OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19014149
JANELLE R. POLK	)
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	)
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	)

OPINION

Representing the Parties:

For Appellant: Janelle R. Polk[1]

For Respondent: David Muradyan, Tax Counsel III

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Janelle R. Polk (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant's claim for refund of $11,785.33 for the 2009 taxable year.[2]

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

ISSUES

1. Has appellant established that FTB erred in its assessment which was based on a federal determination?
2. Has appellant established that she is entitled to abatement of penalties?[3]

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[1] 2009 tax documents were filed in the name of Janelle R. Roberts, while the appeal was filed in the name of Janelle R. Polk. In her August 28, 2018 claim for refund, appellant states her name as "JANELLE R POLK (formerly ROBERTS)."

[2] Appellant filed three separate claims for refund totaling the amounts paid in 2017 toward her 2009 tax liability. This includes tax of $3,018.00, two collection cost recovery fees totaling $492.00, interest of $956.27, an accuracy-related penalty of $603.60, and a frivolous return penalty of $6233.43 ($10,000.00 was assessed, with $6233.43 attributed to taxable year 2009). There is a discrepancy between payments made and amounts owed which may be attributable to an over-collection that FTB transferred to another tax year to cover a deficiency and/or to the fact that the Earnings Withholding Orders for Taxes (EWOTs) issued by FTB included frivolous appeals penalties for 2011, 2014, and 2015.

[3] In its opening brief, FTB indicated that it agreed to abate the accuracy-related penalty and grant a refund of $603.60.

3. Has appellant established that she is entitled to abatement of the collection cost recovery fees (CCRF)?
4. Has appellant established that she is entitled to relief from interest?
5. Should the Office of Tax Appeals (OTA) impose a frivolous appeal penalty pursuant to R&TC section 19714, and if so, in what amount?

FACTUAL FINDINGS

1. Appellant filed a timely 2009 California Resident Income Tax Return (Form 540 2EZ) reporting adjusted gross income (AGI) of $29 and requesting a refund of $2,863. FTB accepted the return as filed and refunded the requested amount. The return showed a Burbank, California address.
2. Subsequently, FTB received information from the Internal Revenue Service (IRS) that appellant's federal AGI was increased to $60,013 based on unreported wages of $59,985.[4]
3. Based on the federal adjustments, FTB issued a Notice of Proposed Assessment (NPA) proposing an increase to appellant's AGI of $59,985, and tax of $3,018, an accuracy-related penalty, and interest.
4. Appellant protested the NPA, stating that "we decline your proposal to assess additional tax." The protest letter included several claims, including among other things, that FTB has no authority to conduct an examination of appellant's return without her consent and that the assessment is "arbitrary and capricious."
5. In a December 15, 2014 letter, FTB explained that its assessment was based on the federal determination, and because "California law is the same as federal law for the issues involved," the NPA is correct. The letter further explained that FTB would modify or cancel its proposed assessment if appellant provided information showing that the IRS had reduced or canceled the federal assessment.
6. Appellant responded by letter and included a California Non-Resident or Part-Year Resident Income Tax Return (Form 540NR). The return reported a Burbank, California address for appellant and claimed total taxable income of $0.

[4] The Form W-2 issued by Warner Brothers Studio Enterprises, Inc. (WB) is not in the record; however, appellant acknowledged in this appeal that it was issued and reported $59,985 of wages, tips, and other compensation.

7. FTB issued a Notice of Action on May 11, 2015, affirming its NPA.
8. FTB subsequently issued a Notice of Income Tax Due, followed by a Final Notice Before Levy and Lien.
9. FTB issued Earnings Withholding Orders for Taxes (EWOTs) to Warner Bros. Entertainment, Inc. and to New Line Productions, Inc. on November 18, 2015, and on February 9, 2016, respectively. Both EWOTs were sent to the same address in Burbank, California.
10. On October 19, 2016, FTB assessed frivolous return penalties totaling $10,000.00, of which $6,233.43 was attributed to taxable year 2009.[5]
11. Subsequent EWOTs were issued, which resulted in tax payments made during 2017, which were allocated to appellant's taxable year 2009 liability and paid the balance due in full.
12. Appellant filed three claims for refund on June 13, 2017, August 2, 2018, and September 7, 2018. Attached to the claims were various documents, including appellant's self-prepared Corrected Wage and Tax Statement (Form W-2C), which purported to change appellant's wages, tips, and other compensation from $59,985 to $0. Appellant also attached IRS Account Transcripts and records of payments made toward her 2009 tax liability.
13. FTB denied appellant's claims for refund on September 25, 2018. This timely appeal followed.
14. On appeal, FTB submitted an IRS Account Transcript dated February 6, 2019. The transcript confirms appellant's claim that she filed an amended federal return (U.S. Nonresident Alien Income Tax Return); however, contrary to appellant's contention, the IRS made no adjustment when the return was filed. The transcript instructs that "ANY MINUS SIGN SHOWN BELOW SIGNIFIES A CREDIT AMOUNT." The only amounts credited after appellant filed her amended federal return are for payments (including withholding and levied amounts) and two credit entries reducing or removing interest charged for late payment.
15. On October 2, 2019, OTA sent appellant a letter notifying her that she was making arguments in this appeal that were previously found to be frivolous. The letter further

[5] The remainder was attributed to taxable years 2011, 2014, and 2015.

notified appellant that if OTA found that her positions on appeal were frivolous or groundless OTA may assess a frivolous appeal penalty of up to $5,000.

16. On May 13, 2019, in another case filed by appellant, OTA assessed a frivolous appeal penalty against appellant of $2,500, based on positions similar to the positions taken in this appeal that were found to be frivolous and/or groundless.

DISCUSSION

Issue 1 - Has appellant established that FTB erred in its assessment which was based on a federal determination?

R&TC section 18622 requires a taxpayer to concede the accuracy of federal changes made to any item required to be reported on a tax return or to state wherein the changes are erroneous. It is well-established law in California that a proposed deficiency assessment based on federal adjustments to income is presumed to be correct, and the burden is on the taxpayer to prove it is erroneous. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Brockett* (86-SBE-109) 1986 WL 22731.)

Generally, California conforms to the definition of "gross income" contained in section 61 of the Internal Revenue Code (IRC).[6] Gross income is defined as "all income from whatever source derived," unless specifically excluded. (IRC, § 61(a).) IRC section 61 lists common types of income, including compensation for services, but the list is not limited to the items enumerated. (Treas. Reg. § 1.61-1.) Specifically, the term "wages" includes "all remuneration . . . for services performed by an employee for his [or her] employer." (IRC, § 3401(a).)

Here, appellant asserts that: 1) the IRS adjusted her 2009 tax liability to $0, 2) she does not earn "wages" because the tax code does not apply when a private employer (here WB) pays a worker for labor, 3) she is not a resident of the State of California and lives "without the United States" in Burbank, California, 4) assessment of taxes violates various constitutional provisions, 5) she did not accept Social Security credits or benefits and as such did not "equitably" agree that her private employer-paid income would constitute "wages," and 5) for several other reasons (85 enumerated in appellant's first claim for refund).[7]

[6] See R&TC section 17071.

[7] To the extent we do not address each of appellant's arguments separately, we note that we find them to be frivolous and unsupported by any legal authority.

First, appellant's assertion that evidence provided establishes that she lives outside of the United States and thus her income is not taxable in California is not persuasive. Although appellant filed amended federal and state nonresident tax returns, neither the IRS nor FTB made adjustments based on those filings. We note that appellant's addresses used on tax documents and communications are in Burbank, California, which is also where her employer, WB, is located. We also find no affirmative evidence of residency in any particular jurisdiction other than California. Thus, we find appellant's assertion unpersuasive as to residency.

In her supplemental brief, appellant argues that FTB may not determine a deficiency based on her Form W-2, so long as it conflicts with her own statement made on her tax return and on the amended Form W-2C she prepared. To support that proposition, appellant cites to *Portillo v. Commissioner* (5th Cir. 1991) 932 F.2d 1128, affg. in part, revg. in part and remanding T.C. Memo. 1990-68 (*Portillo*). However, that decision does not support appellant's assertion that FTB's assessment was arbitrary. In *Portillo*, the Court found that the IRS did adequately link a deficiency to the taxpayer by means of a Form 1099. However, the IRS took no steps to verify the accuracy of the amount reported on the 1099, and it was thus found to be in conflict with the taxpayer's federal return, and the assessment was deemed arbitrary and erroneous.

Here, to the contrary, appellant herself has confirmed the accuracy of the amount reported on a Form W-2 by appellant's employer, WB. She does not dispute that she earned the reported amounts and confirmed that WB was her employer in 2009 and paid her for her labor. She simply asserts that "WB incorrectly and erroneously reported payments [to her] as 'wages' . . . ." Furthermore, in a claim for refund, appellant must prove both the excessiveness of the assessment and the correct amount of any refund to which she may be entitled. (*Portillo, supra*, at p. 1133; *Appeal of Durley* (82-SBE-154) 1982 WL 11831.) Appellant has not established that FTB's linking income to her as reported on an employer-issued Form W-2 was incorrect or arbitrary.

Appellant relies on a misreading of the federal IRC and California R&TC in concluding that the wages of private-sector employees are not income and that her remuneration was not a wage. Appellant admits that she received income from her employer in exchange for her labor. 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, 1016; *Appeals of Wesley, et al.* (2005-SBE-002) 2005 WL 3106917.) Appellant's employer reported on a federal Form W-2 that appellant earned wages of $59,985 in 2009. Appellant agrees she received that income. This evidence satisfies FTB's burden of establishing that its proposed assessment had a rational basis and was reasonable in amount.

Appellant's argument that her wages do not constitute income is a frivolous argument that the Board of Equalization (BOE), the IRS, and the courts have consistently and emphatically rejected. (See, e.g., *Appeal of Balch* (2018-OTA-159P); *Appeal of Myers* (2001-SBE-001) 2001 WL 37126924; *United States v. Buras* (9th Cir. 1980) 633 F.2d 1356; *Fox v. Commissioner*, T.C. Memo. 1996-79.)[8] 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.[9] As held in Revenue Ruling 2006-18, "[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." (Rev. Rul. 2006-18, 2006-15 I.R.B. 743.) Therefore, appellant's arguments that her income is not taxable wages have no merit. As such, appellant has not shown that she may exclude wages from her taxable income for the 2009 taxable year.[10]

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[8] The IRS published a list of identified frivolous positions, which includes the arguments asserted by appellant, in IRS Notice 2010-33 (Int. Rev. Bull. 2010-17, Apr. 26, 2010) and the IRS publication, "The Truth About Frivolous Tax Arguments" < https://www.irs.gov/privacy-disclosure/the-truth-about-frivolous-tax-arguments-introduction > (as of Oct. 11, 2019).

[9] See <https://www.irs.gov/privacy-disclosure/the-truth-about-frivolous-tax-arguments-section-i-a-to-c> (as of Oct. 11, 2019).

[10] With respect to appellant's claims of unconstitutionality of federal and state statutes, or application thereof, we note that 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, subds. (a), (b) and (c).) Similarly, California Code of Regulations,

Issue 2 - Has appellant established that she is entitled to abatement of penalties?

FTB has agreed to abate and refund the accuracy-related penalty imposed for 2009, thus we do not address it further.

The remaining penalty was assessed by FTB under R&TC section 19179, which provides that the penalty may be assessed when a taxpayer files a return that is based upon a position that FTB or the IRS have identified as frivolous. (See also IRC, § 6702.) The penalty, once imposed, may only be rescinded or compromised by FTB's Chief Counsel. (R&TC, § 19179(e).) In addition, FTB's Chief Counsel may not delegate that authority, and notwithstanding any other law or rule of law, the Chief Counsel's determination may not be reviewed in any administrative or judicial proceeding. (R&TC, § 19179(e)(2)-(3).) Therefore, we are precluded by statute from abating the penalty or reviewing any decision of FTB's Chief Counsel denying appellant's request for abatement of the penalty.

Issue 3 - Has appellant established that she is entitled to abatement of the CCRF?

R&TC section 30354.7(a) provides that a CCRF shall be imposed on any person who fails to pay an amount of tax, interest, penalty, or other amounts due and payable under the law. The CCRF shall be imposed only if FTB has mailed a demand notice for payment, advising the taxpayer that continued failure to pay the amount due may result in collection action, including the imposition of a CCRF. (R&TC, § 30354.7(a).) FTB sent demands to appellant (Income Tax Due Notices) on August 25, 2015, and on October 26, 2016. The former notice demanded payment of the outstanding balance for tax, the accuracy-related penalty, and interest for 2009. The latter demanded payment of that same outstanding balance, plus the $10,000 of frivolous return penalties that were assessed. The notices warned appellant that if she did not pay the balance in full within 30 days that FTB could take collection action against her and would impose a CCRF. Appellant did not pay within 30 days of either notice, and FTB assessed a CCRF of $226 in 2015 and $266 in 2016. The CCRFs were properly imposed.

Appellant may be relieved of the CCRF if she establishes that the failure to timely pay the remaining liability was due to reasonable cause and circumstances beyond her control that occurred notwithstanding the exercise of ordinary care. (R&TC, § 30354.7(d).) Here, appellant

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title 18, § 30104(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 the United States or California unless "a federal or California appellate court already has made such a determination."

has provided no evidence or argument that she acted with reasonable cause in her failure to respond to FTB's notices and to pay the balances due. Therefore, we conclude that appellant has failed to establish reasonable cause for relief from the CCRFs.

Issue 4 – Has appellant established that she is entitled to relief from interest?

While there are certain statutory provisions that would allow relief from interest, appellant has not established a basis for relief under any of them. Instead, her claim for relief from interest is only that she is not liable for the underlying taxes and penalties. Because we reject appellant's claims with respect to taxes and penalties, we find that she is not entitled to relief from interest.

Issue 5 - Should OTA impose a frivolous appeal penalty pursuant to R&TC section 19174, and if so, in what amount?

R&TC section 19714 provides that a penalty of up to $5,000 shall be imposed whenever it appears to OTA that proceedings were instituted or maintained primarily for delay, or that an appellant's position is frivolous or groundless. (*Appeal of Balch, supra*; *Appeal of Myers*, *supra*; *Appeal of Castillo* (92-SBE-020) 1992 WL 202571; Cal. Code Regs., tit. 18, § 30502(a).) The following factors will be considered in determining whether, and in what amount, to impose a frivolous appeal penalty under R&TC section 19714: (1) whether appellant is making arguments that OTA, in a precedential opinion, or the BOE, in a formal opinion, or courts have rejected; (2) whether appellant is making the same arguments that the same appellant made 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).) OTA may consider other relevant factors in addition to the factors listed above. (Cal. Code Regs., tit. 18, § 30502(c).)

Appellant's arguments that she did not earn wages and is not a taxpayer because she works in the private sector are arguments that have been clearly and consistently rejected by the IRS, the federal courts, FTB, the BOE, and OTA. (See, e.g., *Appeal of Balch*, *supra*; *Appeal of Myers*, *supra*; *Appeal of Castillo*, *supra*; *Appeal of Bailey* (92-SBE-01) 1992 WL 44503; *Appeals of Dauberger*, *et al.* (82-SBE-082) 1982 WL 11759.) The law summaries FTB sent to appellant (with its opening brief) detailed how appellant's arguments have been consistently

refuted by the courts and the BOE. The law summary also explained how California law, as well as federal law, define taxable income. In addition, appellant made the same arguments in a prior appeal before the OTA and was assessed a penalty of $2,500.[11] She was thereafter notified that the penalty could be assessed in this appeal if it were based on frivolous or groundless positions. As such, appellant has been informed on several occasions during protest proceedings and in this appeal proceeding that the arguments she was making in this appeal had been determined to be frivolous arguments. Nevertheless, appellant maintained this appeal, causing the state to incur unnecessary expense in processing her appeal. In light of these facts, we find that appellant has maintained a frivolous and groundless position that she knew or should have known to be frivolous, and we hereby impose a frivolous appeal penalty of $5,000.[12]

[11] See *Appeal of Roberts* (OTA Case number 18011256, dated May 13, 2019, petition for rehearing denied October 31, 2019).

[12] In determining the amount of the frivolous appeal penalty to impose in this case, we consider fairness to the appellant, as well as to the public, which is impacted by the cost of adjudicating frivolous and groundless appeals. We believe this amount is appropriate based on appellant's history of frivolous filings and as a deterrent for future frivolous appeals.

HOLDINGS

1. Appellant has not established that FTB erred in its assessment which was based on a federal determination.
2. Appellant has not established that she is entitled to abatement of the frivolous return penalty. FTB agreed to refund the accuracy-related penalty of $603.60.
3. Appellant has not established that she is entitled to abatement of the CCRFs.
4. Appellant has not established that she is entitled to relief from interest.
5. OTA imposes a frivolous appeal penalty of $5,000, pursuant to R&TC section 19174.

DISPOSITION

The accuracy-related penalty is abated pursuant to FTB's concession, and FTB's action is otherwise sustained. A frivolous appeal penalty of $5,000 is imposed on appellant.

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Teresa A. Stanley
Administrative Law Judge

We concur:

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Elliott Scott Ewing
Administrative Law Judge

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Richard I. Tay
Administrative Law Judge

Date Issued: 2/26/2020