

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 20015761
J. POLK)
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OPINION

Representing the Parties:

For Appellant: J. Polk
For Respondent: Meghan McEvilly, Tax Counsel IV

R. TAY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, J. Polk (appellant) appeals an action by Franchise Tax Board (respondent) denying appellant’s claims for refund of \$11,554.47 for the 2011 tax year, \$5,145.09 for the 2014 tax year, and \$7,555 for the 2015 tax year.¹

Appellant waived her right to an oral hearing; therefore, we decide this matter based on the written record.

ISSUE²

Whether appellant has shown error in respondent’s imposition of the frivolous return penalty for the 2011 and 2015 tax years and the frivolous submission penalty for the 2011 and 2014 tax years pursuant to R&TC section 19179.

¹ Respondent previously abated the frivolous submission penalty for the 2015 tax year as evidenced by respondent’s letter dated October 23, 2019. Consequently, the frivolous submission penalty for the 2015 tax year is not at issue in this appeal.

² Appellant also argues that respondent erred in its issuance of an Earning Withholding Order for Taxes; however, we do not have jurisdiction to consider appellant’s argument or to grant relief on this issue. (See Cal. Code Regs., tit. 18, § 30104(d) [OTA does not have jurisdiction to hear and decide whether appellant is entitled to a remedy for respondent’s actual or alleged violation of any substantive or procedural right to due process under the law].) Consequently, we will not discuss this issue further.

FACTUAL FINDINGS

1. Appellant, a California resident, was employed during the 2011, 2014, and 2015 tax years (the tax years at issue), and appellant's employer reported her wages on original W-2s for the tax years at issue.

Tax Year 2011

2. Appellant did not timely file a California income tax return for the 2011 tax year. After receiving appellant's W-2 information from her employer, respondent issued a Request for Tax Return (Request) on February 5, 2013, which had a deadline of March 13, 2013.
3. Appellant did not timely file her return in response to respondent's Request. Appellant filed a "zero" return on October 15, 2014, which reported zero California wages and no tax due, which respondent initially accepted.
4. After reviewing appellant's 2011 California income tax return, respondent issued a Notice of Frivolous Return Determination and Demand for Return on July 7, 2016, and sent it to appellant's last known address. Appellant did not file a "valid" return by the deadline imposed by the notice, so respondent imposed the frivolous return penalty for the 2011 tax year.
5. Based on the wage information on the W-2 from appellant's employer, respondent issued a Notice of Proposed Assessment (NPA) on October 24, 2016, imposing tax, penalties, and interest for 2011.
6. Appellant protested the 2011 NPA in a letter dated December 23, 2016. In the protest letter, appellant argued that she had no California wages by law and should not be subject to tax.
7. Respondent issued two letters, dated March 8, 2017, and May 10, 2017, notifying appellant that her protest was a frivolous submission because it was based on an identified frivolous position (referencing R&TC, § 19179), and it reflected a desire to delay or impede the administration of federal or state income tax law. The mailing address on respondent's letters was appellant's last known address. Respondent's letters gave appellant the opportunity to withdraw the frivolous submission. When appellant did not withdraw the 2011 protest, respondent issued a Notice of Determination and a Frivolous Submission Penalty dated September 15, 2017.

8. Respondent also issued a Notice of Action sustaining the NPA on September 25, 2017.
9. Respondent initiated collection action, which resulted in the satisfaction of appellant's balance due. Thereafter, appellant filed a claim for refund, which respondent denied in a letter dated August 23, 2019.

Tax Year 2014

10. Appellant did not file a timely 2014 California income tax return.
11. Respondent issued a Demand for Tax Return (Demand) for 2014. After appellant did not submit a timely response, respondent issued an NPA, which imposed tax, interest and a penalty based on the wage information from appellant's employer's W-2 filing.
12. Appellant protested the 2014 NPA in a letter dated January 27, 2017, and made similar arguments to those she made in her 2011 protest.
13. Respondent issued a Frivolous Submission Notice on May 10, 2017, which was sent to appellant's last known address and notified appellant that respondent had determined that appellant's protest was a frivolous submission.
14. Respondent issued a Notice of Determination and a Frivolous Submission Penalty dated September 15, 2017.

2015 Tax Year

15. For the 2015 tax year, appellant filed a timely California income tax return reporting no wages and no tax due. Contrary to the W-2 information respondent received from appellant's employer, appellant attached W-2s that reported that appellant had no wages for 2015 and zero tax due. Appellant's "corrected" W-2 also included amounts withheld, despite reporting no wages.
16. In response to appellant's "zero" return, respondent issued a Notice of Tax Return Change on March 22, 2016, based on appellant's wage information that respondent received from the California Employment Development Department. Appellant also issued a Notice of Frivolous Return Determination and Demand for Tax Return, which respondent sent to appellant's last known address, and which allowed appellant the opportunity to file a valid return within 30 days of the notice, for the 2015 tax year on July 7, 2016. Appellant did not file a valid return in response to the notice, and respondent imposed the frivolous return penalty.

Facts Applicable to All Years

17. Appellant’s justification for filing these “zero” returns was explained in her protests for the tax years at issue. Appellant had no wages because she was part of a “private business” and not subject to taxation. Furthermore, she explained, that she is not considered an “employee” and not a “United States person” for tax purposes. Thus, appellant argues, she has no wages for the tax years at issue and is not subject to California taxation.
18. Respondent initiated collection action to satisfy appellant’s balance due, which included the imposition of the frivolous return penalties and the frivolous submission penalties.
19. After the balance was fully paid for the tax years at issue, appellant filed claims for refund for amounts paid for the penalties at issue in this appeal, which respondent denied in letters dated August 23, 2019.³

DISCUSSION⁴

Respondent imposed a penalty (the frivolous return penalty) for appellant’s 2011 and 2015 tax years and an additional penalty (the frivolous submission penalty) for appellant’s 2011 and 2014 tax years. Respondent shall impose a frivolous return penalty when a taxpayer filed a document that purports to be an income tax return, the return contained information that, on its face, indicated that the self-assessment was incorrect, and the defect was based on a position which respondent or the Secretary of the Treasury had identified as frivolous. (R&TC, § 19179 [which generally incorporates the provisions of Internal Revenue Code (IRC) section 6702].) Respondent may also impose a frivolous submission penalty under R&TC section 19179(c)(2) if a taxpayer filed a protest that is based on an identified frivolous position.⁵ (See also IRC, § 6702(b).) A taxpayer may avoid imposition of the penalty if within 30 days after respondent

³ The amounts on appeal for the tax years at issue are greater than the amounts imposed for the frivolous return penalties and the frivolous submission penalties. On appeal, appellant only makes substantive arguments for abatement of those penalties. Thus, to the extent the amounts at issue include other substantive issues that are not contingent on the penalties, we sustain respondent’s action and will not discuss those issues further.

⁴ Appellant makes numerous arguments, including due process arguments outside OTA’s jurisdiction, and arguments that are inconsequential and/or irrelevant. (See Cal. Code Regs., tit. 18, § 30103-4.) We summarily dismiss such arguments and will not discuss them further.

⁵ An identified frivolous position is a position that respondent has identified as frivolous. Respondent has adopted IRS Notice 2010-33, which lists such frivolous positions.

gives notice of the imposition of such penalties, the frivolous return or submission is withdrawn. (R&TC, § 19179(c)(1)(E).)

Here, appellant filed her 2011 and 2015 California income tax returns reporting zero wages⁶ despite having earned wages, as was reported on appellant's original W-2s and the IRS's Wage and Income Transcripts. Appellant also submitted protests for the tax years at issue arguing that she had no wage income that was subject to California taxation. Appellant justified her position on her tax returns and in the protests by arguing she had no wages because she was part of a "private business" and not subject to taxation. Furthermore, she explained, that she is not considered an "employee" and not a "United States person" for tax purposes. Thus, appellant argued, she has no wages for the tax years at issue and is not subject to California taxation.

We find respondent properly imposed the frivolous return penalty for the 2011 and 2015 tax years, and the frivolous submission penalty for the 2011 and 2014 tax years. Appellant filed income tax returns for the 2011 and 2015 tax years, and the information on those returns was, on its face, incorrect considering appellant's original W-2 information for 2011 and 2015. Appellant also filed protests for all the tax years at issue arguing for the position she took on her "zero" returns as described above. Appellant's argument that she made, as stated above, is a frivolous position that the IRS has identified in Notice 2010-33, and which our predecessor, the State Board of Equalization, and courts have repeatedly rejected. (R&TC, 19179(d)(1); *Appeal of Wesley, et. al.* (2005-SBE-002) 2005 WL 3106917; *Waltner v. Commissioner*, T.C. Memo. 2014-35.) Because of this, respondent sent a notice to appellant's last known address affording appellant the opportunity to withdraw the frivolous return or submission.⁷ When appellant did not withdraw her tax returns and protests, respondent properly imposed penalties under R&TC section 19179 for the tax years at issue.

Since we find that respondent properly imposed the penalties, we must uphold respondent's action denying appellant's claim for refund. We find no provision under the law that applies here and that allows us to abate the penalties. R&TC section 19179 only grants

⁶ A "zero return" constitutes a purported return for purposes of imposing the penalties specified in IRC section 6702. (See *Rennie v. U.S.* (E.D.Cal. 2002) 216 F.Supp.2d 1078.)

⁷ Appellant also did not file a "valid California tax return" in response to respondent's notices. (*Appeal of Hodgson* (02-SBE-001) 2002 WL 245667 [A "zero return" does not constitute a valid tax return for purposes of RTC § 18501.].)

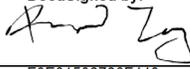
respondent’s Chief Counsel the non-delegable authority to rescind or compromise the penalties, once properly imposed. (R&TC, § 19179(e).)

HOLDING

Appellant has not shown error in respondent’s imposition of the frivolous return penalty for the 2011 and 2015 tax years and the frivolous submission penalty for the 2011 and 2014 tax years.

DISPOSITION

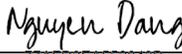
We sustain respondent’s action in full.

DocuSigned by:

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Richard Tay
Administrative Law Judge

We concur:

DocuSigned by:

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Tommy Leung
Administrative Law Judge

DocuSigned by:

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Nguyen Dang
Administrative Law Judge

Date Issued: 11/16/2021