he was not a resident of California lacks evidentiary support. Appellant has consistently communicated with FTB, OTA and its predecessor BOE using a home address in Dublin, California. Based on EDD records and Form W-2 for 2014, appellant was employed by the County of San Mateo. Thus, on the issue of residency, the evidence clearly shows that appellant was a California resident.

Appellant also claims that his wages were not taxable income. Gross income has long been defined by R&TC section 17071 as the starting place to determine taxable income in California. R&TC section 17071 refers to IRC section 61. IRC section 61(a) defines gross income as "income from whatever source derived" and presents a non-exhaustive list of the types of income incorporated in the definition, including compensation for services. Income is included in gross income unless specifically excluded by statute.

To argue that compensation and payments received in the form of wages or salary for services performed are not included within the meaning of gross income is to ignore the repeated findings of BOE, OTA, and the courts that such an argument is frivolous and groundless. (*Appeals of Fred R. Dauberger, et al.*, 82-SBE-082, Mar. 31, 1982; *Appeal of Michael E. Myers*, 2001-SBE-020, May 31, 2001; *Appeal of Eleanor Balch*, 2018-OTA-159P, Oct. 9, 2018.) In *United States v. Romero* (9th Cir. 1981) 640 F.2d 1014, the court held, "[c]ompensation for labor or services, paid in the form of wages and salary, has been universally held by the courts of this republic to be income, subject to the income tax laws currently applicable." In *United States v. Koliboski* (7th Cir. 1984) 732 F.2d 1328, 1329, fn. 1, the court, in affirming criminal convictions for failures to file and seeking to preempt future claims that wages or salaries are not taxable, held, "the defendant still insists that no case holds that wages are income. Let us now put that to rest: WAGES ARE INCOME."

FTB assessed tax based on wage information that FTB obtained from EDD, and Forms W-2 submitted by appellant, which clearly show that appellant earned wages while working for the County of San Mateo. We can reasonably conclude from the evidence before us that the County of San Mateo was paying appellant for labor or services and has been doing so for many

years.<sup>4</sup> Appellant points to no valid exception in the law to exclude his wage income from taxation.

Next, appellant vaguely states that FTB has violated his due process rights, although he does not precisely articulate how. California Code of Regulations, title 18, section 30104(d), states that OTA has jurisdiction to consider the adequacy of notice provided to a taxpayer, but otherwise generally lacks jurisdiction to consider any actual or alleged violation of “any substantive or procedural right.”<sup>5</sup> In this limited way, OTA may consider whether a taxpayer has been given proper notice of FTB’s or OTA’s actions, thus affording appellant procedural due process. Procedural due process in this context means that a taxpayer has the right to receive notice and be provided an opportunity to present a defense to an action taken by FTB. (*Randone v. The Appellate Department of the Superior Court of Sacramento County* (1971) 5 Cal.3d 536 [defining procedural due process generally]; *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 [procedural due process principles applied in administrative law].)

Appellant has presented no evidence or argument that demonstrates how he has been deprived of notice or an opportunity to present a defense to the imposition of tax or penalties proposed by FTB. This record shows that for every action taken by FTB, appellant has received notice and has responded to each of those notices. Clearly, appellant has been given great latitude to describe the multitude of reasons why he contends that he does not owe tax and penalties. He has proven no lack of notice by FTB, BOE, or OTA, nor shown that he has been denied an opportunity to present a defense. FTB, BOE and OTA have provided appellant with all the requisite procedural due process afforded to taxpayers in California.

Further, one of appellant’s many contentions is that FTB has not proven that appellant’s claims are false. Appellant is misinformed about FTB’s responsibilities. Because FTB’s calculation of tax is reasonable and rational, the burden is squarely on appellant to demonstrate

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<sup>4</sup> As stated in the Summary Decision issued by BOE on October 14, 2014, appellant has had wage income from the County of San Mateo from at least 2006.

<sup>5</sup> It has long been established that OTA (and its predecessor, the BOE) does not have jurisdiction to determine whether a statute is unconstitutional or, in the absence of an applicable appellate court decision, to refuse to enforce a California statute on the basis that federal law or federal regulations prohibit the enforcement of the California statute. (Cal. Const., art. III, § 3.5, subs. (a), (b) and (c).) Similarly, California Code of Regulations, title 18, section 30104, subdivisions (a) and (b), preclude OTA from declaring a California statute or a provision of the California constitution as invalid or unenforceable under the constitutions of United States or California unless “a federal or California appellate court already has made such a determination.”

why the calculation of tax is erroneous. FTB has no obligation to refute appellant's legally dubious and previously refuted contentions.

Appellant has not offered evidence or persuasive argument to prove that appellant's proposed assessment of tax is incorrect. Accordingly, we find that FTB's proposed tax assessment is proper.

Issue 2. Has appellant established reasonable cause to abate 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. (R&TC, § 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. (R&TC, § 19131(a).) Here, the late-filing penalty appears to have been correctly calculated and appellant has not shown any error in the computation.

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.) Every 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 belief 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 a valid tax return. Therefore, appellant is liable for the late-filing penalty.

Issue 3. Has appellant established reasonable cause to abate the 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. (R&TC, § 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, similar to the analysis above for determining whether to abate a late-filing penalty.

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 R&TC section 19087(a) after the taxpayer failed to timely respond to 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 has been calculated correctly, and it was properly imposed because appellant failed to properly respond to FTB's Demand for Tax Return dated April 20, 2016, by submitting a valid return or a nonfrivolous reason why a return was not required. Furthermore, FTB has demonstrated that the requirements of California Code of Regulations, title 18, section 19133 (b) have been satisfied. Since appellant has not established reasonable cause for failing to respond to FTB's Demand for Tax Return by filing a valid return for 2014, he is liable for the demand penalty determined by FTB.

Issue 4. Has appellant shown that the filing enforcement cost recovery fee should be abated?

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 dispute the amount of the fee, which is set by the Legislature in the annual Budget Act. (R&TC, § 19254(b).) FTB has no authority to waive or modify this fee and appellant has not shown that the imposition of 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 penalty be imposed against appellant under R&TC section 19714 for instituting and maintaining a proceeding based on a frivolous or groundless position?

In accordance with R&TC § 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.<sup>6</sup> Pursuant to California Code of Regulations, title 18, section 30217(b)(1-5), 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 precedential opinion, or by the courts; (2) whether appellant is making the same arguments that he has made in prior appeals; (3) whether appellant submitted the appeal with the intent of delaying legitimate tax proceedings or the legitimate collection of tax owed; (4) whether appellant has a history of submitting frivolous appeals or failing to comply with California's tax laws; or (5) whether appellant has been notified, in a current or prior appeal, that a frivolous appeal penalty may apply.

The many arguments that appellant makes in this appeal have been previously rejected by our predecessor agency and the courts; these arguments include appellant's contention that wages are not income, that he is not a resident of these United States, and that his due process rights have been abrogated. (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.*, 2005-SBE-002, Nov. 15, 2005; *Appeal of LaVonne 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., supra*). In *Appeals of Robert E. Wesley et. al., supra*, BOE identified a non-exhaustive list of positions that it previously determined to be frivolous. All of appellant's arguments are on this list. Furthermore, the IRS publication "The Truth about Frivolous Tax Arguments"<sup>7</sup> lists and elaborates on the frivolous positions providing further explanation and authority for why these positions are frivolous.

BOE previously imposed a frivolous appeal penalty of \$750 for appellant's appeal

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<sup>6</sup> R&TC section 19714 refers to proceedings before the "State Board of Equalization," however, R&TC 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.

<sup>7</sup> This publication may be accessed at: <<https://www.irs.gov/privacy-disclosure/the-truth-about-frivolous-tax-arguments-introduction>>.

regarding his 2007 tax year. BOE also imposed a \$2,500 frivolous appeal penalty for appellant's appeal for the 2011 tax year. For tax year 2012, BOE imposed a \$5,000 frivolous appeal penalty. Appellant has advanced, unsuccessfully, most, if not all, of the contentions appellant articulates in this appeal in his prior appeals. Appellant has failed to submit valid returns for several years and continues to make the same meritless contentions about why he is not subject to California tax. 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 R&TC 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.

HOLDINGS

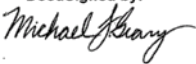
1. Appellant has failed to demonstrate any error in the proposed assessment.
2. Appellant is liable for the late-filing penalty as determined by FTB.
3. Appellant is liable for the demand penalty as determined by FTB.
4. Appellant is liable for the filing enforcement cost recovery fee of \$81.
5. We impose a frivolous appeal penalty against appellant in the amount of \$5,000 pursuant to R&TC section 19714.


DISPOSITION

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

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*Neil Robinson*  
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Neil Robinson  
Administrative Law Judge

We concur:

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Michael Geary  
Administrative Law Judge

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Jeff Angeja  
Administrative Law Judge