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2023 – OTA – 030
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:

E. BROTHERTON

OTA Case No. 19044661

OPINION

Representing the Parties:

For Appellant: E. Brotherton

For Respondent: Eric A. Yadao, Tax Counsel IV

H. LE, Administrative Law Judge: Under Revenue and Taxation Code (R&TC) section 19045, E. Brotherton (appellant) appeals an action by Franchise Tax Board (respondent) proposing additional tax of $1,757, plus penalties, fee and applicable interest, for the 2015 tax year.[1]

Office of Tax Appeals Administrative Law Judges Huy "Mike" Le, Asaf Kletter, and John O. Johnson held an oral hearing for this matter on August 17, 2022, in Cerritos, California. At the conclusion of the hearing, the record was closed and OTA submitted this matter for decision.

ISSUES

1. Whether appellant has demonstrated error in respondent's determination that appellant has a filing requirement for the 2015 tax year.
2. Whether the frivolous appeal penalty should be imposed.

[1] Appellant made no specific arguments against the imposition or for the abatement of the late-filing penalty, the demand penalty, the filing enforcement cost recovery fee, and applicable interest. Instead, appellant argues that if he demonstrates that he does not have a filing requirement, then the penalties, fee and interest should not be assessed.

FACTUAL FINDINGS

1. Appellant has not filed a California income tax return for the 2015 tax year. Appellant also has not filed a California income tax return for the following 16 tax years: 2000, 2001, 2002, 2004, 2005, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2016, 2017, 2018, and 2019.
2. Respondent obtained information reported on federal Form W-2 indicating the following in the 2015 tax year: (1) appellant was an employee with a California address; (2) appellant was employed by a company with a California address; and (3) appellant received wages, tips and other compensation of $50,540.
3. Then, respondent mailed appellant a Demand for Tax Return (Demand) requesting that appellant either file a California income tax return, show that he had already filed such a return, or else explain why he did not have a filing requirement for the 2015 tax year.
4. Appellant untimely responded to the Demand, stating he has "never been paid in 'dollars'" to trigger a filing requirement.
5. Respondent issued a Notice of Proposed Assessment (NPA) to appellant, based on appellant's estimated income of $50,540 as reported on his federal Form W-2.
6. Appellant filed a protest, which respondent rejected through a Notice of Determination.
7. Respondent issued a Notice of Action that affirmed the NPA and noted that the frivolous appeal penalty may be imposed.
8. Thereafter, appellant filed this timely appeal.
9. During this appeal, OTA informed the parties that it may impose the frivolous appeal penalty.

DISCUSSION

Issue 1: Whether appellant has demonstrated error in respondent's determination that appellant has a filing requirement for the 2015 tax year.

R&TC section 18501 requires every individual subject to the Personal Income Tax Law to make and file a return with respondent "stating specifically the items of the individual's gross income from all sources and the deductions and credits allowable," if an individual has, as relevant to this appeal, "[a]n adjusted gross income from all sources in excess of eight thousand dollars ($8,000), if single" or "[a] gross income from all sources in excess of ten thousand dollars

($10,000), if single . . . ." (R&TC, § 18501(a).) These amounts are adjusted annually for inflation. (R&TC, § 18501(d).) For the 2015 tax year, the filing threshold for a single individual under 65 years of age with no dependents is adjusted gross income of more than $13,005 or gross income of more than $16,256.

Here, appellant's W-2 shows the following in the 2015 tax year: (1) he was an employee with a California address; (2) he was employed by a company with a California address; and (3) he received wages, tips and other compensation of $50,540. Accordingly, appellant exceeded the California filing threshold and has a filing requirement for the 2015 tax year.

If a taxpayer fails to file a return, respondent, 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." (R&TC, § 19087(a).) When respondent makes a proposed assessment based on an estimate of income, respondent's initial burden is to show why its proposed assessment is reasonable and rational. (*Appeal of Bindley*, 2019-OTA-179P.) Here, because appellant failed to file his 2015 tax year return, respondent issued a proposed assessment based on appellant's W-2, which showed appellant received California wages, tips and other compensation of $50,540. Accordingly, respondent's proposed assessment is reasonable and rational.

Once respondent has met its initial burden, the proposed assessment of additional tax is presumed correct, and the taxpayer has the burden of proving it to be wrong. (*Appeal of Bindley*, *supra*.) Appellant does not dispute that he received the compensation attributed to him as noted in appellant's W-2. Rather, appellant argues that "dollars" as used in R&TC section 18501 should be defined to mean gold and silver coins. Appellant argues that since he was not paid in gold and silver coins, he did not exceed the California filing threshold.

However, appellant's position is frivolous and blatantly inconsistent with the plain language of R&TC section 18501, which does not limit the definition of "dollars" to solely mean gold and silver coins. Courts have found similar arguments to be frivolous. (See *U.S. v. Daly* (8th Cir. 1973) 481 F.2d 28, 30 [the court rejected as "clearly frivolous" the assertion "that the only 'Legal Tender Dollars' are those which contain a mixture of gold and silver and that only those dollars may be constitutionally taxed"; *Syring v. Commissioner*, T.C. Memo. 1978-419 ["the contention that the receipt of gold and silver coin is the only income that can be taxed is clearly without any foundation"].) In addition, the IRS lists a similar argument as frivolous.

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(See https://www.irs.gov/privacy-disclosure/the-truth-about-frivolous-arguments-section-i-a-to-c#contentionb1.)

OTA needs not address frivolous arguments "with somber reasoning and copious citation of precedent; to do so might suggest that these arguments have some colorable merit." (*Wnuck v. Commissioner*, 136 T.C. 498 citing *Crain v. Commissioner* (5th Cir. 1984) 737 F.2d 1417, 1417.) It is sufficient to note that appellant's arguments, which are substantially similar to the arguments previously rejected by courts, have no colorable merit and little more need be said other than to state that appellant has not met his burden of proving respondent's assessment to be wrong.

Issue 2: Whether the frivolous appeal penalty should be imposed.

The law provides that a frivolous appeal penalty may 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, § 19714; Cal. Code Regs., tit. 18, § 30217(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, § 30217(b).) The following is a non-exclusive list of factors that may be relevant in determining whether to impose a frivolous appeal penalty, and in what amount: (1) whether appellant is making arguments that have been previously rejected by OTA in a precedential opinion, by the Board of Equalization in a precedential Opinion, or by the courts; (2) whether appellant is making the same arguments that the same appellant 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. (*Ibid*.)

In this appeal, appellant's arguments that he does not have a California filing requirement because he was not paid in gold and silver coins are similar arguments that have been clearly and consistently rejected. (*U.S. v. Daly*, *supra*, at p. 30; *Syring v. Commissioner*, *supra*; https://www.irs.gov/privacy-disclosure/the-truth-about-frivolous-arguments-section-i-a-to-c#contentionb1.) A taxpayer's pattern and practice of conduct in prior years is relevant in determining whether to impose a frivolous appeal penalty for the year on appeal. (*Appeal of Castillo* (92-SBE-020) 1992 WL 202571.) Respondent's records indicate that it issued filing

enforcement NPAs to appellant for the 2000, 2001, 2002, 2004, 2005, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019 tax years, which are all final. Appellant also was notified in the NOA and by OTA that a frivolous appeal penalty may be imposed. Based on the frivolous nature of the arguments presented by appellant, his noncompliance history, and his prior awareness that the frivolous appeal penalty may apply, we are imposing a frivolous appeal penalty in this case of $750. Appellant should be aware that we will not hesitate to impose additional frivolous appeal penalties, up to the maximum of $5,000 per appeal, if appellant pursues other appeals that raise similarly frivolous arguments.

HOLDINGS

1. Appellant has not demonstrated error in respondent's determination that appellant has a filing requirement for the 2015 tax year.
2. OTA imposes the frivolous appeal penalty of $750.

DISPOSITION

OTA sustains respondent's action.

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Huy "Mike" Le
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Huy "Mike" Le
Administrative Law Judge

We concur:

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Asaf Kletter
Administrative Law Judge

DocuSigned by:
John O Johnson
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John O. Johnson
Administrative Law Judge

Date Issued: 11/10/2022