



3. FTB made corresponding adjustments to appellants' AGI and deductions and issued a Notice of Proposed Assessment (NPA) proposing additional tax of \$1,688, plus applicable interest.
4. Appellants did not protest the NPA, which became final.
5. FTB's records indicate total payments of \$6,486.44 for appellants' 2016 taxable year, consisting of withholding credits, payments collected by FTB, and a transfer from appellants' 2020 taxable year. Of this amount, FTB refunded a total of \$3,118.78 to appellants.
6. On May 3, 2021,<sup>1</sup> appellants filed an amended California Resident Income Tax Return claiming \$0 in wages and \$0 total tax. FTB treated appellants' amended return as a claim for refund.
7. Appellants' account balance after refunds totaled \$3,367.66 (total payments of \$6,486.44 less total refunds of \$3,118.78). After subtracting a collection cost recovery fee of \$316 and interest paid by appellants of \$302.89, FTB denied appellants' claim for refund of \$2,749 (rounded).<sup>2</sup>
8. FTB denied appellants' claim for refund, and this timely appeal followed.
9. In FTB's opening brief, appellants were advised that they may be subject to a frivolous appeal penalty because appellants are making arguments that have previously been found to be frivolous. In a letter dated September 13, 2022, OTA advised appellants that they may be subject to a frivolous appeal penalty because appellants are making arguments similar to those deemed frivolous in the past.

### DISCUSSION

#### Issue 1: Are appellants entitled to a refund for taxable year 2016?

California residents are taxed upon the entirety of their taxable income regardless of its source. (R&TC, § 17041(a).) Internal Revenue Code (IRC) section 61 defines "gross income"

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<sup>1</sup> The claim for refund was timely because FTB postponed the deadline for claiming 2016 tax refunds to May 17, 2021. (See <https://www.ftb.ca.gov/about-ftb/newsroom/news-releases/2021-04-state-postpones-deadline-for-claiming-2016-tax-refunds-to-may-17-2021.html>.)

<sup>2</sup> In their amended return appellants requested a refund of \$1,697. However, appellants' amended return did not properly account for all of appellants' payments and credits for the 2016 taxable year or FTB's imposition of interest and the collection cost recovery fee. The correct claim for refund amount is \$2,749 as reflected in FTB's claim denial notice.

as “all income from whatever source derived.”<sup>3</sup> Gross income includes compensation for services. (IRC, § 61(a)(1).) Wages and compensation for services are gross income within the meaning of IRC section 61. (See *U.S. v. Romero* (9th Cir. 1981) 640 F.2d 1014, 1016; *Appeal of Balch*, 2018-OTA-159P.) In an action for refund, the taxpayer has the burden of proof. (*Appeal of Li*, 2020-OTA-095P.) The taxpayer must prove not only that FTB’s determination of his or her tax liability is incorrect but also the correct amount of tax. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer’s burden of proof. (*Ibid.*)

Appellants assert that their amended return “was filed within the limitations of law,” and should be accepted as filed, resulting in a refund. Appellants concede that wages are taxable but contend that the payments appellant-husband received from Murrieta do not fall under the definition of “wages” found in IRC section 3401. Appellants assert that a Form W-2, Wage and Tax Statement, (Form W-2) “should have never been issued from [appellant-husband’s] payer [Murrieta]. He is not engaged in Trade or business as defined by IRC § 7701 (26),” which states that the term “trade or business” includes the performance of the functions of a public office.

Appellants’ argument that appellant-husband’s wages do not constitute income is a frivolous argument that the Board of Equalization (BOE), OTA, the IRS, and the courts have consistently and emphatically rejected. (See, e.g., *U.S. v. Buras* (9th Cir. 1980) 633 F.2d 1356; *Fox v. Commissioner*, T.C. Memo. 1996-79; *Appeal of Balch*, *supra*; *Appeal of Myers* (2001-SBE-001) 2019 WL 1187160.) Appellants have not established that the Form W-2 issued by Murrieta is invalid. The IRC section 7701(a)(26) definition cited by appellants just notes that the performance of the functions of a public office are amongst the many activities that may constitute a trade or business. Murrieta issued to appellant-husband a Form W-2 that correctly categorized appellant-husband’s income as “wages.” Appellants have not established that they had zero income as claimed on their amended tax return. Therefore, appellants have not established that they are entitled to a refund.

#### Issue 2: Should OTA impose a frivolous appeal penalty?

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 appellants’ position is frivolous or groundless. (See *Appeal of Balch*, *supra*.) California

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<sup>3</sup> IRC section 61 is incorporated into California law by R&TC section 17071.

Code of 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 appellants are making arguments that OTA, in a precedential opinion, or BOE, in a precedential opinion, or courts have rejected; (2) whether appellants are making the same arguments that the same appellants made in prior appeals; (3) whether appellants submitted the appeal with the intent of delaying legitimate tax proceedings or the legitimate collection of tax owed; (4) whether appellants have a history of submitting frivolous appeals or failing to comply with California’s tax laws; or (5) whether appellants have been notified, in a current or prior appeal, that a frivolous appeal penalty may apply.

Appellants’ argument that appellant-husband’s wages are not taxable income is one that has been consistently rejected by the IRS, the courts, FTB, BOE, and OTA. (See *Appeal of Balch, supra.*) This is the first issuance of an opinion by OTA for appellants who have filed and pursued this frivolous appeal, and appellants have no apparent history of filing frivolous appeals. OTA notes, however, that appellants were warned during the briefing process and in a subsequent letter sent by OTA that they may be subject to a frivolous appeal penalty.

Appellants contend that they did not file a frivolous return because they do not make “tax protester” arguments, and they are not subject to the penalty based on IRC section 6671(b)’s definition of “person.” While appellants may not be claiming the tax laws are unconstitutional or otherwise invalid, the arguments do fall within the category of arguments that have consistently been held to be frivolous.<sup>4</sup> Appellants have cited no authority that provides that in order to be a frivolous argument, a taxpayer must be a “tax protester” as appellants define the term. Moreover, the penalty at issue is not based on appellants’ filing of a frivolous tax return. Rather, it is a penalty imposed based on appellants’ filing and maintaining this frivolous appeal. Thus, appellants first assertion fails. With respect to the definition of “person” in IRC section 6671(b),

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<sup>4</sup> See, e.g., FTB’s Exhibit K, FTB’s Law Summary: Non-Filer – Frivolous Arguments, page 2, 6.a., “Taxpayers have argued that wages are not taxable.” See also Revenue Ruling 2006-18 holding that “[f]ederal income tax laws do not apply solely to federal employees” and “[a]ny argument that Forms W-2 only record and report payments to federal employees . . . has no merit and is frivolous.” (2006-15 I.R.B. 743.)

OTA notes that California does not conform to that section of the IRC. Instead, the frivolous appeal penalty at issue here is governed by state law, specifically R&TC section 17914.


Accordingly, OTA imposes upon appellants a frivolous appeal penalty of \$100. Should appellants continue to file appeals that raise similarly frivolous or groundless arguments, OTA may impose further frivolous appeal penalties pursuant to R&TC section 19714, up to the maximum of \$5,000 per appeal.

HOLDINGS


1. Appellants are not entitled to a refund for taxable year 2016.
2. A frivolous appeal penalty of \$100 is imposed.

DISPOSITION

FTB’s action denying appellants’ claim for refund is sustained. A frivolous appeal penalty of \$100 is imposed.

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 Teresa A. Stanley  
 Administrative Law Judge

We concur:  
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 Andrea L.H. Long  
 Administrative Law Judge

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 Crystal Demetre  
 Staff Services Manager, on behalf of  
 Eddy Y.H. Lam  
 Administrative Law Judge

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