**2001-SBE-001**

BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

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| In the Matter of the Appeal of | ) | |
| | ) | No. 41782 |
| Michael E. Myers | ) | |
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Representing the Parties:

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| For Appellant: | Michael E. Myers |
| For Respondent: | Mark McEvilly, Tax Counsel |
| Counsel for Board of Equalization: | Donald Fillman, Tax Counsel |

## O P I N I O N

This appeal is made pursuant to section 19045 of the Revenue and Taxation Code (R&TC) from the action of the Franchise Tax Board (FTB) on the protest of Michael E. Myers against a proposed assessment of personal income tax in the amount of $649 for the tax year 1997. Respondent also imposed a delinquent filing penalty of $162.25, a notice and demand penalty of $162.25,[1] and a filing enforcement cost recovery fee of $71.00. The issues involved in this appeal generally arise out of appellant's assertions that his earnings are not subject to the California personal income tax.

[1] Because respondent earlier conceded the notice and demand penalty, it will not be discussed in this opinion.

Introduction

Before considering the specifics of this case, we wish to note that we have experienced an increase in a certain type of appeal—ones that are based on contentions that are totally without merit and that have been uniformly rejected for many years by this Board as well as by state and federal courts. The present appeal is illustrative of that trend. It is our intent herein to give clear notice that we strongly disapprove of appeals of this nature. They do nothing but waste our time and cost the taxpayers of this state unnecessary expense. Many of these appeals are almost precisely the same, using large portions—often word for word—from other appeals. The most noteworthy ingredient in these appeals is a series of groundless, frivolous, and nonsensical arguments. Both federal and state courts have dealt with these concerns and documented them in their decisions. We cite the following examples:

> "We are sensitive to the need for the courts to remain open to all who seek in good faith to invoke the protection of law. An appeal that lacks merit is not always—or often—frivolous. However, we are not obliged to suffer in silence the filing of baseless, insupportable appeals presenting no colorable claims of error and designed only to delay, obstruct, or incapacitate the operations of the courts or any other governmental authority. Crain's present appeal is of this sort. It is a hodgepodge of unsupported assertions, irrelevant platitudes, and legalistic gibberish. The government should not have been put to the trouble of responding to such spurious arguments, nor this court to the trouble of 'adjudicating' this meritless appeal."

(Crain v. Commissioner (5th Cir. 1984) 737 F.2d 1417, 1418.)

> "Some people believe with great fervor preposterous things that just happen to coincide with their self-interest . . . . The government may not prohibit the holding of these beliefs, but it may penalize people who act on them."

(Coleman v. Commissioner (7th Cir. 1986) 791 F.2d 68, 69.)

> "Like moths to a flame, some people find themselves irresistibly drawn to the . . . illusory claim that there is no legal requirement to pay federal income tax. And, like the moths, these people sometimes get burned."

(United States v. Sloan (7th Cir. 1991) 939 F.2d 499, 500.)

In the present appeal, two of the documents that appellant filed still contain "footers" with the names of former appellants. They are filled with groundless and frivolous contentions of the kind being sold by charlatans to both unsuspecting taxpayers and those willing

to be duped. It is apparent that appellant does not understand the meaning of the material he cites, but seeks rather to take words and phrases from cases, statutes, and regulations and twist them to say what he wishes them to say. Indeed, attached to one of appellant's briefs—by accident, we assume—are instructions (from an unnamed source) on how to "gum up" a portion of respondent's case.

Facts and Contentions

Appellant failed to file a California personal income tax return for 1997. Respondent received information that appellant was licensed by California's Board of Dental Examiners to practice dentistry. He was listed in the telephone book as Michael E. Myers, DDS—Omni Dental. Respondent also received information from the Employment Development Department (EDD) of California that appellant was self-employed. EDD reported income of $24,640 from appellant's self-employment activity.[2] EDD also reported that appellant had received $756 as a miscellaneous payment from Blue Cross of California, and had received interest from three payors (a bank, a savings bank, and a credit union) totaling $197.

Respondent sent appellant a letter on February 5, 1999, demanding that appellant file a return or provide proof that he was not required to file a return. No return was filed, nor was proof provided that appellant was not required to file a return. On April 9, 1999, respondent issued a Notice of Proposed Assessment (NPA) based on the information it had received. The NPA proposed additional tax of $649.00, a penalty of $162.25 (25 percent of the proposed tax assessment) for failing to file a return on or before the due date, a penalty of $162.25 (25 percent of the tax before any credits) for failing to file a return upon notice and demand, and a $71.00 cost recovery fee. Appellant filed a protest. After considering appellant's protest, respondent issued a Notice of Action that affirmed the NPA. Appellant filed this appeal. Subsequent to the filing of the appeal, in its opening brief, respondent conceded the notice and demand penalty.

Appellant's Contentions. Appellant contends as follows: (1) He did not receive "due process" from respondent or this Board. (2) Respondent's brief "is not germane to the case" and should be stricken. (3) The normal presumption that respondent's assessment is correct was successfully rebutted by appellant. (4) The California income tax law does not apply to his "remuneration" because (a) he is a "Citizen" of the California Republic and thus not a "resident" or "individual" as those terms are used in the tax law (so the code sections relying on those terms "cannot apply to him") and (b) "he was never paid any 'compensation' " because the "money paid to him was 'remuneration' as set forth in the law." In an apparent attempt to force this result, appellant filed a federal Form 4852 and respondent's Form 3525 (substitutes for Form W-2) as well as a Form 540—all showing zero income and zero tax liability. (5) He was at risk of criminal penalties for perjury if he signed a return that showed any income subject to California income tax. (6) Only income from "sources" specified in Internal Revenue Code (IRC) section 861, and its implementing regulations (e.g., Treas. Reg. § 1.861-8(f)(1)) are

[2] The amount of $24,640 appears to be a small amount of income for someone who went through the rigors of dental school and openly holds himself out to be a practicing dentist.

subject to California income tax. Also, the "gross income" of IRC section 61 is restricted to "Agricultural" activities. (7) The United States Supreme Court, in United States v. Burke (1992) 504 U.S. 229, supports appellant's definitions of income stated above. (8) The Internal Revenue Service (IRS) has accepted and acknowledged the validity of the precise same arguments and reasoning as presented in the appellant's Treasury Regulation section 1.861 argument.

Respondent's Contentions. Respondent contends that appellant has not demonstrated error in its proposed assessment of tax, which was based upon available information. It contends that appellant's arguments are the same or variations of arguments previously rejected by the Board.[3] Furthermore, respondent contends that all of appellant's contentions are without merit. We note that appellant has not disputed receiving the amounts indicated by respondent. Rather, appellant has labeled all of his receipts as "remuneration" (not "compensation") and contends that this means that the receipts are not subject to California personal income tax.

Discussion

1. Due Process. This Board is precluded from determining the constitutional validity of California statutes, and we have an established policy of declining to consider constitutional issues. (Cal. Const., art. III, § 3.5; Appeal of Aimor Corp., Cal. St. Bd. of Equal., Oct. 26, 1983; Appeal of Walter R. Bailey, 92-SBE-001, Feb. 20, 1992.) Furthermore, the Board held in Bailey as follows:

> "[D]ue process is satisfied with respect to tax matters so long as an opportunity is given to question the validity of a tax at some stage of the proceedings. It has long been held that more summary proceedings are permitted in the field of taxation because taxes are the lifeblood of government and their prompt collection is critical. [Citations omitted.]"

We conclude that appellant has been provided a full opportunity to present his positions and have them considered. We believe that appellant has received due process of the law in the present case.

Appellant also contends that this Board has denied him due process by requiring him to supplement his appeal, or the appeal may have been dismissed. (See Cal. Code of Regs., tit. 18, § 5075.1, subd. (b)(1).) After appellant filed his initial appeal, we sent him a letter which

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[3] As previously noted, large portions of appellant's brief are exactly, word for word, the same as portions of many other briefs previously filed by other persons espousing the same groundless contentions. In fact, appellant's appeal has a "footer" on each page that states: "Hull FTB Appeal to SBE" and appellant's "opening" brief has a "footer" on each page that states: "Appeal of Tomlinson v. FTB." This Board has previously decided, via summary (nonprecedential) decisions, appeals filed by persons named "Hull" and "Tomlinson," which both raised almost identical arguments as appellant herein.

noted that he had failed to file an income tax return for 1997. It requested him to supplement his appeal by providing sufficient income information to allow this Board to consider and decide his appeal. It stated that without such information his appeal was incomplete. It suggested that appellant may wish to provide a valid California return, and may wish to enclose copies of W-2 forms and/or 1099 forms.

We note that this Board has followed such a procedure for many years. (See Appeal of Walter R. Bailey, supra.) Such income information is extremely necessary in cases such as this, wherein respondent has had to estimate appellant's income and this Board must determine whether appellant has shown that such estimate is incorrect. Under the regulations, when an incomplete appeal is filed, the taxpayer shall be granted 90 days within which to perfect the appeal by filing a complete opening brief.[4] We do not think that such a procedure violates appellant's "due process" in an appeal. Without such information, which is readily available to an appellant, it is difficult to make the required determination. In the present case, appellant responded by submitting a tax return and a substitute W-2 form (both under penalty of perjury) that contained zeros.

2. Request to Strike Brief. The Rules of Practice of the State Board of Equalization (Title 18, California Code of Regulations, Regulation sections 5075 and 5075.1) require that the content of respondents' briefs be relevant to the issues before it. (See Cal. Code Regs., tit. 18, § 5075, subds. (c) & (d).) Respondent's brief meets this requirement. The request to strike is denied.

3. Presumption of Correct Assessment. Appellant contends that respondent did not have an adequate basis for calculating the amount of tax to be assessed, and that he rebutted the normal presumption that respondent's assessment is correct. We disagree. R&TC section 19087 provides, in pertinent part, as follows:

> "(a) If any taxpayer fails to file a return, or files a false or fraudulent return with intent to evade the tax, for any taxable year, the Franchise Tax Board, at any time, may require a return or an amended return under penalties of perjury or 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."

(Emphasis added.) A taxpayer is not in a good position to criticize respondent's estimate of liability when he or she fails to file a required return and, in addition, subsequently refuses to submit information upon request. (Appeals of Fred R. Dauberger, et al., Cal. St. Bd. of Equal., Mar. 31, 1982.) The failure to produce evidence that is within an appellant's control will give rise to a presumption that such evidence is unfavorable to his or her case. (Appeal of Don A. Cookston, Cal. St. Bd. of Equal., Jan. 3, 1983.)

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[4] The Board Proceedings Division effectuates the dismissal of incomplete appeals.

Appellant has not established any error in respondent's assessment of tax. None of appellant's arguments answer or even address the calculations in the NPA. Appellant's primary arguments merely attempt to define "gross income" in such a way as to exclude his own income—an argument of a type this Board has uniformly rejected. (See: Appeal of Alfons Castillo, 92-SBE-020, July 20, 1992; Appeal of Walter R. Bailey, supra; Appeals of Fred R. Dauberger, et al., supra.) Respondent's initial burden is to show why its assessment was reasonable and rational. Federal courts have held that the taxing agency need only provide some evidence linking the taxpayer with the unreported income. (See Rapp v. Commissioner (9th Cir. 1985) 774 F.2d 932.) In the present case, respondent obtained information from EDD to determine appellant's income. Use of this information to arrive at a proposed assessment is reasonable and rational, and so respondent has met its initial burden.[5] Therefore, we must presume that respondent's determination is correct and appellant has the burden of proving it to be wrong. (Todd v. McColgan (1949) 89 Cal.App.2d 509; Appeal of Myron E. and Alice Z. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969; Appeal of Ismael R. Manriquez, Cal. St. Bd. of Equal., Apr. 10, 1979.) If taxpayers fail to present uncontradicted, credible, competent, and relevant evidence as to the issues in dispute, respondent's determination cannot be successfully rebutted. (Appeal of James C. and Monablanche A. Walshe, Cal. St. Bd. of Equal., Oct. 20, 1975.) Appellant has failed to meet this burden.

4. Application of California Tax Law to Appellant's Income. R&TC section 17041 imposes a tax "upon the entire taxable income of every resident of this state . . . ." Appellant has indicated that he lived and worked in California during 1997. In all of the documents that appellant has provided with respect to tax year 1997, he has used only two addresses. Both are located in San Bernardino, California (2130 N. Arrowhead Ave, Suite 205; and 1974 E. Lynwood, 3F). R&TC section 17014 states that "resident" includes "every individual who is in this state for other than a temporary or transitory purpose," and "every individual domiciled in this state who is outside the state for a temporary or transitory purpose."

Appellant states that because he is a "Citizen" of California, he is not a "resident" of California. Appellant does not allege that he is a resident or domiciliary of any other state or country. Rather, appellant states that California's income tax laws apply to a "resident" but not a "Citizen." He states that a "resident" is an "individual" (Rev. & Tax. Code, § 17014) and that an "individual" is a "natural person" (Rev. & Tax. Code, § 17005), but "a natural person as defined by law, is not the same as a Citizen as it does not have the same attributes." Appellant concludes: "It is therefore a fact that the appellant, as a Citizen under the law is not a 'resident'." This argument defies logic and is nothing but "semantics" (as that term is used to describe the "deliberate distortion or twisting of meaning"). (Webster's New World Dict. (3rd college ed.

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[5] Appellant contends that his submission of federal Form 4852 and respondent's Form 3525, "Substitute[s] for Form W-2," on which he reports zero wages and zero taxable distributions for 1997, prevents respondent from satisfying its initial burden because they were signed under penalty of perjury. We disagree. Appellant's forms attack the definition of taxable income, but do not establish that respondent's use of information from EDD was incorrect.

1991) p. 1219, col. 2.) Simply defining a person as a "Citizen" of California does not preclude that person from also being defined as a "resident" of California.[6]

Appellant also contends "he was never paid any 'compensation' . . . ." Rather, he argues that the "money paid to him was 'remuneration' . . . ." This is another instance of "semantics." Appellant has made no attempt to suggest any meaningful difference between "compensation" and "remuneration" for income tax purposes. In fact, the two words can each be defined by the other—each is a synonym of the other. (See Webster's New World Dict. (3rd college ed. 1991) p. 284, col. 2, and p. 1136, col. 1.) Once again, appellant's position is groundless and frivolous.

Appellant objected to the citation by respondent of the case of United States v. Romero (9th Cir. 1981) 640 F.2d 1014 (Romero). However, Romero is a good example of how the courts treat the use of semantics to make groundless and frivolous contentions. In Romero, a taxpayer pursued similar "semantic" arguments (contending that he was not a "person" and that his "wages" were not "income," much like appellant has contended that he is a "Citizen" rather than a "resident" and that his "remuneration" was not "compensation"). In Romero, at page 1016, the court stated as follows:

> "Courts are established at public expense to try issues, not to play games.
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> " . . . . . .
> "Romero's proclaimed belief that he was not a "person" and that the wages he earned as a carpenter were not "income" is fatuous as well as obviously incorrect. . . . Compensation 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. . . .
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> " . . . . . .

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[6] We note that other persons have argued that they are neither "residents" nor "Citizens" of the "State of California," because they have no "political relationship" with such an entity. These persons claim that they merely live in California in a geographical sense, but are simply not subject to California's tax laws because they have not consented to the State's right to govern them. Such contentions are not merely contrary to law but are contrary to the maintenance of a civilized society.

Still other persons have argued that IRC section 871 may be used to avoid all taxation. They make the nonsensical contention that they have "the 'tax status' of a 'nonresident alien individual' . . . by filing a revocation of the election of 26 USC § 871(b) and . . . [not being] effectively connected with the conduct of a trade or business within the United States." Not only does this contention defy logic, but, like the contention made by appellant herein based on IRC section 861 (see discussion, infra, of "Income 'Sources' "), IRC section 871 is not even applicable to California taxes. This Board rejects such contentions.

> "[Romero] is attempting willfully and intentionally to shift his burden to his fellow workers by the use of semantics. He seems to have been inspired by various … groups across the land who postulate weird and illogical theories of tax avoidance, all to the detriment of the common weal and of themselves."[7]

5. Income "Sources." Appellant's primary contention relies on his misapplication of IRC section 861 and its implementing regulations (most specifically, Treasury Regulation section (Regulation) 1.861-8(f)(1)). Appellant contends that "gross income" (apparently for both federal and state tax purposes) is limited to income from an obscure list of "operative sections" listed in Regulation 1.861-8(f)(1). This contention is groundless and frivolous. To better understand this contention we will briefly review a few IRC sections and regulations. California Revenue and Taxation Code (R&TC) section 17071 defines "gross income" by reference to IRC section 61 "except as otherwise provided." Section 61 defines "gross income" as follows:

> "Except as otherwise provided in this subtitle [Subtitle A—Income Taxes], gross income means all income from whatever source derived, including (but not limited to) the following items:
> (1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
> (2) Gross income derived from business;

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[7] We also note that some persons additionally rely on IRC section 3401 (a)(8)(A)(i), to argue that their "remuneration" does not constitute "wages." Such reliance is also in error. This argument hinges on a reference to IRC section 911(a), which states in pertinent part:

> "At the election of a qualified individual . . . there shall be excluded from the gross income of such individual, and exempt from taxation under this subtitle . . . (1) the foreign earned income of such individual . . . ."

IRC section 911 (b) defines "foreign earned income" as the amount received by a qualified individual from sources within a foreign country that constitute earned income for services performed by the individual. Subsection (d) defines a "qualified individual" as a United States citizen who resided in a foreign country for the requisite period of time. Although the above stated argument pertaining to this section is unclear, some persons appear to contend that IRC section 911 restricts the definition of "gross income" to compensation for services earned by a United States citizen living and working abroad, and other income is thus not "included" in gross income. These people are mistaken. Section 911 merely describes a type of compensation that may be excluded from gross income under the stated circumstances; it does not in any way define what is included in gross income. If a person is not a foreign resident, section 911 simply cannot apply. Therefore, the exception to the definition of "wages" in IRC section 3401 (a)(8)(A)(i), also cannot apply.

(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;
(9) Annuities;
(10) Income from life insurance and endowment contracts;
(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust."

(Emphasis added.)

For federal purposes, IRC section 1 imposes a tax on the taxable income of every individual who is a citizen or resident alien of the United States. One of its implementing regulations provides, in part, as follows:

> "In general, all citizens of the United States, wherever resident, and all resident alien individuals are liable to the income taxes imposed by the Code whether the income is received from sources within or without the United States. . . . As to tax on nonresident alien individuals, see sections 871 and 877."

(Treas. Reg. § 1.1-1(b); emphasis added.) Thus, for a citizen or a resident alien it will normally not matter whether a source of income is from within the United States or without—since both are subject to the federal income tax unless specifically provided elsewhere in the code (such as the "foreign earned income" discussed above).

Nonresident aliens and foreign corporations have special provisions for federal income tax purposes. For example, IRC section 871 imposes "a tax of 30 percent of the amount received from sources within the United States by a nonresident alien individual . . . [on income other than capital gains]." (Emphasis added.) One of the implementing regulations for IRC section 871 provides, in part, as follows:

> "For purposes of the income tax, alien individuals are divided generally into two classes, namely, resident aliens and nonresident aliens. Resident alien individuals are, in general, taxable the same as citizens of the United States; that is, a resident alien is taxable on income derived from all sources, including sources without the United States."

(Treas. Reg. § 1.871-1(a); emphasis added.) Once again, it is clear that citizens and resident aliens are taxable on income from all sources, both within and without the United States.

For some purposes (such as taxing the income of nonresident alien individuals and foreign corporations), it is necessary to know whether a source of income is from within or without the United States. (See Int.Rev. Code, § 871, supra.) IRC sections 861 through 865, together with their implementing regulations, provide the bases for making this determination—for federal income tax purposes. IRC section 861 provides the criteria for determining which portions of various income items are from "sources" within the United States, and IRC section 862 does the same for "sources" of income without the United States. (IRC sections 863–865 provide additional rules—including for the apportionment and allocation of income to sources within or without the United States.)

The regulations under IRC section 861 assist in determining whether income is from a source within or without the United States—including situations where income comes partly from within and partly from without the United States—and where it is necessary to allocate and apportion deductions. It is here that appellant makes his primary error. Appellant completely misapplies Regulation 1.861-8, subsections (a)(1) and (f)(1). He concludes that these relatively obscure portions of the regulations suddenly change the whole definition of taxable income for citizens and resident aliens to include only income from the list of "operative sections" in subsection (f)(1) of this regulation. This defies logic and the clear purpose of IRC section 861. Subsection (a)(1) of the regulation states that it applies to the determination of taxable income "from specific sources and activities under other sections of the Code, referred to in this section as operative sections." The list of "operative sections" in subdivision (f)(1) does not include IRC sections 61 and 63. Therefore, rather than limiting either "gross income" under section 61 or "taxable income" under section 63, this regulation has only the very limited application defined therein. Indeed, Regulation 1.861-8(g) provides a number of examples of how section 861 should be applied. (See Treas. Reg. § 1.861-8(g), examples 17-22 and 25-33.) These examples show how to determine whether an item of income (sometimes in very complex factual situations) is from a source within or without the United States. Sometimes the examples use terms such as "domestic" or "U.S." source, or "foreign" source, instead of "within" or "without." But they all clearly apply only to the determination of whether an item of income is from "within" or "without" the United States.

More importantly, IRC section 861 and its implementing regulations do not apply to the determination of taxable income under California law. California is not concerned with whether the income of California residents is from a source within or without the United States. (Indeed, the examples in Regulation 1.861-8(g) specifically recognize the different tax methods of the various states—some of which use the "worldwide unitary business theory" and some do not.) Unlike the specific references that California R&TC makes to IRC sections 61 and 63 (and many others), IRC section 861 has not been adopted "by reference." Rather, California adopted specific provisions for determining the gross income of nonresidents of California (R&TC sections 17951–17955). R&TC section 17073, subdivision (a), provides: "Section 63 of the Internal Revenue Code, relating to taxable income defined, shall apply, except as otherwise

provided." (Emphasis added.) R&TC sections 17951–17955 are the provisions "otherwise provided." Appellant, as a resident of California (defined by Rev. & Tax. Code section 17014), is not covered by these sections. (These sections impose tax on the California-source income of nonresidents for the same reason California residents are taxed—because persons "enjoying the benefits of the state, should in return contribute to the support of the state" [Whittel v. Franchise Tax Board (1964) 231 Cal.App.2d 278, 285].)

As a separate argument, appellant contends that IRC section 61 is restricted to "Agricultural" activities. His "reasoning" for this contention winds its way through a footnote in the 1939 IRC and "the CFR INDEX PARALLEL TABLE 1991." This argument defies logic and is completely groundless.

6. Court Decisions Cited by Appellant. None of the court decisions cited by appellant provide support for his positions. Indeed, in the primary case cited, United States v. Burke, supra, 504 U.S. 229, the court ruled against an argument that attempted to narrowly define "gross income." The court held, at page 233, that the term "gross income" was very broad—limited only by exclusions specifically enumerated elsewhere in the IRC:

> "The definition of gross income under the Internal Revenue Code sweeps broadly. Section 61(a) . . . provides that 'gross income means all income from whatever source derived,' subject only to the exclusions specifically enumerated elsewhere in the Code. As this Court has recognized, Congress intended through § 61(a) and its statutory precursors to exert 'the full measure of its taxing power,' Helvering v. Clifford, 309 U.S. 331, 334, 84 L. Ed. 788, 60 S. Ct. 554 (1940), and to bring within the definition of income any 'accession to wealth.' Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431, 99 L. Ed. 483, 75 S. Ct. 473 (1955)."

7. Penalty of Perjury. The Fifth Amendment to the United States Constitution provides, in part, that "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." The courts have consistently held that the privilege against self-incrimination does not justify a refusal to file an income tax return. (See: United States v. Sullivan (1927) 274 U.S. 259; United States v. Neff (9th Cir. 1980) 615 F.2d 1235.) The typical case concerns a taxpayer who contends that the mere act of filing a tax return will place him or her at risk of prosecution for something revealed thereby (such as income from the illegal sale of drugs or illegal gambling). A taxpayer may usually exercise the privilege against self-incrimination, however, by reporting the correct amount of income but not labeling it as income from an "illegal" trade or business. For example, the income may be shown as from "sales" rather than from "sales of illegal drugs." Yet the income must still be reported as gross income. (See Garner v. United States (1976) 424 U.S. 648.) The courts also hold that the Fifth Amendment may be claimed only if there are "substantial hazards of self-incrimination" that are "real and appreciable" and not merely "imaginary and unsubstantial." (United States v. Rendahl (9th Cir. 1984) 746 F.2d 553, 555, quoting Neff, supra, at p. 1239). Appellant has neither alleged nor provided evidence that appellant meets these criteria.

Appellant's stated fear of criminal penalties for perjury is a variation of a traditional Fifth Amendment argument. Appellant first attempts to create his own definition of "gross income" (such that it excludes his own "remuneration"). He then contends that to report any of his "remuneration" as "gross income" would be "perjury." As is discussed above under the "Income Sources" heading, appellant's self-created definition of gross income has no basis in the law. Thus, appellant's stated fear of criminal penalties for perjury is "imaginary" as well as groundless and frivolous.

8. Actions of the Internal Revenue Service. Appellant contends that the IRS agrees with his theories. In support of this contention, appellant provides copies of correspondence between the IRS and appellant, as well as between the IRS and Bosset Partners Marketing, Inc. Included are copies of checks purporting to be refunds of employment taxes initially paid to the IRS by the employer and then refunded after the employer sent the IRS a statement that the withholdings had been in error. We have been provided copies of these documents many times in the past, from many different appellants. Indeed, they seem to have been widely distributed. Although we do not know all of the circumstances of the cited transactions, they clearly do not establish that the IRS agrees with appellant's contentions. Furthermore, this Board has a duty to apply the law as it is written without regard to whether the IRS, or any other entity, has been misinformed or is in error. (See Appeal of Der Weinerschnitzel International, Inc., Cal. St. Bd. of Equal., Apr. 10, 1979.)

Penalties and Fees

Penalty for Delinquent Return. R&TC section 19131 provides that if a taxpayer fails to make and file a return on or before the due date, a penalty of 5 percent of the tax shall be added to the tax for each month or fraction thereof that a return is not filed on or before the due date (not to exceed 25 percent of the tax), unless the taxpayer can establish reasonable cause and no willful neglect. Appellant failed to file a return for in excess of five months, making the calculation of the penalty proper. There is a presumption of correctness of a penalty assessed by respondent. (Appeal of Robert Scott, Cal. St. Bd. of Equal., Apr. 5, 1983.) In order to overcome the presumption of correctness of a penalty, a taxpayer must provide credible and competent evidence to support a claim of reasonable cause; otherwise, the penalty will not be abated. (Appeal of Winston R. Schwyhart, Cal. St. Bd. of Equal., Apr. 22, 1975.)

Reasonable Cause. A "delinquent filing" penalty may be abated by establishing that the failure to timely file was due to reasonable cause and not due to willful neglect. To establish reasonable cause, taxpayers must demonstrate that they exercised ordinary business care and prudence in determining the proper amount of tax due as of the original due date for the return. (Appeal of Stephen C. Bieneman, Cal. St. Bd. of Equal., July 26, 1982.) The cause that will allow an abatement of penalty must be a cause that would prompt an ordinarily intelligent businessperson to have so acted under similar circumstances. (Appeal of J. B. Ferguson, Cal. St. Bd. of Equal., Sept. 15, 1958.) The burden is on appellants to prove that the difficulties experienced prevented them from filing a timely return. (Appeal of Kerry and Cheryl James, Cal. St. Bd. of Equal., Jan. 3, 1983.) A taxpayer's misunderstanding of the law will generally

not constitute reasonable cause. (Appeal of Diebold, Inc., Cal. St. Bd. of Equal., Jan. 3, 1983.) Appellant has not met this burden, so the penalty may not be abated.

Cost Recovery Fee. R&TC section 19254 provides that if a taxpayer fails or refuses to pay a liability for taxes, penalties, interest, or other liability after mailing the taxpayer proper notice, or fails or refuses to make and file a tax return after formal legal demand to file, the Franchise Tax Board shall impose a "collection cost recovery fee" or a "filing enforcement cost recovery fee, respectively. There is no "reasonable cause" exception in the statute. The amount is determined annually to reflect actual costs as reflected in the annual Budget Act. Respondent correctly imposed the fee after proper notice.

Penalty for Frivolous Appeal. Revenue and Taxation Code section 19714 provides that a penalty of up to $5,000 shall be imposed whenever it appears to the Board that proceedings before it have been instituted or maintained primarily for delay or that the position is frivolous or groundless. Appellant was notified of this fact in both the Notice of Action issued on October 4, 1999, and this Board's letter of November 29, 1999, which accepted this appeal. Despite this notice, appellant filed and has maintained an appeal containing groundless and frivolous positions. We conclude that a frivolous appeal penalty should be imposed against appellant in the amount of $1,000.

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O R D E R

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, pursuant to section 19047 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Michael E. Myers against a proposed assessment of additional personal income tax for the year 1997 in the amount of $649.00, a delinquent filing penalty of $162.25, and a filing enforcement

cost recovery fee of $71.00, be and the same is hereby sustained. In addition, we impose a penalty of $1,000 for maintaining a groundless or frivolous position before the Board.

Done at Sacramento, California, this 31th day of May, 2001, by the State Board of Equalization, with Board Members Mr. Klehs, Mr Chaing, Mr. Parrish, Mr. Andal, and *Ms. Marcy Jo Mandel present.

Claude Parrish, Chairman

John Chiang, Member

Johan Klehs, Member

Dean Andal, Member

* Marcy Jo Mandel, Member

*For Kathleen Connell per Government Code section 7.9.

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