

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19095273
S. KREBS AND)
F. KREBS)
_____)

OPINION

Representing the Parties:

For Appellants: S. Krebs and F. Krebs

For Respondent: Jean M. Cramer, Tax Counsel IV

A. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, S. Krebs and F. Krebs (appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$5,130, plus applicable interest, for the 2015 tax year.

Appellants waived their right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUES

1. Whether appellants have shown error in FTB’s proposed assessment of additional tax.
2. Whether a frivolous appeal penalty should be imposed.

FACTUAL FINDINGS

1. Appellants timely filed a joint California resident income tax return for the 2015 tax year, reporting wages received on Forms W-2 from Jeff Brucia, DDS, Lauren C. Hebel, and F B Associates Inc. They reported tax of \$5,132, withholdings of \$6,267, and an overpayment of \$1,135, which FTB refunded to appellants.
2. Subsequently, appellants filled out three Forms 3525, Substitute for Form W-2, and revised their wages to zero. Appellants attached the forms to an amended 2015 tax return and correspondingly reduced their as filed wages, federal adjusted gross income (AGI), California AGI, taxable income, and tax to zero. As a result, appellants claimed a refund

- of \$5,132. FTB refunded appellants \$5,132, plus an additional \$300.02 in accrued interest.
3. FTB subsequently issued a Notice of Proposed Assessment (NPA), which increased appellants' income to include wages reported by their employers on the Forms W-2, and proposed an additional tax of \$5,130, plus interest.
 4. Appellants timely protested the NPA.
 5. FTB sent to appellants a Frivolous Submission Notice, notifying them that their protest is considered a frivolous submission and they may be subject to a \$5,000 frivolous submission penalty if they did not withdraw their protest. Appellants notified FTB that they would not be withdrawing their protest.
 6. FTB issued a Notice of Action (NOA), affirming the NPA. The NOA notified appellants that the Office of Tax Appeals (OTA) may impose up to a \$5,000 frivolous appeal penalty under R&TC section 19714. This timely appeal followed.

DISCUSSION

Issue 1. Whether appellants have shown error in FTB's proposed assessment of additional tax.

FTB has the initial burden of showing that its proposed assessment is reasonable and rational. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.) Once it satisfies its burden, FTB's determination is presumed to be correct, and the taxpayers have the burden of proving error. (*Todd v. McColgan, supra*, at p. 514; *Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) Unsupported assertions are insufficient to satisfy taxpayers' burden of proof. (*Appeal of Magidow, supra*.)

R&TC section 17041(a) imposes a tax "upon the entire taxable income of every resident of this state." R&TC section 17071 incorporates IRC section 61, which defines "gross income" as "all income from whatever source derived, including . . . [c]ompensation for services." (IRC, § 61(a)(1).) It is undisputed that appellants were California residents who received wages as listed on their original Forms W-2 from three employers. Therefore, FTB's use of appellants' Forms W-2 to calculate their taxable income was reasonable and rational.

Appellants dispute FTB's characterization of their amended return as an "invalid" return. Returns that do not contain sufficient data from which FTB can compute and assess the tax liability of a particular taxpayer, or that do not demonstrate an honest and genuine attempt to

satisfy the requirements of California’s tax law (including “zero returns”) are not valid returns. (*Appeal of Hodgson* (2002-SBE-001) 2002 WL 245667.) Therefore, FTB correctly characterizes appellants’ return as an invalid return because they reported zero income.

Appellants also maintain their wages are not taxable because: (1) the income tax is an excise tax; (2) they are not statutorily liable for the income tax; and (3) taxation of their income is barred by the Sixteenth Amendment of the United States Constitution. We disagree.

Appellants’ contentions, and other similar arguments, have consistently been rejected by our predecessor, the Board of Equalization (BOE), and by OTA as frivolous and without merit. (See, e.g., *Appeal of Balch*, 2018-OTA-159P; *Appeals of Wesley, et al.* (2005-SBE-002) 2005 WL 3106917; *Appeal of Myers, supra*; *Appeal of Castillo* (92-SBE-020) 1992 WL 202571; *Appeals of Bailey* (92-SBE-001) 1992 WL 44503; *Appeals of Dauberger, et al.* (82-SBE-082) 1982 WL 11759.) As such, we decline to discuss appellants’ contentions further, because “to do so might suggest that these arguments have some colorable merit.” (*Crain v. Commissioner* (5th Cir. 1984) 737 F.2d 1417 [discussing the reason courts often decline to refute frivolous taxpayer arguments with “somber reasoning and copious citation of precedent”].) Based on the foregoing, appellants have not established error in FTB’s proposed assessment of additional tax.

Issue 2. Whether a frivolous appeal penalty should be imposed.

R&TC section 19714 provides that a penalty of up to \$5,000 shall be imposed whenever it appears to OTA that proceedings before it have been instituted or maintained primarily for delay, or that the taxpayers’ position is frivolous or groundless. California Code of Regulations, title 18, section (Regulation) 30217(a) provides that OTA may 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 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 the BOE, in a formal opinion, or courts have rejected; (2) whether appellants are making the same arguments that the same appellants made in prior appeals; (3) whether appellants filed the appeal with the intent of delaying legitimate tax proceedings or the legitimate collection of tax owed; (4) whether appellants have a history of filing frivolous appeals or failing to comply with California’s tax

laws; and (5) whether appellants have been notified, in a current or prior appeal that a frivolous appeal penalty may apply.

As explained above, appellants are making the same arguments that have long been held to be frivolous. (See, e.g., *Martin v. Commissioner* (6th Cir. 1985) 756 F.2d 38; *Appeal of Balch, supra*; *Appeals of Wesley, et al., supra*.) Appellants have received multiple notices by FTB regarding the frivolous nature of their arguments: (1) the notice of the frivolous submission penalty for the 2015 tax year; (2) the inclusion of FTB’s Law Summary Nonfiler – Frivolous Arguments during the protest and appeals process; and (3) the notification in the NOA for the 2015 tax year stating that OTA may impose a frivolous appeal penalty of up to \$5,000 pursuant to R&TC section 19714. Despite these warnings, appellants have pursued this appeal by maintaining only frivolous arguments.

While we consider that appellants have not submitted a prior frivolous appeal with us as a mitigating factor, appellants also have a history of filing zero returns with FTB for tax years 2014, 2016, and 2017 when appellants did in fact earn wages, which reflects a continual noncompliance with California’s tax laws.¹ Based on the foregoing, we hereby impose a frivolous appeal penalty of \$500.

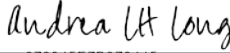
¹ Appellants have previously filed an appeal with OTA but withdrew the appeal before its resolution. As such, we cannot conclude that appellants have a history of maintaining frivolous appeals before OTA.

HOLDINGS

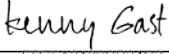
1. Appellants have not shown error in FTB’s proposed assessment of additional tax.
2. A frivolous appeal penalty in the amount of \$500 is imposed against appellants pursuant to R&TC section 19714.

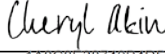
DISPOSITION

FTB’s actions are sustained in full and a frivolous appeal penalty of \$500 is imposed.

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 Andrea L.H. Long
 Administrative Law Judge

We concur:

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 Kenneth Gast
 Administrative Law Judge

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 Cheryl Akin
 Administrative Law Judge

Date Issued: 4/28/2020