

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

In the Matter of the Appeal of:  
**J. HANEY**

) OTA Case No. 220310003  
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**OPINION**

Representing the Parties:

For Appellant: J. Haney

For Respondent: Joel Smith, Tax Counsel III

E. LAM, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, J. Haney (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$481.00, and a late filing penalty of \$120.25, for the 2016 tax year; and additional tax of \$238.00, a late filing penalty of \$135.00, and a notice and demand penalty (demand penalty) of \$183.00, for the 2018 tax year.<sup>1</sup>

Appellant waived the right to an oral hearing; therefore, the Office of Tax Appeals (OTA) decides the matter based on the written record.

**ISSUES**

1. Whether appellant has shown any error in the proposed assessments for the 2018 and 2016 tax years.
2. Whether appellant has demonstrated reasonable cause to abate the late filing penalties for the 2018 and 2016 tax years.
3. Whether frivolous appeal penalties should be imposed for the 2018 and 2016 tax years.

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<sup>1</sup> In FTB’s opening brief, FTB concedes that the demand penalty for the 2018 tax year is improperly imposed. As such, FTB will abate the demand penalty imposed for the 2018 tax year.

FACTUAL FINDINGS

1. Appellant timely filed his 2018 and 2016 California Resident Income Tax Return, together with Form 3525 to claim that the issued W-2s for both tax years, and the earned income reported by Toy Locker Inc., are not taxable. Appellant's 2018 and 2016 tax returns reported zero tax due.
2. On July 10, 2019, FTB reviewed appellant's 2018 tax return and issued a Notice of Frivolous Return Determination and Demand for Tax Return (Frivolous Determination and Demand) for the 2018 tax year. On July 23, 2019, FTB received appellant's protest of the 2018 Frivolous Determination and Demand.
3. On December 5, 2019, FTB reviewed appellant's 2016 tax return and issued a Frivolous Determination and Demand for the 2016 tax year. Appellant did not respond to the 2016 Frivolous Determination and Demand.
4. After review, FTB issued two separate Notices of Proposed Assessment (NPAs) for the 2018 and 2016 tax years based on W-2 earned income for those years.
5. The 2018 NPA proposed an additional tax of \$238.00, a late filing penalty of \$135.00, and a demand penalty of \$183.00.
6. The 2016 NPA proposed an additional tax of \$481.00 and late filing penalty of \$120.25.
7. Appellant timely protested both the 2018 and 2016 NPAs and provided the same argument that he did not receive taxable income from Toy Locker Inc. for both 2018 and 2016 tax years.
8. FTB acknowledged receipt of appellant's protest and separately issued a Frivolous Submission Notice for the 2018 and 2016 tax years, indicating that appellant's tax position could be subject to frivolous penalty. Appellant responded and indicated the desire to continue with the protest for 2018 and 2016 tax years.
9. FTB issued two separate Notices of Action (NOAs) affirming the 2018 and 2016 NPAs.
10. This timely appeal followed.

## DISCUSSION

### Issue 1: Whether appellant has shown any error in the proposed assessments for the 2018 and 2016 tax years.

If any taxpayer fails to file a return, or files a false or fraudulent return with intent to evade the tax, FTB “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 FTB proposes a tax assessment based on an estimate of income, its initial burden is to show that the proposed assessment was reasonable and rational. (*Appeal of Bindley*, 2019-OTA-179P.) Once the FTB 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. (*Ibid.*) When a taxpayer fails to file a valid return, FTB’s use of income information from various sources to estimate a taxpayer’s taxable income is a reasonable and rational method of estimating taxable income. (*Appeal of Sheward*, 2022-OTA-228P.)

FTB’s determination is presumed to be correct, and the taxpayer has the burden of proving otherwise. (*Appeal of Bindley, supra.*) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing error, FTB’s determinations must be upheld. (*Ibid.*) The burden of proof requires proof by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c).)

Here, FTB met its initial burden by presenting evidence that appellant had W-2 earned income from Toy Locker Inc. for both 2018 and 2016 tax years. However, appellant has not shown that this earned income was not subject to tax. Also, appellant has not presented evidence that this tax liability was incorrectly calculated. Instead, appellant made various unsupported assertions,<sup>2</sup> which are insufficient to meet appellant’s burden of proof with regards to the issues in this appeal. Therefore, there is no evidentiary basis to overturn FTB’s proposed assessment.

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<sup>2</sup> As an illustration, appellant asserts that the “FTB employees accessed [appellant’s] ‘information’ without authority which is a violation of the Taxpayer Browsing Protection Act and punishable as set forth therein.” OTA will 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*, (2011) 136 T.C. 498, 499, citing *Crain v. Commissioner* (5th Cir. 1984) 737 F.2d 1417, 1417.)

Issue 2: Whether appellant has demonstrated reasonable cause to abate the late filing penalties for the 2018 and 2016 tax years.

If any taxpayer files a false or fraudulent return with intent to evade the tax, R&TC section 19131 shall also be applicable. (R&TC, § 19087(a).) R&TC section 19131 imposes a late filing penalty on a taxpayer who fails to file a return by either the due date or the extended due date unless it is shown that the failure was due to reasonable cause and not willful neglect. Generally, to establish reasonable cause, the taxpayer must show that the failure to file a timely return occurred despite the exercise of ordinary business care and prudence, or that such cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) Unsupported assertions are not enough to satisfy a taxpayer’s burden of proof. (*Ibid.*)

Appellant has not contested the computation of the late filing penalties. Appellant has not shown that he had reasonable cause for failing to file valid 2018 and 2016 tax returns timely. Instead, appellant attempted to file tax returns for the 2018 and 2016 tax years that did not report taxable W-2 earned income received from Toy Locker Inc. to avoid tax for which appellant is liable. Under these circumstances, FTB properly imposed the late filing penalties.

Issue 3: Whether frivolous appeal penalties should be imposed for the 2018 and 2016 tax years.

OTA may impose a penalty of up to \$5,000 whenever it appears that a proceeding before it has been instituted or maintained primarily for delay or that the taxpayer’s position in the proceeding is frivolous or groundless.<sup>3</sup> (R&TC, § 19714.) OTA’s Rules for Tax Appeals contain the following non-exclusive list of factors to be considered when determining whether to impose the penalty, and in what amount: (1) whether the taxpayer is making arguments that have been previously rejected by OTA in a precedential opinion, by BOE in a Formal Opinion, or by the courts; (2) whether the taxpayer is repeating arguments that he advanced unsuccessfully in prior appeals; (3) whether the taxpayer filed the appeal with the intent of delaying legitimate tax proceedings or the legitimate collection of tax owed; (4) whether the taxpayer has a history of filing frivolous appeals or failing to comply with California’s tax laws; and (5) whether the

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<sup>3</sup> R&TC section 19714 refers to proceedings before the “State Board of Equalization or any court of record.” However, R&TC section 20(b) provides that this phrase now refers to OTA, as the Board of Equalization’s (BOE’s) authority to handle income and business tax appeals has been transferred to this agency.

taxpayer has been notified, in a current or prior appeal, that a frivolous appeal penalty might apply. (Cal. Code Regs., tit. 18, § 30217(b)(1-5).)

Appellant has raised many of the same sorts of arguments<sup>4</sup> that have been rejected consistently by OTA, BOE, and state and federal courts<sup>5</sup>, such as the assertion that the W-2 earned income is not subject to tax and FTB had no right to “know or [had] business reason to scope” appellant’s returns. (See, e.g., *Appeal of Balch*, 2018-OTA-159P; *Appeals of Wesley, et al.* (2005-SBE-002) 2005 WL 3106917; *U.S. v. Romero*, (9th Cir. 1981) 640 F.2d 1014, 1016.) Appellant was warned by the 2018 and 2016 Frivolous Determination and Demand notices that the frivolous appeal penalty might be imposed.

However, a mitigating factor for appellant is that there is no history of appellant filing frivolous appeals before the OTA. Therefore, OTA concludes that a frivolous appeal penalty will not be imposed at this time. Although OTA will not impose the frivolous penalty in this proceeding, OTA cautions appellant that OTA will not hesitate to impose frivolous appeal penalties pursuant to R&TC section 19714, up to the maximum of \$5,000 per appeal, if appellant files additional appeals that raise similarly frivolous arguments.

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<sup>4</sup> OTA has no authority to resolve any grievances that appellant may have against FTB aside from the correct amount of appellant’s California income tax liability, if any. (*Appeals of Dauberger, et al.* (82-SBE-082) 1982 WL 11759.) Appellant makes various arguments, including due process arguments, which are outside OTA’s jurisdiction, and other arguments that are inconsequential and/or irrelevant. (See Cal. Code Regs., tit. 18, §§ 30103, 30104.) OTA summarily dismisses such arguments and will not discuss them further.

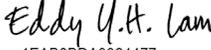
<sup>5</sup> See also the IRS publication “The Truth about Frivolous Tax Arguments,” which provides further explanation and authority for the contention that wages, tips and other compensation received for personal services are not income, is frivolous. (<https://www.irs.gov/privacy-disclosure/the-truth-about-frivolous-arguments-section-i-a-to-c#contentionb1> .)

HOLDINGS

1. Appellant has not shown any error in the proposed assessments for the 2018 and 2016 tax years.
2. Appellant has not demonstrated reasonable cause to abate the late filing penalties for the 2018 and 2016 tax years.
3. Frivolous appeal penalties should not be imposed for the 2018 and 2016 tax years.

DISPOSITION

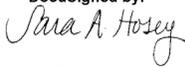
FTB’s action in imposing the demand penalty for the 2018 tax year is reversed, as conceded by FTB. Frivolous appeal penalties will not be imposed. In all other respects, FTB’s actions are sustained.

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Eddy Y.H. Lam  
 Administrative Law Judge

We concur:

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Sara A. Hosey  
 Administrative Law Judge

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Keith T. Long  
 Administrative Law Judge

Date Issued: 4/18/2023