

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

In the Matter of the Appeal of: ) OTA Case No. 220610566  
C. BONE AND )  
A. BONE )  
\_\_\_\_\_ )

**OPINION**

Representing the Parties:

For Appellants: C. Bone  
A. Bone

For Respondent: Christopher T. Tuttle, Tax Counsel III

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, C. Bone and A. Bone (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying claims for refund of \$2,491 for tax year 2018, \$2,672 for tax year 2019, and \$3,338 for tax year 2020.

Appellants waived the right to an oral hearing. Therefore, this appeal is decided based on the written record.

**ISSUES**

1. Whether appellants have shown error in FTB’s denial of their claims for refund for tax years 2018, 2019, and 2020.
2. Whether the frivolous return penalties under R&TC section 19179 were properly imposed for tax years 2018, 2019, and 2020.

**FACTUAL FINDINGS**

**Tax Year 2018**

1. Appellants filed a 2018 California Resident Income Tax Return (Form 540) using a filing status of married filing jointly. The return reported California wages and tax and, after applying California withholdings, appellants reported an overpayment of \$1,617 and

requested a refund of the same amount. The overpayment was refunded to appellants and/or paid to other governmental agencies on their behalf under FTB's agency offset program.<sup>1</sup>

2. C. Bone's wages and California withholdings were reported on a Form W-2.
3. Appellants filed an amended Form 540 for 2018, which revised their reported wages and tax to zero. The amended return requested a refund of the California withholding reported on C. Bone's Form W-2, including the California state disability insurance (CASDI) withheld. Appellants requested a refund of \$4,108.<sup>2</sup> Attached to the amended return was a statement by appellants that the wages reported on the Form W-2 were not subject to tax.
4. FTB treated the amended return as a claim for refund, which it denied on May 25, 2022, as frivolous.
5. On May 25, 2022, FTB issued a Notice of Frivolous Amended Return Determination, stating that it determined the amended return was frivolous. The notice stated that appellants must withdraw the amended return within 30 days, or FTB would impose a \$5,000 frivolous return penalty under R&TC section 19179(a).
6. On June 6, 2022, appellants replied that they would not withdraw the amended return and filed an appeal with the Office of Tax Appeals (OTA) based on FTB's denial of their claim for refund in the amount of \$2,491.

#### Tax Year 2019

7. Appellants filed a 2019 Form 540 using a filing status of married filing jointly. The return reported wages and tax, and after applying California withholdings, appellants reported an overpayment of \$1,986 and requested a refund of the same amount. The overpayment was refunded to appellants.
8. C. Bone's wages and California withholdings were reported on a Form W-2.

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<sup>1</sup> FTB issued an Intercept Funds Notice – State Tax Refund, which stated that the refund was intercepted to pay a debt to other agencies. The intercepted funds totaled \$1,550.85, leaving the remaining refund as \$66.15.

<sup>2</sup> This amount consists of the \$1,617 which was previously refunded to appellants (or paid on their behalf to other governmental agencies), plus the \$2,491 at issue here for the 2018 tax year. On their California Explanation of Amended Return Changes, appellants reported the refund as \$2,491 (\$4,108 - \$1,617).

9. Appellants filed an amended return for 2019, which revised their reported wages and tax to zero. The amended return requested a refund of the California withholding reported on C. Bone's Form W-2, including the CASDI withheld. Appellants requested a refund of \$4,658.<sup>3</sup> Attached to the amended return was a statement by appellants that the wages reported on the Form W-2 were not subject to tax.
10. FTB treated the amended return as a claim for refund, which it denied on May 13, 2022, as frivolous.
11. On May 13, 2022, FTB issued a Notice of Frivolous Amended Return Determination, stating that it determined the amended return was frivolous. The notice stated that appellants must withdraw the amended return within 30 days, or FTB would impose a \$5,000 frivolous return penalty under R&TC section 19179(a).
12. On June 6, 2022, appellants replied that they would not withdraw the amended return, and filed an appeal with OTA based on FTB's denial of their claim for refund in the amount of \$2,672.

#### Tax Year 2020

13. Appellants filed a 2020 Form 540 using a filing status of married filing jointly. The return reported wages and tax and, after applying California withholdings, appellants reported an overpayment of \$1,663 and requested a refund of the same amount. The overpayment was refunded to appellants.
14. C. Bone's wages, and California withholdings were reported on a Form W-2.
15. Appellants filed an amended return for 2020, which revised their reported wages and tax to zero. The amended return requested a refund of the California withholding reported on C. Bone's Form W-2, including the CASDI withheld. Appellants requested a refund of \$5,001.<sup>4</sup> Attached to the amended return was a statement by appellants that the wages reported on the Form W-2 were not subject to tax.

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<sup>3</sup> This amount consists of the \$1,986 which was previously refunded to appellants, plus the \$2,672 at issue here for the 2018 tax year. On their California Explanation of Amended Return Changes, appellants reported the refund as \$2,672 (\$4,658 - \$1,986).

<sup>4</sup> This amount consists of the \$1,663 which was previously refunded to appellants, plus the \$3,338 at issue here for the 2018 tax year. On their California Explanation of Amended Return Changes, appellants reported the refund as \$3,338 (\$5,001 - \$1,663).

16. FTB treated the amended return as a claim for refund, which it denied on May 25, 2022, as frivolous.
17. On May 25, 2022, FTB issued a Notice of Frivolous Amended Return Determination, stating that it determined the amended return was frivolous. The notice stated that appellants must withdraw the amended return within 30 days, or FTB would impose a \$5,000 frivolous return penalty under R&TC section 19179(a).
18. On June 6, 2022, appellants replied that they would not withdraw the amended return, and filed an appeal with OTA based on FTB’s denial of their claim for refund in the amount of \$3,338.

### DISCUSSION

#### Issue 1: Whether appellants have shown error in FTB’s denial of the claims for refund for tax years 2018, 2019, and 2020.

Taxpayers bear the burden of proving entitlement to a refund claim. (*Appeal of Carr*, 2022-OTA-157P.) In an action for refund, taxpayers cannot assert error and thus shift to FTB the burden to justify the tax. (*Ibid.*) Unsupported assertions are insufficient to satisfy the taxpayers’ burden of proof. (*Appeal of Wright Capital Holdings LLC*, 2019-OTA-219P.) FTB’s determinations cannot be successfully rebutted when taxpayers fail to provide credible, competent, and relevant evidence as to the issues in dispute. (*Ibid.*)

R&TC sections 17071 and 17072 define “gross income” and “adjusted gross income” by referring to and incorporating into California law Internal Revenue Code (IRC) sections 61 and 62, respectively. IRC section 61 states that, unless otherwise provided, “gross income means all income from whatever source derived,” including compensation for services. Income generally 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. (*U. S. v. Romero* (1981) 640 F.2d 1014, 1016; *Appeal of Balch*, 2018-OTA-159P.)

Wages were reported on Forms W-2 issued by C. Bone’s employer. Therefore, C. Bone must include the wages in gross income, pursuant to IRC section 61. (*U. S. v. Romero*, *supra*, 640 F.2d at p. 1016; *Appeal of Balch*, *supra*.) Appellants do not provide any arguments or evidence showing error in FTB’s denial of the claims for refund. Appellants provide frivolous arguments, such as that the wages reported on the Form W-2 are not subject to tax and that they

have no duty to report tax to the state. Frivolous arguments such as these do not establish that C. Bone was not required to report the wages as income. (*Appeal of Balch, supra; Appeals of Wesley and Couchman* (2005-SBE-002) 2005 WL 3106917.) Appellants' arguments, such as that the wages are not taxable income, are arguments that have been consistently rejected by the IRS, the courts, FTB, OTA's predecessor, the Board of Equalization, and OTA. (*Appeal of Balch, supra; Appeals of Wesley and Couchman, supra.*) Therefore, appellants have not shown error in FTB's denial of the claims for refund.

Issue 2: Whether the frivolous return penalty under R&TC section 19179 was properly imposed for tax years 2018, 2019, and 2020.

R&TC section 19179(a) states that a penalty shall be imposed for filing a frivolous return and shall be determined in accordance with IRC section 6702, except as otherwise provided. The parties present arguments regarding the frivolous return penalties imposed by FTB for the years at issue. However, OTA has no authority to review frivolous return penalties imposed under R&TC section 19179. (*Appeal of Balch, supra.*) 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).) In addition, the penalties were not part of appellants' refund claim that is the subject of this appeal. (See Cal. Code Regs., tit. 18, § 30103(a)(3).) Accordingly, while OTA has jurisdiction over the denial of the claims for refund, it does not have jurisdiction to review FTB's imposition of the frivolous return penalties.<sup>5</sup> (See also *Appeal of Reed*, 2021-OTA-326P.)

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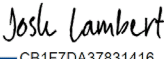
<sup>5</sup> The frivolous return penalty, imposed by FTB under R&TC section 19179 is separate and distinct from the frivolous appeal penalty under R&TC section 19714, which may be imposed by OTA. Under R&TC section 19714, OTA has the statutory authority to impose a penalty of up to \$5,000 if it finds that an appeal before it has been instituted or maintained primarily for delay or that a taxpayer's position in the appeal is frivolous or groundless. (R&TC, § 19714; see also Cal. Code Regs., tit. 18, § 30217(a).) Appellants have no prior appeals at OTA, from which to determine they have a history of submitting frivolous appeals. (See Cal. Code Regs., tit. 18, § 30217(b).) Therefore, OTA does not impose that penalty in this proceeding. However, appellants' arguments suggest that such a penalty may be warranted in the future should they file another appeal with OTA raising the same or similar issues.

HOLDINGS

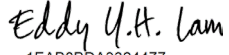
1. Appellants have not shown error in FTB’s denial of the claims for refund for tax years 2018, 2019, and 2020.
2. OTA has no jurisdiction to review the frivolous return penalties under R&TC section 19179 for tax years 2018, 2019, and 2020.

DISPOSITION

FTB’s action is sustained.

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 Josh Lambert  
 Administrative Law Judge

We concur:

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 Eddy Y.H. Lam  
 Administrative Law Judge

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 Andrew J. Kwee  
 Administrative Law Judge

Date Issued: 3/2/2023