

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:
R. BURNINGHAM

) OTA Case No. 221011565
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OPINION

Representing the Parties:

For Appellant: R. Burningham

For Respondent: Joel M. Smith, Tax Counsel III

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, R. Burningham (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$11,368.00, a late filing penalty of \$2,842.00, a notice and demand (demand) penalty of \$2,940.50, a filing enforcement fee of \$97.00, and applicable interest, for the 2019 tax year.¹

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

ISSUES

1. Whether appellant established error in FTB’s proposed additional tax assessment.
2. Whether the late filing penalty should be abated.
3. Whether a frivolous appeal penalty should be imposed.

¹ FTB now concedes that the conditions required for imposition of the demand penalty and filing enforcement fee were not met in this instance. Therefore, FTB states that it will relieve the penalty and fee at the conclusion of the appeal. As such, the demand penalty and filing enforcement fee are no longer in dispute and will not be discussed further.

FACTUAL FINDINGS

1. Appellant did not file a California income tax return for 2019. FTB received wage information from the California Employment Development Department (EDD) showing that appellant earned sufficient income to prompt a return-filing requirement. FTB also received information from the IRS that appellant's employers filed federal forms W-2 reporting appellant's wages.
2. FTB initiated a filing enforcement action by issuing a Demand for Tax Return (Demand) to appellant, requiring appellant to respond by September 8, 2021, either by filing a 2019 return, providing a copy of a previously filed return, or explaining why he did not need to file a return.
3. Appellant responded to the Demand on September 7, 2021, contending that he was not subject to California income tax.
4. On November 5, 2021, FTB issued a Notice of Proposed Assessment (NPA) to appellant proposing to assess tax of \$11,368.00. The NPA also imposed a late filing penalty of \$2,842.00, a demand penalty of \$2,940.50, and a filing enforcement fee of \$97.00. Appellant filed a timely protest and on September 7, 2022, FTB issued a Notice of Action (NOA) affirming the NPA.
5. This timely appeal followed.

DISCUSSION

Issue 1: Whether appellant established error in FTB's proposed additional tax assessment.

California residents are taxed upon their entire taxable income regardless of the source of that income. (R&TC, § 17041(a).) R&TC section 18501 requires every individual subject to the Personal Income Tax Law to make and file a return with FTB "stating specifically the items of the individual's gross income from all sources and the deductions and credits allowable," if the individual has gross income or adjusted gross income exceeding certain filing thresholds.

(R&TC, § 18501(a)(1)-(4).) R&TC section 19087(a) provides that if any taxpayer fails to file a return, FTB, at any time, "may make an estimate of the net income, from available information, and may propose to assess the amount of tax, interest, and penalties due." FTB's initial burden is to show that its proposed assessment is reasonable and rational. (*Appeal of Bindley*, 2019-OTA-179P.) An assessment based on unreported income is presumed correct when the taxing agency

introduces a minimal factual foundation to support the assessment. (*Ibid.*) Once FTB has met this initial burden, the burden then shifts to the taxpayer to prove the proposed assessment is wrong. (*Ibid.*)

R&TC sections 17071 and 17072 define “gross income” and “adjusted gross income” by referring to and incorporating Internal Revenue Code (IRC) sections 61 and 62, respectively, into California law. 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* (9th Cir. 1981) 640 F.2d 1014, 1016; *Appeal of Balch*, 2018-OTA-159P.)

Appellant did not file a 2019 return. FTB received wage information from EDD, which it used to estimate appellant’s income. The wages were also reported on Forms W-2 issued by appellant’s employers. Based on this information, FTB determined that appellant had a return filing requirement. Therefore, appellant must include his wages as part (or all) of his gross income, pursuant to IRC section 61. (See also *Appeal of Balch, supra.*) Accordingly, FTB’s use of the wage information it received from EDD to estimate appellant’s income is reasonable and rational. (R&TC, § 19087(a) [FTB may use available information to estimate net income]; see also *Appeal of Bindley, supra.*)

In this appeal, appellant provides frivolous arguments to support his unfounded theory that wages do not constitute gross income. For example, appellant argues that the general population is not liable for the payment of tax. Appellant also asserts that citizens of the United States are exempt from the federal income tax. Frivolous arguments such as these do not establish that appellant was not required to report his wages as income. (See *Appeal of Balch, supra* [“Appellant’s argument that [] wages do not constitute income is a frivolous argument that the Board of Equalization, the [IRS], and the courts have consistently and emphatically rejected”].) Appellant does not provide any non-frivolous argument or evidence establishing error in FTB’s determination. Therefore, appellant has not met his burden of showing error in FTB’s determination.

Issue 2: Whether the late filing penalty should be abated.

California imposes a penalty for failing to file a return on or before the due date, unless the taxpayer shows that the failure is due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) When FTB imposes a penalty, it is presumed to have been imposed correctly. (*Appeal of Xie*, 2018-OTA-076P.) A taxpayer may rebut this presumption by providing credible and competent evidence supporting abatement of the penalty for reasonable cause. (*Ibid.*)

Appellant did not file a 2019 return. Appellant argues that he has no filing requirement and does not owe tax on the income received. However, the Office of Tax Appeals (OTA) has determined that appellant had sufficient income to require him to file a return for the 2019 tax year, and appellant provides no argument or evidence establishing the penalty was improperly imposed or that he had reasonable cause for the failure to timely file a return. OTA notes that ignorance of the law is not reasonable cause for the failure to comply with statutory requirements. (*Appeal of Cremel and Koepfel*, 2021-OTA-222P.) Therefore, the late filing penalty should not be abated.

Issue 3: Whether a frivolous appeal penalty should be imposed.

R&TC section 19714 provides that a penalty of up to \$5,000 shall be imposed whenever it appears that proceedings before OTA have been instituted or maintained primarily for delay, or that the appellant's position is frivolous or groundless. (*Appeal of Balch, supra.*) California Code Regulations, title 18, (Regulation) section 30217(a) provides that OTA shall impose a frivolous appeal penalty pursuant to R&TC section 19714 “[i]f a Panel determines that a franchise or income tax appeal is frivolous or has been filed or maintained primarily for the purpose of delay.” Regulation section 30217(b) lists the following nonexclusive factors to be considered in determining whether, and in what amount, to impose a frivolous appeal penalty: (1) whether the appellant is making arguments that OTA, in a precedential Opinion, or the State Board of Equalization (BOE), in a precedential Opinion, or courts have rejected; (2) whether the appellant is making the same arguments that the same appellant made in prior appeals; (3) whether the appellant submitted the appeal with the intent of delaying legitimate tax proceedings or the legitimate collection of tax owed; (4) whether the appellant has a history of submitting frivolous appeals or failing to comply with California's tax laws; or (5) whether the appellant has been notified, in a current or prior appeal, that a frivolous appeal penalty may apply.

Appellant’s arguments, such as that his wages are not taxable income, are arguments that have been consistently rejected by the IRS, the courts, FTB, BOE, and OTA. (See *Appeal of Balch, supra.*) In a letter from OTA to appellant on October 12, 2022, accepting appellant’s current appeal, appellant was notified that a frivolous appeal penalty may apply. In a prior appeal before OTA (for the 2013 tax year), OTA issued an Opinion which did not impose a frivolous appeal penalty but notified appellant that appellant’s “positions and conduct in this [prior] appeal suggest that such a penalty may be warranted in the future should he file another appeal with OTA raising the same or similar issues.” (See *Appeal of Burningham, 2020-OTA-054.*) In another prior appeal before OTA (for the 2018 tax year), OTA issued an Opinion imposing a frivolous appeal penalty in the amount of \$500. At that time, OTA notified appellant that if appellant continues to file appeals that raise similar frivolous arguments, OTA may impose additional frivolous appeal penalties pursuant to R&TC section 19714, up to the maximum of \$5,000 per appeal.


Nevertheless, appellant persists in filing frivolous appeals. As such, OTA imposes a frivolous appeal penalty of \$2,500. If appellant files additional appeals that raise similar frivolous arguments, OTA may impose additional frivolous appeal penalties pursuant to R&TC section 19714, up to the maximum of \$5,000 per appeal.

HOLDINGS

1. Appellant has not established error in FTB’s proposed additional tax assessment.
2. The late filing penalty should not be abated.
3. A frivolous appeal penalty of \$2,500 is imposed.


DISPOSITION

The demand penalty and filing enforcement fee are relieved consistent with FTB’s opening brief. Otherwise, FTB’s action is sustained. In addition, a frivolous appeal penalty in the amount of \$2,500 is imposed pursuant to R&TC section 19714.

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Keith T. Long
Administrative Law Judge

We concur:

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Teresa A. Stanley
Administrative Law Judge

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Lauren Katagihara
Administrative Law Judge

Date Issued: 4/12/2023