

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)
J. O'NEILL) OTA Case No. 220410250
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OPINION

Representing the Parties:

For Appellant: J. O'Neill
For Respondent: Josh Ricafort, Attorney

R. TAY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, J. O'Neill (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$2,077, a late filing penalty of \$519.25, and applicable interest for the 2015 tax year.

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

ISSUES¹

1. Whether appellant has shown error in FTB's proposed assessment of tax for the 2015 tax year.
2. Whether FTB properly imposed the late filing penalty for the 2015 tax year.
3. Whether OTA should impose a penalty pursuant to R&TC section 19714 (the frivolous appeal penalty).

¹ Appellant argues, in one sentence, FTB's proposed assessment is untimely for purposes of the statute of limitation. However, OTA finds no evidence in the record to support this argument. Therefore, the argument is summarily dismissed without further discussion.

FACTUAL FINDINGS

1. Appellant filed a timely 2015 California income tax return and reported zero taxable income and no tax due. With his return, appellant submitted a substitute Form W-2, which reported a zero amount for “wages, tips, or other compensation before deductions for taxes, insurance, etc.” The substitute Form W-2 also contained additional alterations: on line 4, the term “wages” was replaced with “earnings”; and the phrase “employer or” was eliminated to favor the term “payer.” Appellant claimed a refund of the tax withheld in 2015. FTB processed the return and issued a refund.
2. After processing appellant’s return, FTB received information that appellant had earned wages in 2015, and based on that information, issued a Notice of Proposed Assessment (NPA) for additional tax, interest, and the late filing penalty.
3. Appellant protested the NPA in a letter dated July 25, 2021. In his protest, appellant argued his income as reported on a Form 1099-MISC was “payments for work not qualifying as a ‘trade or business’” and thus, was not “income” subject to income tax. Appellant also argued his payments reported on Forms W-2 and Forms 1099-MISC constituted “non-taxable earnings and/or personal payments.”
4. FTB denied the protest and issued a Notice of Action dated March 25, 2022. The Notice of Action warned appellant regarding the possible imposition of a penalty for the filing of frivolous appeals.
5. Appellant filed this timely appeal. On appeal, appellant filed lengthy documents (including a 77-page reply brief and a 74-page Motion to Strike Respondent’s Opening Brief) with numerous arguments, including arguments he made at protest. Appellant also argues that information from the IRS and the California Employment Development Department, provided by FTB at protest and on appeal, are all hearsay, and thus, are not valid proof appellant had income subject to taxation. Additionally, appellant alleges FTB violated his due process rights.
6. Prior to the filing of this appeal, OTA imposed a penalty on appellant for filing a frivolous appeal for the 2014 tax year.² On June 29, 2023, OTA issued a letter informing

² In the opinion, OTA warned appellant that subsequent filings of frivolous appeals may result in additional frivolous appeal penalties.

appellant a penalty may be imposed in this appeal if OTA determines an appeal is frivolous or has been filed or maintained primarily for the purpose of delay.

DISCUSSION

Issue 1: Whether appellant has shown error in FTB's proposed assessment of tax for the 2015 tax year.

R&TC sections 17071 and 17072 define “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.)

FTB's determination is presumed to be correct, and a taxpayer has the burden of proving error. (*Appeal of Wright Capital Holdings, LLC*, 2019-OTA-219P.) A taxpayer cannot carry that burden without providing “credible, competent, and relevant evidence as to the issues in dispute.” (*Ibid.*) Appellant contends FTB's determination is erroneous because the determination is not based on actual knowledge of appellant's receipt of income but is based on “hearsay.”³ On the contrary, OTA finds FTB's determination is amply supported by the evidence (the Form W-2 information from appellant's employer, the Form 1099-MISC and the Form 1099-G as shown on appellant's federal Wage and Income Transcript). Where, as here, there is no dispute that appellant received the amount at issue, the burden is on appellant to prove that the amount received was nontaxable in nature. (*Tokarski v. Commissioner* (1986) 87 T.C. 74, 76-77.) In short, it is not FTB's burden to prove that the amount appellant received constituted taxable income; it is appellant's burden to prove that it was not.

Appellant's arguments that the wages he received are nontaxable are based on phrases and language taken from irrelevant and readily distinguishable authorities. Those arguments have repeatedly been rejected by the courts and are frivolous. For example, in response to a similar claim that wages do not constitute taxable income, the United States Court of Appeals for

³ It is noteworthy that the rules of hearsay under the California Evidence Code are inapplicable per OTA Regulation 30214, which also states that all relevant evidence is admissible. (Cal. Code Regs., tit. 18, § 30214.)

the Seventh Circuit emphatically stated more than 35 years ago: “Let us now put [taxpayer’s argument] to rest: WAGES ARE INCOME. Any reading of tax cases by would-be tax protesters now should preclude a claim of good-faith belief that wages—or salaries—are not taxable.” (*U.S. v. Koliboski* (7th Cir. 1984) 732 F.2d 1328, 1329, fn. 1.) Likewise, the United States Court of Appeals for the Ninth Circuit, in *U.S. v. Romero, supra*, 640 F.2d 1014, 1016, held that “[c]ompensation for labor or services, paid in the form of wages or salary, has been universally, held by the courts of this republic to be income, subject to the income tax laws currently applicable.” (See also *Hendrickson v. Commissioner*, T.C. Memo. 2019-10; *Boyce v. Commissioner*, T.C. Memo. 1996- 439, affd. (9th Cir. 1997) 122 F.3d 1069; *Crain v. Commissioner* (5th Cir. 1984) 737 F.2d 1417; *Appeal of Balch, supra*; *Appeals of Wesley, et al.* (2005-SBE-002) 2005 WL 3106917.) And finally, appellant’s specific argument that his wages are not taxable because they are not related to a “trade or business” have also been consistently rejected. (See *Appeal of Castillo* (92-SBE-020) 1992 WL 202571.)

Appellant also proffers questions and issues of due process at the protest level and on appeal; issues over which OTA does not have jurisdiction. (See Cal. Code Regs., tit. 18, § 30104(e).) Arguments such as these have been found to be frivolous or groundless in prior precedential opinions. (See *Appeal of Balch, supra*.) Appellant provides no other grounds sufficient to carry his burden of proof.

Issue 2: Whether FTB properly imposed the late filing penalty for the 2015 tax year.

California imposes a penalty for the failure to file a return on or before the due date, unless it is shown that the failure was due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) Here, although appellant filed a return before the due date, appellant’s zero return is not a *valid* return, which is a requirement to avoid imposition of the late filing penalty. (*Appeal of Hodgson* (2002-SBE-001) 2002 WL 245667.) Thus, FTB’s imposition of the late filing penalty is presumptively proper. The penalty is computed at 5 percent of the tax due, after allowing for timely payments, for every month that the return is late, up to a maximum of 25 percent. (R&TC, § 19131(a).) The late filing penalty appears to have been correctly calculated and appellant has neither alleged nor proven any error in the computation.

The burden is on the taxpayer to establish reasonable cause for failing to timely file a return. (*Appeal of Xie*, 2018-OTA-076P.) Appellant’s arguments, as discussed above, do not

establish reasonable cause; to the contrary, they indicate willful neglect of the tax laws. Accordingly, appellant is liable for the late filing penalty.

Issue 3: Whether OTA will impose the frivolous appeal penalty.

R&TC section 19714 provides that a penalty of up to \$5,000 shall be imposed whenever it appears to OTA that the proceedings before it have been instituted or maintained by the taxpayer primarily for delay, or that the taxpayer's position is frivolous or groundless. California Code of Regulation, title 18, (Regulation) section 30217(a) also provides OTA shall impose a frivolous appeal penalty pursuant to R&TC section 19714 if it is determined a franchise and 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 appellant is making arguments that OTA, in a precedential opinion, or the Board of Equalization, in a precedential opinion, or courts have rejected; (2) whether appellant is making the same arguments that the same appellant made in prior appeals; (3) whether appellant submitted the appeal with the intent of delaying legitimate tax proceedings or the legitimate collection of tax owed; (4) whether appellant has a history of submitting frivolous appeals or failing to comply with California's tax laws; or (5) whether appellant has been notified, in a current or prior appeal, that a frivolous appeal penalty may apply.

Here, as noted above, appellant's arguments are frivolous. They have consistently been rejected by OTA, our predecessor agency, and the courts.⁴ Furthermore, appellant was made aware of the fact that he risked being subject to the frivolous appeal penalty in the Notice of Action that forms the basis of this appeal. Additionally, prior to the filing of this appeal, appellant appealed FTB's proposed assessment of tax for the 2014 tax year to OTA, during which he made some of the same frivolous arguments he makes in this appeal. OTA assessed the frivolous appeal penalty for the 2014 tax year in an opinion issued prior to appellant's filing of his opening brief in this appeal. Taking all these factors into consideration,

⁴ See also the IRS publication "The Truth about Frivolous Tax Arguments" (<https://www.irs.gov/privacy-disclosure/the-truth-about-frivolous-tax-arguments-introduction>, updated yearly), which lists and elaborates on frivolous tax positions and provides further explanation and authority for why those positions are frivolous.


OTA exercises its discretion and imposes a frivolous appeal penalty of \$2,000, which is significantly less than the potential maximum amount of \$5,000.

HOLDINGS

1. Appellant has not shown error in FTB’s proposed assessment of tax for the 2015 tax year.
2. FTB properly imposed the late filing penalty for the 2015 tax year.
3. OTA imposes the frivolous appeal penalty in the amount of \$2,000.


DISPOSITION

FTB’s action is sustained in full and a frivolous appeal penalty in the amount of \$2,000 is imposed.


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Richard Tay
Administrative Law Judge

We concur:

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Andrea L.H. Long
Administrative Law Judge

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Michael F. Geary
Administrative Law Judge

Date Issued: 3/18/2024