



### ISSUES

1. Whether appellants have demonstrated error in FTB's denial of their claims for refund for tax years 2017, 2018, and 2021.
2. Whether appellant J. Lin has demonstrated error in FTB's proposed assessment of tax for tax year 2021.
3. Whether appellant J. Lin has established reasonable cause to abate the late filing penalty for tax year 2021.
4. Whether OTA has jurisdiction to consider appellants' appeal of the frivolous return penalties for tax years 2017, 2018, and 2021.
5. Whether OTA should impose a frivolous appeal penalty on appellants pursuant to R&TC section 19714.

### FACTUAL FINDINGS

#### 2017 Tax Year

1. On April 10, 2018, appellants filed their 2017 California Resident Income Tax Return, reporting taxable income of \$322,661, total tax of \$23,931, withholdings of \$27,838, and a tax overpayment of \$3,907. On May 10, 2018, FTB issued appellants a refund of \$3,907.
2. On April 15, 2022, appellants filed an amended tax return for the 2017 tax year, reporting taxable income of \$26,309, zero total tax, and withholdings of \$27,838, and requesting a \$27,838 refund.
3. In letters dated October 12, 2022, and December 5, 2022, FTB denied appellants' claim for refund on the ground that it was based on a frivolous amended return.

#### 2018 Tax Year

4. On July 4, 2019, appellants filed their 2018 California Resident Income Tax Return, reporting taxable income of \$381,370, total tax of \$29,460, withholdings of \$37,512, and a tax overpayment of \$8,052. On July 5, 2019, FTB issued appellants a refund of \$8,052.
5. On April 15, 2022, appellants filed an amended tax return for the 2018 tax year, reporting taxable income of \$27,971, zero total tax, and withholdings of \$37,512, and requesting a \$37,512 refund.
6. In a letter dated June 29, 2022, FTB denied appellants' claim for refund on the ground that the claim was based on a frivolous amended return.

7. On August 1, 2022, FTB received correspondence (dated April 14, 2022) from appellants requesting a refund for the 2018 tax year. In a notice dated December 5, 2022, FTB issued a second denial of appellants' 2018 tax year claim for refund, stating that the claim was denied because it was based on a frivolous amended return.

### 2021 Tax Year

8. FTB received information from the California Employment Development Department (EDD) that appellant J. Lin earned wage income from three employers during the 2021 tax year.
9. On April 15, 2022, appellants filed their 2021 California Resident Income Tax Return, reporting zero wages, zero taxable income, zero total tax, and withholdings of \$62,590, and claiming a refund of \$62,590.
10. On June 29, 2022, FTB sent appellant J. Lin a Notice of Frivolous Return and Demand for Tax Return (Demand) regarding the 2021 tax year, stating that if he failed to file a valid tax return within 30 days, FTB would impose a frivolous return penalty of \$5,000 pursuant to R&TC section 19179(a).<sup>3</sup>
11. On or about August 1, 2022, FTB received from appellants a response dated April 14, 2022, objecting to the June 29, 2022 Demand.
12. On November 3, 2022, appellants filed another 2021 California Resident Income Tax Return that similarly reported zero taxable income, zero total tax, and withholdings of \$62,590, and claimed a refund of \$62,590. On December 5, 2022, FTB issued to appellant J. Lin a denial of this claim for refund.
13. In a notice dated December 5, 2022, FTB denied the 2021 claim for refund on the ground that the claim was based on a frivolous amended return.
14. On March 1, 2023, FTB sent appellant J. Lin a Notice of Proposed Assessment (NPA), stating that because he had failed to file a valid tax return pursuant to the June 29, 2022 Demand, FTB proposed tax of \$17,024 and a late filing penalty of \$4,256.<sup>4</sup>
15. On May 5, 2023, FTB received a letter from appellant J. Lin protesting the NPA.

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<sup>3</sup> FTB indicates that it issued this Demand only to appellant J. Lin, and did not include appellant D. Lin, because the proposed assessment is based on FTB's authority to estimate income and propose tax under R&TC section 19087, and "stems from information received from third parties as it pertains to [appellant J. Lin] only."

<sup>4</sup> The NPA also proposed a demand penalty of \$11,787.75, which FTB has agreed to abate on appeal.

16. On August 15, 2023, appellants filed a 2021 California Nonresident of Part-Year Resident Income Tax Return, with the phrase “as amended” written on the first page; appellants wrote that the explanation for filing an amended return was that they were “rebutting the W-2 [forms],” and that “[t]he earnings made from these ‘payers’ were not ‘wages’” and were not taxable. On this return, appellants again reported zero taxable income, zero total tax, and withholdings of \$62,590, and claimed a refund of \$62,590.
17. On August 30, 2023, FTB issued a Notice of Action to appellant J. Lin affirming the NPA.

#### Appeals to OTA

18. On January 30, 2023, OTA received appellants’ appeal of FTB denials of appellants’ claims for refund for the 2017, 2018, and 2021 tax years.
19. On April 25, 2023, OTA issued a letter to appellants which stated in part that, if OTA determines that a franchise or income tax appeal is frivolous, OTA shall impose a frivolous appeal penalty pursuant to R&TC section 19714.
20. On September 29, 2023, OTA received appellant J. Lin’s appeal of the Notice of Action proposing additional tax and penalties for the 2021 tax year.
21. Thereafter, OTA consolidated these appeals.

#### DISCUSSION

##### Issue 1: Whether appellants have demonstrated error in FTB’s denial of their claims for refund for tax years 2017, 2018, and 2021.

In an action for refund, the taxpayer has the burden of proving entitlement to a refund by a preponderance of the evidence. (*Appeal of Estate of Gillespie*, 2018-OTA-052P; Cal. Code Regs., tit. 18, § 30219(a), (b).) The taxpayer must prove not only that FTB’s determination of the tax liability is incorrect, but also the correct amount of tax owed. (*Appeal of Li*, 2020-OTA-095P.) Unsupported assertions are insufficient to satisfy the taxpayer’s burden of proof. (*Appeal of Wright Capital Holdings LLC*, 2019-OTA-219P.) FTB’s determinations cannot be successfully rebutted when the taxpayer fails to provide credible, competent, and relevant evidence as to the issues in dispute. (*Ibid.*)

R&TC sections 17071 and 17072 define “gross income” and “adjusted gross income” by referring to and incorporating into California law Internal Revenue Code (IRC) sections 61 and 62, respectively. R&TC section 17041(a) provides that California residents shall be taxed upon their entire taxable income regardless of its source. IRC section 61 defines gross income as all income from whatever source derived, unless provided otherwise. Wages

and compensation for services are gross income within the meaning of IRC section 61. (IRC, § 61(1); *U.S. v. Romero* (1981) 640 F.2d 1014, 1016; *Appeal of Balch*, 2018-OTA-159P.)

Here, Forms W-2 issued by appellants' employers reported wages paid to appellants during the 2017, 2018, and 2021 tax years. Therefore, appellants must include the wages in gross income, pursuant to IRC section 61. (*U.S. v. Romero, supra*, 640 F.2d at p. 1016; *Appeal of Balch, supra*.) Appellants do not provide any arguments or evidence showing error in FTB's denial of the claims for refund. Appellants provide frivolous arguments, such as that their earnings are not taxable wages because they are not employees of the state or federal government. Such arguments have consistently been rejected by OTA, the Board of Equalization (BOE) (OTA's predecessor), the IRS, and courts as frivolous and without merit. (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*; *Appeals of Wesley and Couchman* (2005-SBE-002) 2005 WL 3106917.) OTA declines to address such frivolous arguments because "to do so might suggest that these arguments have some colorable merit." (*Crain v. Commissioner* (5th Cir. 1984) 737 F.2d 1417, 1417.) Consequently, appellants have not shown error in FTB's denial of the claims for refund.

Issue 2: Whether appellant J. Lin has demonstrated error in FTB's proposed assessment of tax for tax year 2021.

As stated above, 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, 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.

FTB's initial burden is to show that its proposed assessment is reasonable and rational. (*Appeal of Bindley*, 2019-OTA-179P.) If FTB meets this initial burden, the assessment is presumed correct, and the burden shifts to the taxpayer to prove it is erroneous. (*Ibid.*) Unsupported assertions are insufficient to satisfy the taxpayer's burden. (*Ibid.*)

Here, FTB proposed an assessment based on Form W-2 information reported to EDD by appellant J. Lin's employers. FTB's reliance on this third-party reporting information is a

reasonable and rational basis for the proposed assessment. Therefore, appellant J. Lin bears the burden of demonstrating error in the proposed assessment. The accuracy of the Forms W-2 income is further substantiated by the Wage and Income Transcript FTB obtained from the IRS. Accordingly, FTB's proposed assessment was reasonable and rational and the burden shifts to appellant J. Lin to prove the assessment is erroneous.

On appeal, appellant J. Lin provides similar frivolous arguments that appellants raised regarding the claims for refund in Issue 1. As discussed above, those frivolous arguments are meritless, and OTA will not address them further. In addition, appellant J. Lin disputes the proposed assessment on the ground that it was not also issued to his spouse. FTB issued the NPA only to appellant J. Lin because the amount of the NPA is based on information that FTB obtained from third parties regarding appellant J. Lin's income. Accordingly, FTB's issuance of the NPA solely to appellant J. Lin does not show error, and appellant J. Lin has not met his burden to show error in the proposed assessment.

Issue 3: Whether appellant J. Lin has established reasonable cause to abate the late filing penalty.

A late filing penalty will be imposed when a taxpayer fails to file a tax return before its due date, unless the taxpayer establishes that the late filing was due to reasonable cause and was not due to willful neglect. (R&TC, § 19131(a).) The filing of a return improperly reporting zero taxable income and zero tax is not a valid return and subjects the filer to various penalties. (*Appeal of Hodgson* (2002-SBE-001) 2002 WL 245667; see *Appeal of Reed*, 2021-OTA-326P.) When FTB imposes a penalty, the law presumes that the penalty was imposed correctly, and the burden of proof is on the taxpayer to show that reasonable cause exists to support abating the penalty. (*Appeal of Xie*, 2018-OTA-076P.) 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 an ordinarily intelligent and prudent businessperson would have so acted under similar circumstances. (*Appeal of Belcher*, 2021-OTA-284P.)

Appellant J. Lin filed what he purported to be a timely and valid tax return. However, as discussed above, this return did not report any of his wages. As such, appellant J. Lin did not file a valid tax return by the filing deadline. Therefore, FTB's imposition of the late filing penalty was proper and appellant J. Lin has the burden of proof to show reasonable cause exists to support abating the penalty. Here, an ordinarily intelligent and prudent businessperson would not have filed a zero return or otherwise failed to report their wages based on frivolous arguments. As such, there is no reasonable cause to support abating the late filing penalty.

Issue 4: Whether OTA has jurisdiction to consider appellants' appeal of the frivolous return penalties for tax years 2017, 2018, and 2021.

R&TC section 19179(a) states that a penalty shall be imposed for filing a frivolous return and shall be determined in accordance with IRC section 6702, except as otherwise provided. The normal protest and appeal procedures do not apply to the frivolous return penalty. (See R&TC, §§ 19179, 19180(b); *Appeal of Balch, supra.*) The only process available to taxpayers to contest the frivolous return penalty is to pay the penalty in full, then file a written claim for refund with FTB. (R&TC, § 19180(b).) There is no evidence in the record showing that the penalty was paid and a refund of the penalty was requested; thus, OTA has no jurisdiction to address this issue on appeal.

Issue 5: Whether OTA should impose a frivolous appeal penalty on appellants pursuant to R&TC section 19714.

OTA shall impose a frivolous appeal penalty of up to \$5,000 whenever it appears that an appeal has been instituted or maintained primarily for delay, or that a taxpayer's position is frivolous or groundless. (R&TC, § 19714; Cal. Code Regs., tit. 18, § 30217(a); *Appeal of Balch, supra.*) OTA may consider any relevant factors in determining whether, and in what amount, to impose a frivolous appeal penalty, including, but not limited to, the following: (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).)

As discussed above in Issues 1 and 2, here appellants have made frivolous arguments, such as their assertions that their earnings are not taxable wages because they are private sector workers; such arguments have consistently been rejected by OTA, BOE, the IRS, and courts as frivolous and without merit. (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*; *Appeals of Wesley and Couchman, supra.*) OTA's April 25, 2023 letter notified appellants that if OTA determines that an appeal is frivolous, OTA shall impose a frivolous appeal penalty pursuant to R&TC section 19714. In addition, FTB's briefings and correspondence have repeatedly notified appellants that they were raising frivolous arguments. To the extent that the present appeal

concerns claims for refund for the amounts appellants have already paid, it is unlikely that it has been instituted or maintained primarily for delay.<sup>5</sup> However, appellants continued to pursue this appeal despite being notified that the frivolous appeal penalty may be applied against taxpayers who maintain frivolous or groundless appeals. Although appellants do not have a history of filing prior appeals, appellants have concurrently appealed FTB's claim denials for the 2019 and 2020 tax years under frivolous arguments identical to the arguments in the present appeal.<sup>6</sup>

In determining the amount of the frivolous appeal penalty to impose in this case, OTA considers fairness to appellants, as well as to the public, which is impacted by the cost of adjudicating frivolous and groundless appeals. (*Appeal of Balch, supra.*) In this case, appellants were informed prior to and during this appeal that their positions may be frivolous, yet appellants continued with this appeal and filed separate appeals for the 2020 tax year under an identical frivolous position. Therefore, pursuant to R&TC section 19714 and Regulation section 30217(a), OTA imposes a frivolous appeal penalty of \$1,000. Appellants are on notice that they may be subject to a frivolous appeal penalty of up to \$5,000 if they file any future appeal raising similar frivolous arguments.

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<sup>5</sup> OTA does not make the same conclusion regarding the portion of the appeal concerning the proposed tax and penalty in the March 1, 2023 NPA for the 2021 tax year.

<sup>6</sup> In appellants' appeal for the 2020 tax year, OTA imposed a frivolous appeal penalty of \$1,000.

HOLDINGS

1. Appellants have not demonstrated error in FTB’s denial of their claims for refund for tax years 2017, 2018, and 2021.
2. Appellant J. Lin has not demonstrated error in FTB’s proposed assessment of tax for tax year 2021.
3. Appellant J. Lin has not established reasonable cause to abate the late filing penalty for tax year 2021.
4. OTA does not have jurisdiction to consider appellants’ appeal of the frivolous return penalties for tax years 2017, 2018, and 2021.
5. OTA imposes on appellants a frivolous appeal penalty of \$1,000 pursuant to R&TC section 19174.

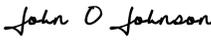
DISPOSITION

FTB’s actions denying appellants’ claims for refund for the 2017, 2018, and 2021 tax years are sustained. As conceded by FTB on appeal, the demand penalty for the 2021 tax year shall be abated. Otherwise, FTB’s action proposing additional tax and the late filing penalty for the 2021 tax year is sustained. In addition, OTA imposes on appellants a frivolous appeal penalty in the amount of \$1,000.

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 Suzanne B. Brown  
 Administrative Law Judge

We concur:

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 Cheryl L. Akin  
 Administrative Law Judge

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 John O. Johnson  
 Administrative Law Judge

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