OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19075075
T. SENA	)
	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant: T. Sena

For Respondent: Shanon Pavao, Tax Counsel III

J. MARGOLIS, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, T. Sena (appellant) appeals an action by the respondent Franchise Tax Board (FTB) proposing tax of $2,864 and a late-filing penalty of $716 for appellant's 2015 tax year.

Appellant waived her right to an oral hearing; therefore, this matter is being decided based on the written record.

ISSUES[1]

1. Has appellant demonstrated error in FTB's proposed assessment?
2. Is appellant liable for the late-filing penalty imposed under R&TC section 19131?
3. Should a frivolous appeal penalty be imposed under R&TC section 19714 and, if so, in what amount?

FACTUAL FINDINGS

1. Appellant is a California resident who failed to file a California income tax return for the 2015 tax year. During 2015, she resided in Rancho Cucamonga, California.

[1] FTB also briefed the issue of whether appellant is entitled to an abatement of interest under R&TC section 19104. However, appellant did not seek interest abatement in her appeal, so we do not address that issue other than to note that the record before us does not even remotely suggest that appellant might qualify for interest abatement.

2. FTB received information indicating that appellant was employed in California by the Redlands Unified School District (RUSD) and that she received a Form W-2 reflecting her receipt of $63,156 of wage income from RUSD during 2015.

3. On May 11, 2017, FTB mailed a Request for Tax Return (FTB Form 4600G) to appellant requesting that she file a 2015 return, provide a copy of said return if she had already filed one, or explain why no return was required. A response to FTB's request was required by June 14, 2017, although appellant requested and received several extensions of time within which to comply.

4. On or about August 15, 2017, appellant finally responded to FTB's request by completing section B of the Form 4600G, alleging that she had no filing requirement. The grounds stated in her response were that: (a) she "worked outside of Federal Jurisdiction"; (b) her "earnings … were not connected with a trade or business in the United States"; (c) she did "not have an employer in the State of California"; (d) she had no "wages" or "earnings" during 2015; and (e) she supported herself during 2015 from "earned funds from sources without the 'State of California.' " Included with her response were approximately 50 pages of pre-printed documentation that allegedly caused appellant to not be subject to tax and explained why the tax laws did not apply to her. Much of appellant's pre-printed documentation purported to be copyrighted by SEDM, the Sovereignty Education and Defense Ministry.[2]

5. FTB did not find appellant's response to its Request for Tax Return sufficient, and issued a November 27, 2017 Notice of Proposed Assessment (NPA) determining that the $63,156 RUSD paid to appellant constituted taxable California income, and proposing that appellant's 2015 California tax liability, after exemption credit, was $2,864, and proposing a late-filing penalty of $716, plus interest.

6. Appellant timely protested the NPA by submitting over 60 pages of pre-printed materials, again largely from SEDM, raising various arguments as to why she was not subject to the tax laws.

7. FTB offered appellant the opportunity to have an oral hearing on her protest, but appellant requested a postponement of the hearing and ultimately never participated in

[2] SEDM promotes frivolous tax positions to the public through its website, <https://sedm.org [as of May 8, 2020]. (See generally, *United States v. Hansen* (S.D. Calif. 2006) 2006 WL 4075446 [enjoining promoter of SEDM, which the court refers to as a "tax-fraud scheme" that the "courts have rejected"].)

one. After protest, FTB affirmed its NPA in full, by issuing a Notice of Action on June 20, 2019. The Notice of Action also informed appellant of the potential for her to become subject to a penalty of up to $5,000 if she appealed FTB's determination based upon frivolous arguments.

8. Appellant filed this timely appeal from FTB's Notice of Action. Appellant's appeal letter includes copies of the pre-printed materials from SEDM that she had previously provided to FTB.

9. FTB filed its opening brief in which it explained the basis for its position, and that appellant's arguments have been repeatedly rejected by the IRS and the courts.

10. Appellant responded to FTB's opening brief, claiming that the burden of proof in this matter rests upon FTB, and that FTB has not sustained that burden. Appellant also claimed that: the amount she received during 2015 in exchange for her labor was not "income" because "wages and salaries are NOT income' " (emphasis in original); she is not a "taxpayer" subject to this country's and state's tax laws; she could not be taxed because she was not exercising a "privilege" that had been granted by the government and that tax may not be imposed upon "one who works in an ordinary occupation"; she "has a domicile in heaven and not on federal territory"; and FTB's notices to her are invalid because they capitalized all of the letters in her name.

DISCUSSION

Issue 1: Has appellant demonstrated error in the proposed assessment?

California residents are taxed upon their entire taxable income, regardless of source. (R&TC, § 17041(a).) R&TC 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 gross income in IRC section 61 specifically includes, among other things, compensation for services, 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 Wesley et al.* (2005-SBE-002) 2005 WL 3106917.) 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, 121.)

R&TC section 18501(a) requires every individual subject to the California Personal Income Tax Law to file a return with FTB specifically stating the items of gross income from all sources and the deductions and credits allowable if their income exceeds the applicable filing thresholds. R&TC section 19087(a) provides that if a taxpayer fails to file a return, FTB at any time "may make an estimate of the net income, from any available information, and may propose to assess the amount of tax, interest, and penalties due."

Where, as here, FTB proposes a tax assessment based on an estimate of a taxpayer's income, FTB's initial burden is to show that its determination is reasonable and rational. (*Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.) The Form W-2 information FTB received from appellant's California employer, the RUSD, satisfies that burden. (*Appeals of Bailey* (92-SBE-001) 1992 WL 44503 [estimate based on third-party information reporting]; *Appeals of Tonsberg* (85-SBE-034) 1985 WL 15812 [use of third-party information reporting].)

Appellant nevertheless attempts to shift the burden of proof to FTB, contending that FTB's determination is arbitrary and erroneous. Here, however, FTB's determination is amply supported by the evidence (the Form W-2 information from appellant's employer); it is not an arbitrary determination.[3] And where, as here, there is no dispute that a taxpayer received the amount at issue, the burden is on the taxpayer to prove that the amount received was nontaxable in nature. (*Tokarski v. Commissioner* (1986) 87 T.C. 74, 76-77.) In short, it is not FTB's burden to prove that the amount appellant received constituted taxable income; it is appellant's burden to prove that it was not. And because FTB has shown a rational basis for its unreported income determination, and the amount of unreported income determined is reasonably based on that evidentiary foundation, FTB's determination is presumed correct, and appellant has the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Myers, supra*.)

Appellant's arguments that the wages she received are nontaxable are based on snippets of language taken from irrelevant and readily distinguishable authorities. Those arguments have repeatedly been rejected by the courts. For example, in response to a similar claim that wages do

[3] Although appellant has submitted a "corrected" W-2 that purports to eliminate her wage income, we ignore that document as it lacks authentication, reliability, and credibility. (See generally *Hendrickson v. Commissioner*, T.C. Memo. 2019-10.)

not constitute taxable income, the United States Court of Appeals for the Seventh Circuit emphatically stated more than 35 years ago: "Let us now put [taxpayer's argument] to rest: WAGES ARE INCOME. Any reading of tax cases by would-be tax protesters now should preclude a claim of good-faith belief that wages—or salaries—are not taxable." (*United States v. Koliboski* (7th Cir. 1984) 732 F.2d 1328, 1329, fn. 1.) Likewise, the United States Court of Appeals for the Ninth Circuit, in *United States v. Romero* (9th Cir. 1981) 640 F.2d 1014, 1016, held that "[c]ompensation for labor or services, paid in the form of wages or salary, has been universally, held by the courts of this republic to be income, subject to the income tax laws currently applicable." (See also *Hendrickson, supra*; *Boyce v. Commissioner*, T.C. Memo. 1996-439, affd. (9th Cir. 1997) 122 F.3d 1069; *United States v. Rivera* (D. N.M. 2015) 2015 WL 4042197; *Crain v. Commissioner* (5th Cir. 1984) 737 F.2d 1417; *Appeal of Balch*, 2018-OTA-159P; *Appeals of Wesley, et al.* (2005-SBE-002) 2005 WL 3106917; *Appeal of Myers, supra*.) As the United States Court of Appeals for the Tenth Circuit stated in *Sorenson v. O'Neill* (10th Cir. 2003) 73 Fed.Appx. 341, 343: "We need not waste judicial resources explaining once again why the [taxpayers] are subject to [the] tax laws, just like everyone else who lives in the United States." Accordingly, we reject appellant's arguments, and hold that she has failed to satisfy her burden of proving error in FTB's tax determination.

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. (R&TC, § 19131.) The penalty is computed at 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 neither alleged nor proven any error in the computation.

The burden is on the taxpayer to establish reasonable cause for failing to timely file a return. (*Appeal of Scott* (82-SBE-249) 1982 WL 11906.) Appellant's arguments that she is not subject to tax do not establish reasonable cause; to the contrary, they indicate willful neglect of the tax laws. Accordingly, appellant is liable for the late-filing penalty.

Issue 3: Should a frivolous appeal penalty be imposed and, if so, in what amount?

In accordance with R&TC section 19714, this office 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.[4] Under our Rules for Tax Appeals, 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 of Equalization 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; (4) whether the taxpayer has a history of filing frivolous appeals or failing to comply with California's tax laws; and (5) whether the taxpayer has been notified, in a current or prior appeal, that a frivolous appeal penalty may apply. (Cal. Code Regs., tit. 18, § 30217(b)(1-5).)

Here, as noted above, appellant's arguments are frivolous. They have consistently been rejected by us, our predecessor agency and the courts. It also appears that appellant filed this appeal with the intent of delaying the assessment and collection of taxes due from her.[5] Furthermore, appellant was made aware of the fact that she risked being subject to the frivolous appeal penalty in the Notice of Action that forms the basis of this appeal. On the other hand, FTB provided us with no information indicating that appellant has a history of filing frivolous appeals or of failing to comply with California's tax laws and, although the filing of this frivolous appeal consumed significant resources of this office, appellant did not request an oral hearing, which would have consumed even more resources. Taking all these factors into consideration, we exercise our discretion and impose a frivolous appeal penalty of $1,500, which is significantly less than the potential maximum amount of $5,000.

[4] R&TC section 19714 refers to proceedings before the State Board of Equalization (SBE), however, R&TC section 20(b) explains that this phrase now refers to the Office of Tax Appeals because the SBE's authority to handle income and business tax appeals has been transferred to this agency.

[5] See also the IRS publication "The Truth about Frivolous Tax Arguments" (<https://www.irs.gov/privacy-disclosure/the-truth-about-frivolous-tax-arguments-introduction>, updated yearly), which lists and elaborates on frivolous tax positions and provides further explanation and authority for why those positions are frivolous.

HOLDINGS[6]

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. We impose a frivolous appeal penalty against appellant in the amount of $1,500 pursuant to R&TC section 19714.

DISPOSITION

FTB's action is sustained in full, and a frivolous appeal penalty of $1,500 is imposed pursuant to R&TC section 19714.

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Jeffrey I. Margolis
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Jeffrey I. Margolis
Administrative Law Judge

We concur:

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Keith T. Long
Administrative Law Judge

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Elliott Scott Ewing
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Elliott Scott Ewing
Administrative Law Judge

Date Issued: 5/18/2020

[6] 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.