

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 230112299  
A. DENICOLA )  
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**OPINION**

Representing the Parties:

For Appellant: A. DeNicola  
For Respondent: Eric R. Brown, Attorney

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, A. DeNicola (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$1,426.69 for the 2020 tax year.

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

**ISSUES**

1. Whether appellant has demonstrated error in FTB’s denial of appellant’s claim for refund for the 2020 tax year.
2. Whether the frivolous appeal penalty will be imposed.

**FACTUAL FINDINGS**

1. Appellant filed his 2020 California Resident Income Tax Return (return) on May 15, 2021. Relative to the signature box, appellant wrote, “Non assum[p]sit, signature and form not valid and false without the attached, [signed] tax form [attachment] dated on same date.” The attachment is titled Tax Form Attachment (the attachment). In general, the attachment includes frivolous arguments and incorrect interpretations of law.
2. Appellant reported a balance due of \$1,057 but did not pay the balance owed.

3. FTB sent appellant a Notice of Tax Return Change – Revised Balance, which made adjustments, imposed a late payment penalty, and included applicable interest. The notice directed appellant to pay the balance by August 11, 2021. Appellant did not remit payment by the prescribed deadline.
4. FTB sent appellant an Income Tax Due Notice directing appellant to pay the balance owed by September 30, 2021. Appellant did not remit payment by the deadline.
5. FTB sent appellant a Final Notice Before Levy directing appellant to pay the balance by November 4, 2021. The notice informed appellant that the failure to pay within 30 days would result in the imposition of a collection cost recovery fee.
6. After appellant failed to remit payment by the deadline, FTB undertook collection activities, which included Earnings Withholding Orders that imposed a collection cost recovery fee and an Intent to Offset Federal Payments.
7. Appellant’s 2020 tax balance was satisfied through several payments from the collection activities.
8. FTB explained to appellant via letter dated March 1, 2022, that FTB has the authority to assess, enforce, and collect state income taxes. Further, the letter provided information regarding frivolous tax arguments, and directed appellant to research such arguments.<sup>1</sup>
9. FTB received appellant’s claim for refund.
10. FTB denied appellant’s claim for refund by letter dated October 21, 2022.
11. This timely appeal followed.
12. On March 30, 2023, OTA sent appellant an acknowledgement letter, which warned appellant that a frivolous appeal penalty may apply.
13. With its opening brief, FTB included a Law Summary – Nonfiler – Frivolous Arguments, listing relevant authorities on frivolous arguments. Item no. 7 of the law summary addresses frivolous appeal penalties.

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<sup>1</sup> The letter included a reference to FTB resources and IRS resources pertaining to frivolous arguments (e.g., the IRS publication, “The Truth About Frivolous Tax Arguments”).

## DISCUSSION

### Issue 1: Whether appellant has demonstrated error in FTB's denial of appellant's claim for refund for the 2020 tax year.

Appellant bears the burden of proving entitlement to his refund claim, which means he must not only prove the tax paid was incorrect, but also produce evidence to establish the proper amount of tax due, if any. (*Appeal of Jali, LLC*, 2019-OTA-204P.)

When FTB imposes a penalty, the law presumes that the penalty was imposed correctly. (*Appeal of Xie*, 2018-OTA-076P.) When FTB notifies a taxpayer that the continued failure to pay an amount due may result in the imposition of a fee and the taxpayer fails to timely pay the amount due in response to the notice, then FTB shall impose the cost recovery fee. (R&TC, § 19254(a)(1).) Once FTB properly imposes the fee, there is no language in the statute that would excuse the fee for any reason, including reasonable cause. (See *Appeal of Auburn Old Town Gallery, LLC*, 2019-OTA-319P.)

Interest generally must be assessed from the date a payment is due through the date that it is paid. (R&TC, § 19101.) The imposition of interest is mandatory, and FTB cannot abate interest except where authorized by law. (R&TC, § 19101; *Appeal of Balch*, 2018-OTA-159P.) Interest is not a penalty; it is compensation for the use of money. (*Appeal of Balch, supra.*) Interest accrues on a deficiency assessment regardless of the reason for the assessment. (*Ibid.*)

Appellant argues that he did not sign the return, rather he filed the return as non assumpsit<sup>2</sup> together with the attachment; and therefore, based on the law of contracts he has no obligation to pay California income taxes. Appellant acknowledges that he received FTB's March 1, 2022 letter, but appellant states "I am not sure what 'frivolous arguments' he is referring to . . . I only cited US Supreme Court Decisions, U.S. Code, IRS policy, and references to Holy Scripture." Appellant further argues that "Every word in that attachment is absolute and standing law." Appellant also reiterates his position that he is not a "taxpayer" as defined in Internal Revenue Code (IRC) section 7701(a)(14).<sup>3</sup>

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<sup>2</sup> The general issue in the action of assumpsit; being a plea by which the defendant avers that "he did not undertake" or promise as alleged. (Black's Law Dict. (11th ed. 2019).)

<sup>3</sup> Appellant raises other arguments in this appeal. This Opinion addresses appellant's primary arguments. As to other arguments not expressly addressed herein, OTA has considered them all and concludes that they are without merit.

In response, FTB maintains its position that appellant is making frivolous arguments, which have been consistently and emphatically rejected by OTA, State Board of Equalization (BOE), the IRS, and the courts. In support, FTB cites to various authorities and publications (e.g., Article IV, section of the Constitution of the State of California; R&TC sections 19087, 19252, 19501; and FTB's Law Summary – Nonfiler – Frivolous Arguments as well as IRS Notice 2010-33). Similarly, FTB disputes appellant's position that he is not a person within the meaning of IRC section 7701(a)(1) and (14). FTB references an IRS publication "The Truth About Frivolous Arguments" in support of its position that appellant's argument regarding IRC section 7701(a)(14) is frivolous. Furthermore, FTB argues that the definition of taxpayer includes individuals according to R&TC section 17004. Finally, FTB argues that appellant's position, that his tax obligation arises under contract, is unsupported by law.

Here, the law is clear. Appellant, a California resident, has the obligation to file returns and pay income tax. (IRC, § 61; R&TC, §§ 17041(a), 18501(a)(1)-(4); *Commissioner v. Glenshaw Glass Co.* (1955) 348 U.S. 426, 431; *Appeal of Balch, supra.*) Appellant's use of the term non assumpsit, together with the attachment, does not change the law or appellant's obligations associated therewith. (See *Holmes v. Commissioner*, T.C. Memo. 2011-31.) The authorities cited in FTB's March 1, 2022 letter and the law summary included with FTB's opening brief correctly detail how appellant's arguments have been consistently refuted by OTA, BOE, the IRS, and the courts. Moreover, OTA need not address frivolous arguments. (*Wnuck v. Commissioner* (2011) 136 T.C. 498.) Thus, OTA finds each of appellant's arguments to be frivolous and meritless. (*Appeal of Balch, supra.*)

Other than the frivolous arguments previously addressed, appellant has not set forth any arguments, or provided evidence, regarding the penalty, fee, interest, or adjustments. Thus, OTA finds that appellant has not established reasonable cause to abate the penalty, fee, or interest. Moreover, OTA finds no support for any adjustments based on OTA's review of the written record. In sum, OTA finds that appellant has not demonstrated error in FTB's denial of his refund claim.

Issue 2: Whether to 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 the appellant's position is frivolous or groundless. (*Appeal of Balch, supra; Neufield v. State*

*Board of Equalization* (2004) 124 Cal.App.4th 1471, 1478.) California 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 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 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. (Cal. Code Regs., tit. 18, § 30217(b).)

Regarding the first factor, appellant is making arguments that OTA, BOE, the IRS, and the courts have consistently rejected. This factor supports the imposition of the frivolous appeal penalty. For the second factor, there is no evidence that appellant is making the same arguments as a prior appeal. This factor does not support the imposition of the frivolous appeal penalty. As to the third factor, appellant did not respond to various FTB notices and FTB had to involuntarily collect the balance due. Also, appellant continued to maintain his appeal using the same frivolous arguments even after receiving the March 1, 2022 letter from FTB. Likewise, appellant did not respond to FTB’s opening brief which also addressed appellant’s arguments as frivolous. This course of action tends to show that appellant intended to delay legitimate tax proceedings or the legitimate collection of tax owed, which supports the imposition of the frivolous appeal penalty. With respect to the fourth factor, there is no evidence in the record that appellant has a history of submitting frivolous appeals or failing to comply with California’s tax laws, which does not support the imposition of the frivolous appeal penalty. As to the fifth factor, appellant was notified, by FTB and OTA, in the current appeal that a frivolous appeal penalty may apply. Here, however, FTB did not expressly argue that it should be imposed.

OTA finds that a warning against making future frivolous arguments serves California’s best interest here. Although OTA does not impose the penalty in this appeal, appellant’s position


in this appeal suggests that such a penalty may be warranted in the future should appellant file another appeal with OTA raising the same or similar issues.

HOLDINGS


1. Appellant has not demonstrated error in FTB’s denial of appellant’s claim for refund for 2020 tax year.
2. The frivolous appeal penalty is not imposed. However, appellant is cautioned from making similar arguments in the future.


DISPOSITION

FTB’s action is sustained.

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 Josh Aldrich  
 Administrative Law Judge

We concur:

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 Administrative Law Judge

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 Andrea L.H. Long  
 Administrative Law Judge

Date Issued: 12/12/2023