BEFORE THE OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

IN THE MATTER OF THE APPEAL OF,)
)
K. DAVIS and J. DAVIS,) OTA NO. 241017661
)
APPELLANT.)
)
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TRANSCRIPT OF PROCEEDINGS

Fresno, California

Tuesday, April 7, 2026

Reported by:
ERNALYN M. ALONZO
HEARING REPORTER

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Transcript of Proceedings, taken at 855 M Street, Suite 960, Fresno, California, 93721, commencing at 10:39 a.m. and concluding at 11:29 a.m. on Tuesday, April 7, 2026, reported by Ernalyn M. Alonzo, Hearing Reporter, in and for the State of California.

APPEARANCES:

Panel Lead: ALJ AMANDA VASSIGH

Panel Members: ALJ HUY "MIKE" LE
ALJ SARA A. HOSEY

For the Appellant: K. DAVIS
GARY FEHDRAU

For the Respondent: STATE OF CALIFORNIA
FRANCHISE TAX BOARD

DAVID MURADYAN
JACKIE ZUMAETA

I N D E X

E X H I B I T S

(Appellant's Exhibits 1-27 were received into evidence at page 6.)

(Department's Exhibits A-W were received into evidence at page 6.)

OPENING STATEMENT

CLOSING STATEMENT

Fresno, California; Tuesday, April 7, 2026

10:39 a.m.

JUDGE VASSIGH: So, we'll go on the record.

This is the Appeal of Davis, OTA Case No. 241017661. The date is April 7th, 2026, and the time is 10:39 a.m. This hearing is being held in person in Fresno, California.

I am Judge Vassigh. I will be the lead for the purposes of conducting this hearing. My co-panelists, Judge Le and Judge Hosey, and I are equal participants in determining and deliberating the outcome of this appeal.

I'm going to ask the parties to identify themselves on the record and who they represent, starting with Franchise Tax Board.

MR. MURADYAN: David Muradyan, Franchise Tax Board.

JUDGE VASSIGH: Okay.

MS. ZUMAETA: Jackie Zumaeta, Franchise Tax Board.

JUDGE VASSIGH: Thank you.

MR. FEHDRAU: My name is Gary Fehdrau. I'm representing Mr. Kevin Davis and Mrs. Janet Davis today.

JUDGE VASSIGH: Okay.

MR. DAVIS: My name is Kevin Davis, and I'm the

Appellant.

JUDGE VASSIGH: Okay. Thank you.

So as stated in our Minutes and Orders, the parties have agreed that the issues to be decided in this appeal are: One, whether Appellants have shown error in FTB's denial of their claim for refund for tax year 2019 or 2020; two, whether OTA has jurisdiction to review FTB's assessment of frivolous return penalties, and if so, whether FTB properly assessed such penalty.

And as far as exhibits, we had no objections, so all exhibits will be admitted. That is Appellants' Exhibits 1 through 27 now admitted into evidence.

(Appellants' Exhibits 1-27 were received into evidence by the Administrative Law Judge.)

JUDGE VASSIGH: And Franchise Tax Board's Exhibits A through W now admitted into evidence.

(Department's Exhibits A-W were received into evidence by the Administrative Law Judge.)

JUDGE VASSIGH: During our prehearing conference, the parties stated that they will not present any witnesses today.

But I do want to check with you, Mr. Fehdrau, is Mr. Davis planning on presenting any testimony?

MR. FEHDRAU: No, not today.

JUDGE VASSIGH: Okay.

MR. MURADYAN: Judge Vassigh?

JUDGE VASSIGH: Yes, sir.

MR. MURADYAN: Would it be okay if I speak real quick?

JUDGE VASSIGH: Sure.

MR. MURADYAN: On the second issue, FTB concedes that OTA has jurisdiction, but we're going to simply argue that the frivolous penalties were submitted properly.

JUDGE VASSIGH: Okay. You're conceding that OTA has jurisdiction over the frivolous return penalties.

MR. MURADYAN: That's correct.

JUDGE VASSIGH: Okay. Thank you.

We ready to move to Appellants' presentation.

Mr. Fehdrau, we talked about giving you 20 minutes for your presentation, and whenever you are ready please proceed.

MR. FEHDRAU: Yes. We talked about 20 minutes, but also I had originally asked for 30. Is that still allowable?

JUDGE VASSIGH: If you find that you need the extra 10 minutes --

MR. FEHDRAU: Okay. Okay.

JUDGE VASSIGH: -- go ahead and ask at the end.

MR. FEHDRAU: Okay. All right. Sounds good. Are you -- are you going to stop me at 20 minutes, because it's about a -- it was about like 20-26 or so minutes when I kind of went through it. So, I don't know if --

JUDGE VASSIGH: I'll let you know when you're at 20 minutes --

MR. FEHDRAU: Okay.

JUDGE VASSIGH: -- and if you need a little bit more time, we can give you another 5 to 10 minutes.

MR. FEHDRAU: Yeah. Okay. That sounds good. Thank you. Okay. So, i guess I'll begin right now then.

PRESENTATION

MR FEHDRAU: Good morning. My name is Gary Fehdrau, and I'm here representing Appellants. I use -- when I use the term income any time in this presentation, I will only use it in its definitional sense within the 16th Amendment, and in its constitutional sense of which definition and meaning --

THE HEARING REPORTER: Excuse me, sir.

MR. FEHDRAU: Yes.

THE HEARING REPORTER: I'm sorry. I really need you to slow down a little bit. I know there's a time constraint.

MR. FEHDRAU: Right.

THE HEARING REPORTER: But I can only write so many words per minute.

MR. FEHDRAU: Okay. Yeah. I have a lot to cover, and so that would be -- I mean, I kind of was reading through it to --

JUDGE VASSIGH: So, Mr. Fehdrau, you can have more time --

MR. FEHDRAU: Okay.

JUDGE VASSIGH: -- because we want to make sure that you're able to present the argument. But I also think it might be helpful for you to remember, we do have your list of authorities. We do have the briefing and the exhibits, so if that helps you kind of focus your argument.

MR. FEHDRAU: Right. I have it kind of narrowed down. There's just a couple of main things that I have to handle.

JUDGE VASSIGH: Okay.

MR. FEHDRAU: Okay. I apologize.

So when I use the term "income" any time in this presentation, I only use it in its -- within its definition within the 16th Amendment in its constitutional sense of which definition and meaning have been thoroughly settled by the U.S. Supreme Court. The same applies to the term gains, profit, or income, which over time has been consent -- condensed simply to income. When I use the terms -- when I use the term "wages" any time in this presentation, I only use it as defined at 26 USC Section 3401A and section 3121A.

JUDGE VASSIGH: Mr. Fehdrau.

MR. FEHDRAU: Yes.

JUDGE VASSIGH: Sorry to interrupt you. I'm going to ask you to go slower.

MR. FEHDRAU: Okay.

JUDGE VASSIGH: And we'll make sure you get --

MR. FEHDRAU: I -- okay. I just didn't want to --

JUDGE VASSIGH: Yeah.

MR. FEHDRAU: I'm just trying to hit --

JUDGE VASSIGH: We will make sure you get to --

MR. FEHDRAU: I apologize.

JUDGE VASSIGH: -- finish.

MR. FEHDRAU: Okay. So, for -- do you want me to start from the top again, or are we -- no. Okay.

For tax years 2019 and 2020, Appellants filed their original tax returns with an ignorant and uneducated understanding of the income tax laws. In the spring of 2024, they became educated about the true nature of these laws and how they are lawfully applied, so they filed amended returns for these two years.

For the record, for tax years 2019 through 2022, I was a business director for a public school district in

California, which means I worked for a political subdivision of this state. I filed original California returns for these years with an ignorant and uneducated understanding of the income tax laws. When I became educated about their true nature in the spring of 2024, I filed amended California returns for all four years rebutting that I had received wages as claimed on forms W2 filed about me. I received full refunds of taxes previously paid with interest and no dispute from the FTB.

In Southern Pacific v. Lowe, the Court said, "We reject the broad contention submitted on behalf of government that all receipts, everything that comes in, are income," end quote.

What is income? Income is a legal and constitutional term which holds the same definition today that it held with the inception of the federal income tax in the Federal Revenue Act of 1862 enacted on July 1st, 1862. Though a non-apportion income excise tax was first introduced by being appended to an 1861 apportion direct tax by being appended to the direct tax, it lacked clarity as to its nature as an excise. This was remedied by repealing the 1861 non-apportioned income excise tax and replacing it with the duties in the Act of 1862.

The current and -- the current Internal Revenue Code find its foundational principles rooted in the Act of

1862. The preface of the Internal Revenue Code of 1939 says, "The whole body of Internal Revenue Law in effect on January 2nd, 1939, therefore, has its ultimate origin in 164 separate enactments of Congress. The earliest of these was approved on July 1st, 1862, the latest, June 16th, 1938," end quote.

The Internal Revenue Code of 1986 has amended as a continuation of the original act of 1862. Relevant to our discussion today are sections 86, 90, and 93 of the Revenue Act of 1862, which are contained in Exhibit 26. The Act of 1862 is the first iteration of the income tax as we know it today, an excise with provisions for withholding laid upon the pay of U.S. government workers, found in section 86, also known as a salary duty. At the same time, pursuant to section 90, also known as an income duty, the excise is separately laid upon the gains, profit, or income that might be derived from pay or other sources of private sector persons and U.S. government workers alike, such as through investments and taxable activities by its explicit, separate, and otherwise unnecessary identification in section 86 of the remuneration of U.S. government workers as taxable and taxed.

This original enactment provides a forthright statutory acknowledgment that the remuneration of private sector workers is not. After all, if gains, profit, or income derived from pay is the same thing as the pay itself, the pay of U.S. government workers identified in section 86 would be taxed under section 90. And the relevant portion of section 86 would be nonsensically superfluous. This clearly lawful distinction cannot and could not change through the many less candid reenactments and modifications of the tax since. Two years later the salary duty of section 86 and the income duty of section 90 were merged into one statute as both their subject matter. That is the gainful exercise of governmental privilege, and rates were the same. Subsequent acts changed the rate and even added progressivity, but the imposition of the tax and the specifications and exclusions from its objects remain.

Also, pursuant to section 93, it is the tax return filing party's declaration under oath or affirmation that determines the amount of income received. The tax agency only has authority to determine and assess the amount of tax owed based on the income so declared, unless it provides additional reasonable and probative evidence that the declaration is incorrect. There is a common misunderstanding -- misconception that prior to the 16th Amendment, the U.S. Supreme Court ruled the income tax unconstitutional, but this is actually incorrect.

In Pollock v. Farmers Loan and Trust Co., the Court stated, "Ordinarily, all taxes paid primarily by persons who can shift the burden upon someone else or who are under no legal compulsion to pay them are considered indirect taxes. But attacks on the property holders in respect to their estates, whether real or personal, or the income yielded from such estates -- by such estates, and the payment of which cannot be avoided are direct taxes," end quote. Direct taxes are capitations with no choice to avoid them. Indirect taxes are excise taxes, which are taxes on certain privileged activities in which one may choose not to participate; thus, avoiding the tax.

The Court also said, "The power to tax real and personal property and the income from both, there being an apportionment, is conceded that such a tax is a direct tax in the meaning of the Constitution has not been, and in our judgement, cannot be successfully denied," end quote.

Here, the Court is saying that a tax connected with receipts from property are already acquired as indistinguishable, in essence, from the tax upon the property itself without regard to any exercise or privilege in deriving such receipts, because the mere possession of property is meaningless without deriving gain from it. In other words, even the otherwise taxable income is untaxable if connected with personally owned property. The court conceded to the argument that real and personal property taxes and the income received from both are direct taxes.

The Pollock ruling establish that receipts derived from the use of property cannot be treated as income, even if associated with the taxable activity. In Pollock, the Court state, "The tax imposed by the Act of 1894, so far as it falls on the income of real estate and of personal property being a direct tax within the meaning of the Constitution and, therefore, unconstitutional and void because not apportioned according to representation, although sections constituting one entire scheme of taxation are necessarily invalid," end quote. The court did not strike down any other sections of the Act, therefore, the other sections about income taxes imposed on gains, profit, or income measured by receipts derived from non-property sources, such as participating in privilege activities through labor or personal services remained active.

It is not the payments received for labor or personal services in general or on the person directly, otherwise known as capitations, that is being taxed. Otherwise, this would be a direct tax subject to apportionment. But rather, what is specifically being taxed is the gainful exercise of federal privilege or power in the form of gains, profit, or income derived from payments received for labor or personal services.

In the -- in response to the Pollock ruling, the 16th Amendment was passed. This removed the argument that income tax is measured by receipts derived from the use of real and personal property amounted to a direct tax. The income tax is not and never was taxing the property itself directly, which the 16th Amendment makes clear. Or rather, what is being taxed specifically is the gainful exercise of federal privilege or power in the form of gains, profit, or income measured by payments received from the use of real or personal federal property.

The 16th Amendment stated income or the exercise of federal privilege or power received from the use of federal property is what is being taxed, not the property itself; and did not change the nature of the income tax or what is being taxed by the income tax in any way. That which was being taxed prior to the passing of the 16th Amendment is the same thing as that which is being taxed after the passing. In --

JUDGE VASSIGH: Mr. Fehdrau.

MR. FEHDRAU: Yes.

JUDGE VASSIGH: I'm going to ask you to slow down --

MR. FEHDRAU: Slow down.

JUDGE VASSIGH: -- a little bit more.

MR. FEHDRAU: Okay. Sorry. I just --

JUDGE VASSIGH: Thank you so much.

MR. FEHDRAU: -- wanted to make sure.

In United States of County Allegheny -- County of Allegheny, the Court stated, "The government is an abstraction, and its possession of property largely instructed. Actual possession and custody of government property nearly always are in someone who is not himself the government but acts in its behalf and for its purposes. He maybe an officer, an agent, or a contractor. His personal advantages from the relationship by way of salary profit or beneficial personal use of the property may be taxed", end quote.

In Brushaber v. Union Pacific Railroad Co., the Court stated, "We are of opinion, however, that the confusion is not inherent but arises from the conclusion that the 16th Amendment provides for a hitherto unknown power of taxation. That is a power to levying income tax, which although direct, should not be subject to the regulation of apportionment applicable to all of the direct taxes. And the far reaching affect of this erroneous assumption will be made clear by generalizing the many contentions advanced in argument to support it. But it clearly results that the proposition and contentions under it, if acceded to, would cause one provision of the constitution to destroy another. That is, they would result in bringing the provisions of the amendment exempting a direct tax from apportionment into irreconcilable conflict with the general requirement that all direct taxes be apportioned," end quote.

See Stanton v. Baltic Mining Co. See also, Peck and Co. v. Lowe. See also, South Carolina v. Bakers, which all state the same about the 16th Amendment. In Brushaber, income is, the Court defined, "In its nature an excise entitled to be enforced as such, unless and until it was conceded that to enforce it would amount to accomplishing the result, which the requirement as to apportionment on direct taxation was adopted to prevent. In which case, the duty would arise to disregard form and consider substance alone and hence, subject the tax to the regulation as to an apportionment which otherwise, an excise would not apply to it," end quote. This means the income tax is an indirect excise tax and not a direct tax in any form.

The term "income" is narrowly and specifically defined for federal income and California income tax purposes as a tax on the exercise of governmental privileges from private and public sources. The brief for Respondent in Lucas v. Earl stated, "It is to be noted that by the language of the act, it is not salaries, wages, or compensation for personal service that are to be included in gross income. That which is to be included is gains, profit, or income derived from salaries, wages, or compensation for personal services. Salaries, wages, or compensation for personal service are not to be taxed as an entirety, unless in their entirety there are gains, profit, and income," end quote.

The income tax is only upon the gains, profit, or income derived from any source, public or private, but it is solely upon the gains, profit, or income thereof. Income as an excise or privilege tax is only received for the gainful exercise of federal privilege, property, or power for federal and California purposes. But for California purposes also includes what may be called the gainful exercise of California privilege, property, or power should the California legislator choose to exercise this authority statutorily in the California R&TC.

In Flint v. Stone Tracy Co., the Court stated, "Excises or taxes laid upon the manufacturer or sale or consumption of commodities within the country upon licenses to pursue certain occupations and upon corporate privileges, the requirement to pay such taxes involves the exercise of privileges. And if business is not done in the manner described, no tax is payable," end quote.

Privileges are not rights. Privileges may be taxed. The government has no authority to tax inalienable rights or the exercise of the freedoms thereof.

In Murdock v. Pennsylvania, the Court stated, "It could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional," end quote. Citizens have the right to follow any of the common occupations of life, the right of personal liberty, and the right of private property.

The Court in Butcher's Union Co. v. Crescent City Co., stated, "The right to follow any of the common occupations of life is an inalienable right," end quote.

In Coppage v. Kansas, the Court stated, "Included in the right of personal liberty and the right of private property, partaking in the nature of each is the right to make contracts for the acquisition of property, chief among which is that of persona employment by which labor or other services are exchanged for money or other forms of property," end quote.

Rights may not be taxed. Exercising governmental privilege is not a right.

In Moore v. United States, the Court stated, "Indeed the parties have cited no apportion direct tax in the current Internal Revenue Code, and it appears that Congress has not enacted an apportioned tax since the

Civil War. By contrast, indirect taxes are the familiar of federal taxes imposed on activities or transactions. That category of taxes includes duties imposed and excise taxes, as well as income taxes. Because income taxes are indirect taxes, they're permitted under Article 1 section 8 without apportionment.

In 1861, Congress enacted the nation's first un-apportioned income tax. The Civil War income tax was recognized as an indirect tax under the head of excise, duties, and impose. In 1980 -- I'm sorry. In 1895, however, in Pollock v. Farmers Loan and Trust Co., this Court held that a tax on income from property equated to a tax on the property itself, thus, a direct tax that had to be apportioned among the states. Congress and the states responded to Pollock by approving a new constitutional amendment. Ratified in 1913, the 16th Amendment rejected Pollock's conflation of one, income from property; and two, the property itself. Therefore, the 16th Amendment expressly confirmed what had been the understanding of the constitution before Pollock. Taxes on income, including taxes on income from property are indirect taxes that need not be apportion.

Brushaber, "Meanwhile, property taxes remain direct taxes that must be apportioned," end quote.

In Eisner v. Macomber, cited by Respondent, the

Court stated, "The 16th Amendment must be construed in connection with the tax and clauses of the original Constitution and the effect attributed to them before the Amendment was adopted."

In Pollock v. Farmers Loan and Trust Co., it was held the taxes upon rents and profits of real estate and upon rent returns from investments of personal property were, in effect, direct taxes upon the property from which the -- such income arose imposed by reason of ownership, and that Congress could not impose such taxes without apportioning them among the states according to population as required by the original Constitution. Afterwards, and evidently in recognition of the limitation upon the taxing power of Congress, thus determined the 16th Amendment was adopted in words loosely expressing the object to be accomplished. As repeatedly held, this did not extend the taxing power to new subjects, but merely removed the necessity which otherwise exist for an apportionment among the states on taxes laid on income.

Brushaber v. Union Pacific Railroad Co., Stanton v. Baltic Mining Co., Packing Co. v. Lowe, a proper regard for its genesis as well as its very clear language requires also that, "This amendment shall not be extended by loose construction so as to repeal or modify except as applied to income those provisions of the Constitution that require an apportionment according to the population for direct taxes on property real and personal. This limitation still has an appropriate and important function and is not to be overwritten by Congress or disregarded by the courts.

"It becomes essential to distinguish between what is and what is not income, as the term is there used and to apply the distinction as cases arise according to truth and substance without regard to form. Congress cannot by any definition and it may adopt conclude the manner since it cannot by legislation alter the Constitution from which it alone derives its power to legislate and within whose limitations alone, that power can be lawfully exercised," end quote.

The same history and meaning of income from the Brushaber -- Brushaber ruling that is traced by Appellants' in their briefs and discussed here to day is the same history provided by the United States Supreme Court in Eisner v. Macomber as cited by Respondent, and more recently in Moore v. United States, the meaning and nature of includes -- and including in the law. It is axiomatic that when specific terms or phrases are defined within a statute, those terms lose any and all of their general or common meanings. The statutory meaning of a term excludes unstated meanings of that term. See

Meese v. Keene. See also, Steinberg v. Carhart. See also, Western Union Telegraph Co. V. Lenroot, which stated this: "From Black's Law Dictionary, 6th edition, includes cio unions as exclusion alterius, the exclusion -- the -- the inclusion of one is the exclusion of another. This doctrine decrees that where law expressly describes a particular situation to which it shall apply, an irrefutable inference must be drawn that what was omitted or excluded was intended to be omitted or excluded," end quote.

In Appeal of Eleanor Balch, the opinion cites IRS ruling 2006-18, which is about people claiming he false contention that only federal employees earn wages subject to the income tax, which is irreconcilable with Appellants to this appeals claims. The revenue ruling states, "Thus, the word includes, as used in the definition of employee under section 3401(c), is a term of enlargement, not limitation. This is a half truth."

In Montello Salt v. Utah, the U.S. Supreme Court stated, "The Court also considers that the word 'including' was used as a word of enlargement. The learning court being of the opinion that this was its ordinary sense with this we cannot concur," end quote.

In United States v. The Schooner Betsey and Charlotte, Chief Justice Marshall said, "It has been said that words" -- "it has been stated that the word 'including' means moreover or as well as. But if this was the meaning of the legislature, it was a very embarrassing mode of expressing this idea," end quote.

Since the rule of construction applying to includes and including under 26 USC section 7701(c), the terms allow for limited expansion to other things not listed, but only to those of like kind in classes those which are, the IRS declaration is certainly correct. In that sense and to that degree includes is a term of enlargement as the IRS says. It is simply not a term of unlimited to large -- unlimited enlargement as the IRS implies, and which is one reads from the statement.

The federal 9th Circuit Court of Appeals, which is controlling and binding here, in Pacific National Insurance Co. v. The United States describes includes and including as conveying, quote, "A calculated indebtedness -- indefiniteness -- a calculated indefiniteness with respect to the outer limits of the term defined," end quote.

JUDGE VASSIGH: Mr. Fehdrau.

MR. FEHDRAU: Yes.

JUDGE VASSIGH: I'm just going to let you know right now that we're at 20 minutes.

MR. FEHDRAU: Okay.

JUDGE VASSIGH: It looks like you have some more to share.

MR. FEHDRAU: Yeah.

JUDGE VASSIGH: So, to ensure that you have the opportunity to present anything, I'll give you the additional 10 minutes we talked about.

MR. FEHDRAU: Okay. Quoting First National Bank in Plan City, Plan City, Florida -- I'm gonna have to read faster to get through. I have just a --

THE HEARING REPORTER: No.

MR. FEHDRAU: Okay. Okay.

THE HEARING REPORTER: The record is barely holding on right now.

MR. FEHDRAU: Okay.

THE HEARING REPORTER: Please, not any faster than what you are doing now.

JUDGE VASSIGH: Why don't you slow down a little bit.

MR. FEHDRAU: Okay.

JUDGE VASSIGH: And then we'll check in again --

MR. FEHDRAU: Okay.

JUDGE VASSIGH: -- in 10 minutes. Okay.

MR. FEHDRAU: Okay. Should I start from the beginning of that quote or just where I left off?

THE HEARING REPORTER: At the beginning of the quote, please.

MR. FEHDRAU: Okay. So I'll start at the sentence here.

JUDGE VASSIGH: And then to be, you know, respectful of the time and ensure we cover what can impact the appeal, you might want to focus on some evidentiary matters here.

MR. FEHDRAU: Okay.

JUDGE VASSIGH: Okay.

MR. FEHDRAU: Well, a lot of the -- the issue is interpretation of the terms.

JUDGE VASSIGH: Okay.

MR. FEHDRAU: And so, I'm just making sure to cover all of that.

JUDGE VASSIGH: Okay.

MR. FEHDRAU: The Federal 9th Circuit Court of Appeals, which is controlling and binding here in Pacific National Insurance Co. v. The United States describes includes and including as conveying quote, "A calculated indefiniteness with the respect to the outer limit of the terms defined," end quote.

Quoting First National Bank in Plant City, Plant City, Florida v. Dickinson, and then adding from its own precedent in United States v. Graham, its scope is illustrated, rather than qualified by the specific --

specified examples," end quote.

Under this rule, the Court describes the terms "includes" or "including" as providing a calculated indefiniteness. This is the expandability of the meaning of the statutory term to things not listed in the definition indefiniteness, but only to -- but only things of the same character kind and class, as those listed calculated. The terms "includes" and "including" are still limited in nature as they are in the law in general, but they are infinitely expansive within the bounds created by the definition of a given statute. It may not assimilate any meanings outside of this outer bound limit created by the definition.

At the same time, the fact the term "employees" defined in the statute at all makes it inescapably plain that it is not intended to include all others either. If the term was meant to cover everybody, meaning the standard dictionary definition of employee, it would not have been given a statutory definition in the first place. Title 26 contains numerous explicit exceptions to the statutory meaning of the terms "includes" and "including" by adding the qualifying language, but is not limited to or but not limited to in various places in the Tax Code where includes and including are deployed.

Section 61 is one such example, quote, "Gross income means all income from whatever source derived, including but not limited to the following items," end quote. This by itself is enough to make clear that the only expansion or enlargement provided by the terms of section 7701(c) is inherently limited. If it were not, there would be no point in adding "but not limited to" at section 61 or anywhere else in Title 26, because that would already be true of every deployment of the term "includes" throughout the law. When includes or including as defined at section 7701(c) are used within a statutory definition, such as at section 3401(c), the term imports a defined kind and class. And under settled rules of statutory construction, limit the term's reach to items of like kind and class as those enumerated.

This means that an employee as defined at section 3401(c), only means an officer, employee, or elected official of the United States, a state, or any political subdivision thereof, or the District of Columbia or any agency or instrumentality of any one or more of the foregoing, and also means an officer of a corporation or things not enumerated but are of like class as these items. Anything outside of this definition and like kind in class as those -- as those enumerated are excluded from the definition for statutory purposes. Applying these principles of statutory construction, we see that the language of section 7701(c), providing for the inclusion of other things otherwise within the meaning of the term defined, means under the principle of ejusdem generis and the doctrine of noscitur a sociis, the inclusion of other things otherwise within the meaning of the term as defined by the things listed.

The unstated things that can be imagined is also included are general terms, which must conform to the character of like kind and class of those expressly listed this applies to all defined terms within Title 26, which uses includes or including in its definition. The terms United States and state as the terms are used at section 3401(c) are defined at section 7701(a)(9) and section 7701(a)(10) respectively. As such, for Title 26 scope and purposes, the terms United States as defined at section 7701(a)(9) and the term state as defined at section 7701(a)(10) do not include California. When a kind and class is explicitly identified as an object of the law or as an identification -- or as a definition of one of its statutory terms, the omitted group is explicitly excluded as an object of the law or the definition. The simple fact is, Congress does not provide statutory definitions for mere words meant to remain mere words and retain their common meanings.

That is why when a definition is provided, it is the sole definition that applies. When a definition is provided, the meaning of the things defined is specialized. And if the thing defined mimics a common word, its meaning will be different from that of the common word. It hardly needs to be pointed out that the consequence of statutory defining a term, that is, having the common meaning of the mimicked word stripped away thereby, it is not undone by deploying yet another custom defined term, such as includes or including.

If the term were meant to be the word and not to have its meaning restricted, specialized, and uncommon, it would not have been defined in the statute at all. If Congress did not want to includes or including to be limiting in nature, it would have statutorily codified it as not limiting as it did in Title 11 USC section 102 paragraph 3 and Title 28 USC section 3003 subsection (a) paragraph 1. It should be clear -- clear now that neither Appellant or an employee as defined at section 3401(c) for Title 26 purposes. Since they are not an employee as defined at section 3401(c), the payments they receive for activities performed in their relationship with Three Way Chevrolet Co., and the State of California are not wages.

Respondent's opening brief, Respondent cites Eisner v. Macomber, which only supports Appellants' claims as discussed previously. Also cited are United States v.

Buras, Schiff v. Commissioner, Abrams v. Commissioner, United States v. Connor Jr., and United States v. Romero. Here, Buras, Abrams, Connor Jr., and Romero did not dispute, but stipulated and agreed that they had wages. Yet, wrongly claimed such wages were not income. Schiff did not dispute that he earned income but wrongly claimed it was not taxable. The claims made in these cases cited by Respondent are irreconcilable with Appellants' claims in this appeal, and do nothing to support Respondent's case since Appellants in this appeal do not agree or stipulate that they receive wages but rebut such claims made about them.

Appellants also rebut that certain payments wrongly classified as income or as such. Appellants do not agree with but stipulate and rebut third-party claims made about them. This is directly opposed to the cases cited by Respondent. In Appeal of Eleanor Balch, Appellant Balch claims only public sector -- only the public sector is subject to the income tax, but this is false. Both public and private sector are subject to the income tax on any income received where Appellants use the phrase private sector earnings are private non-fed -- privilege -- where Appellants use the phrases, private sector earnings or private non-federally privileged, they simply mean the activities they perform for these payments were not for the gainful exercise of federal privilege, which means they are not gains, profit, or income for federal purposes. Where they made such claims, they did not receive gains, profit, or income derived from private sources.

Federally privileged private sector earnings and private federally privileged payments are income and taxable as such. Private sector earnings are not income in themselves, unless they are gains, profit, or income derived from private sector earnings. Appellants' private sector earnings contained no federal gains, profit, or income since the activities they perform for their private sector earnings and/or private non-federally privileged payments are not for the gainful exercise of federal privilege, they are not income, and that's not taxable as such. Thus, this does not signify that gains, profit, or income derived from private sources are not taxable because this is false. All gains, profit, and income received in any form derived from public or private sources are subject to the income tax. To be clear, everyone, citizen, non-citizen, resident, or nonresident, and every entity, corporation, partnership, LLC, et cetera, in the public or private sector is subject to the federal income tax on income received. However, payments that are not income are not taxed as such.

Appeal of Eleanor Balch stated, "Appellant's employer reported on forms W2 that Appellant earned wages. Therefore, Appellant must include her wages in her gross income pursuant to IRC section 61. Appellant's arguments that her wages do not constitute income is a frivolous argument," end quote.

Appellants to this appeal do not claim wages are not income. They rebut that they received wages. A Form W-2 does not create a tax liability. Form W-2, quote, "Is an information return filed by a third party to the relationship between the IRS and the taxpayer, which reports income as a third party believes it to be. The Internal Revenue Code makes it clear that this is not the final word of what a taxpayer's taxable income is," end quote.

As quoted from Daines v. Alcatel, S.A., this is made clear by 26 USC section 6201(d), as pointed out by the Court. This Court may not be controlling and binding on Respondent, but the Tax Court cases cited by the case are. Daines v. Alcatel said, "The Tax Court has held that a Form 1099 is insufficient on its own to establish a taxpayer's income. See Estate of Gryder v. Commissioner. Citing Portillo v. Commissioner, a Form 1099 is insufficient to form a rational foundation for tax assessment against the taxpayers in this case. Thus, while the Form 1099 can serve as the basis for the inception of an IRS investigation, it cannot and does not on its own create tax liability or establish how much income a taxpayer actually received," end quote.

Information returns, such as Form 1099 and W-2 are limited in -- hold limited weight once reasonably disputed, which Appellant Balch did not do in accordance with the law by suggesting that only public sector persons are subject to the income tax. Appellants to this appeal do make any claims consistent with Appellant Balch's claims. Appellant to this appeal do not make any claim or hold the contention that wages are not income. Wages are income. Appellants to this appeal have made no claims that federal income tax laws solely apply to federal employees. This is blatantly false.

JUDGE VASSIGH: Mr. Fehdrau.

MR. FEHDRAU: Yes.

JUDGE VASSIGH: I'm just going to ask you to slow again.

MR. FEHDRAU: Okay. Sorry.

JUDGE VASSIGH: We want to make sure --

MR. FEHDRAU: I just have like --

JUDGE VASSIGH: -- that Ms. Alonzo is able to get --

MR. FEHDRAU: Yeah. Sorry.

JUDGE VASSIGH: -- everything.

MR. FEHDRAU: I just have two more paragraphs. I'm --

JUDGE VASSIGH: Don't worry about the time.

MR. FEHDRAU: Okay.

JUDGE VASSIGH: Let's make sure that she can catch everything.

MR. FEHDRAU: Okay.

JUDGE VASSIGH: Thank you.

MR FEHDRAU: So, I don't remember where I was at, so I'm just going to start here.

The income tax laws apply to everyone, federal and non-federal. Anyone who receives gain, profit, or income in any form derived from any source, public or private, is subject to taxation on this income. Appellants in this appeal rebut erroneous claims that payments they received for wages and rebut erroneous claims that other payments characterized as income on Form 1099 -- 1099-R were as such.

In Appeals of Fred R. Dauberger, et al., and Appeal of Michael E. Myers, Appellants made numerous tax protestor type claims consistently rejected by courts, which are irreconcilable with the claims of Appellants to this appeal. Opinions of Abrams v. Commissioner, Appeal of Eleanor Balch, and Appeal of Michael E. Miles --

Meyers, also cited by Respondent make the claim that income includes all ascensions to wealth.

Citing Commissioner v. Glenshaw Glass Co., in Commissioner v. Glenshaw Glass Co., footnote 11 stated, "In discussing section -- in discussing section 61 of the 1954 Revenue Code, the House Report states section 61(a) provides that gross income includes all income from whatever source derived. This definition is based on the 16th Amendment, and the word income is used in its constitutional sense. House Report No. 1337 supre note 10 at A18, a virtually identical statement appears in Senate Report No. 1622 supre note 10 at 168," end quote.

It's only income as used in the constitutional sense as an excise on the gainful exercise of government privilege received in the form of ascensions to wealth that is included. The term "income" must always be used and understand -- understood in its constitutional sense in regards the tax law as fully detailed here.

And that's all I've to say.

JUDGE VASSIGH: Thank you, Mr. Fehdrau. I appreciate your presentation.

MR. FEHDRAU: Thank you.

JUDGE VASSIGH: I'm going to check with my co-panelists to see if anyone has any questions for you.

Judge Hosey?

JUDGE HOSEY: No questions from me. Thank you, for your presentation today.

JUDGE VASSIGH: Judge Le?

JUDGE LE: No questions. Thank you.

JUDGE VASSIGH: And I have no questions, so we will move over to Franchise Tax Board's presentation.

Appellants had a little over 30 minutes for their presentations. So, if you would like that extra 10 minutes or so, feel free to take it, and proceed when you're ready.

MR. MURADYAN: Thank you.

PRESENTATION

MR. MURADYAN: Good morning. My name is David Muradyan, and I represent Respondent Franchise Tax Board in this matter. Along with me here is my colleague Jackie Zumaeta.

There are two issues in this case: First, whether Appellants have shown error in FTB's denial of their claim for refund for tax years 2019 and 2020; and second, whether OTA lacks jurisdiction over Appellants' claim for refund of the frivolous return penalties. As noted in the beginning of the hearing, FTB concedes that OTA has jurisdiction with respect to the frivolous return penalties but nevertheless, contends that the frivolous penalties were properly imposed.

In this case, Appellants timely filed their original tax return, but several years later, on April 15, 2024, they filed amended returns for both years, effectively claiming zero taxable income or a substantially reduced amount. For both tax years Appellants attached California Form 3525, which is a form used as a substitute for Form W-2 and Form 1099-R, and explained that the payments made to them by payors do not constitute wages or that the total wage -- total non-wage capital contributions from private sector earnings are not includable in taxable income.

FTB reviewed both the 2019 and 2020 amended returns and determined that the returns were frivolous. By letters dated July 11, 2024, FTB sent Appellants a notice of frivolous return determination and demanded that Appellants withdraw the frivolous amended returns within 30 days or face imposition of the frivolous return penalty.

Also, by letter dated July 11th, 2024, FTB denied Appellants' claim for refund. Appellants failed to withdraw the frivolous amended returns within 30 days. And as a result, FTB sent Notices of Frivolous Return Penalty and Demand For Payment for both tax years, which ultimately Appellants paid. Following FTB's denial of claim for refunds, Appellants filed with the appeal with the OTA.

With respect to the first issue, Appellants have not shown error in FTB's denial of their claim for refund for the 2019 or 2020 tax years. It is well established that wages and distributions of income are taxable income. Revenue & Taxation Code section 17071 defines gross income the starting the point for determining taxable income by reference to section 61 of the IRC, which states that gross income means, quote, "Gross income from whatever source derived," and gives a non-exhausted list of types of income incorporated in the definition.

In part, types of income includes compensation for services, gross business income, gain from dealings in property interest and dividends. Courts have confirmed that compensation earned income, portfolio income, passive income are all taxable despite arguments to the contrary. The general rule is that all income is included in gross income unless excluded specifically by statute.

Appellants in this year received wages via Form W-2 and/or distributions via Form 1099-R for both years. Appellants acknowledge receiving federal Forms W-2 and 1099-R but argue the income and distributions they received is not subject to tax based on their contention that they did not receive wages as an employee in the trade or business or any other federally connected activity. Appellant's position has long been determined by the IRS to be frivolous. Appellants are attempting, through the assertion of frivolous arguments, to avoid a tax for which they are clearly liable. The Office of Tax Appeals, its predecessor the Board of Equalization, and appellate courts have all held that similar arguments are frivolous and groundless.

Appellants' argument regarding the taxability of their distributions from their retirement accounts, just like the taxability of the wages they received is frivolous and without merit. California imposes a tax on every California resident's entire taxable income. Section 170701 incorporates IRC section 61, which defines gross income as all income from whatever source is derived, including annuity and pension income. Therefore, because Appellants have not shown error in FTB's denial of their claims for refund for the 2019 or 2020 tax years, they have not satisfied their burden of proof, and the proposed deficiency assessments should be sustained.

With respect to the second issue, FTB agrees that although OTA has jurisdiction over Appellants' claim for refund of the frivolous return penalties, the penalties were properly imposed. Pursuant to section 19179, a frivolous return penalty may be assessed when a taxpayer files a return that does contain information on which the substantial correctness may be judged, or -- or on its face, indicates the self-assessment is substantially incorrect and is based upon a position that the FTB or the IRS has identified as frivolous, or reflects the desire to delay or impede the administration of California or federal income tax laws.

For both years, FTB reviewed the 2019 and 2020 amended returns and determined that the returns were frivolous. By letter, dated July 11, 2024, FTB sent Appellants a Notice of Frivolous Amended Return Determination, and demanded for Appellants to withdraw the frivolous amended returns within 30 days or face the penalty. In both instances, Appellants did not withdraw the penalty. Accordingly, the frivolous return penalties were properly imposed.

In summary, because Appellants have not shown error in FTB's denial of their claims for refund for 2019 or 2020, they have not satisfied their burden of proof and the proposed deficiency assessment should be sustained. Moreover, the frivolous return penalties for both years were properly imposed.

Thank you for your time. And with that, I'd be happy to take any questions you may have.

JUDGE VASSIGH: Thank you, Mr. Muradyan.

Judge Le, do you have any questions for Franchise Tax Board?

JUDGE LE: No questions. Thank you.

JUDGE VASSIGH: Judge Hosey, do you have any questions for the Franchise Tax Board?

JUDGE HOSEY: No questions. Thank you for your presentation today.

JUDGE VASSIGH: And I just want to note, I think at one point you said Appellants did not withdraw the penalty, but I think you meant return.

MR. MURADYAN: The returns, correct. Sorry.

JUDGE VASSIGH: Correct. I just want to make sure the record is correct on that. Thank you, Mr. Muradyan.

Mr. Fehdrau, at this point, if you would like, as we discussed at our prehearing conference, you can take an additional five minutes to close or refute anything that FTB has said.

CLOSING STATEMENT

MR. FEHDRAU: I would just like to say that again, the Supreme Court has stated that the income is an excise tax, and it cannot be imposed as a non-apportion direct tax under the 16th Amendment, and liability can only result in relation to taxable activities. This clearly means that the characterization of these arguments as frivolous by Respondent, any lower court, or any opinion thereof that contradicts these lawful facts, and every court or agency that has sought to evade these arguments is currently or in the past, itself frivolous and invalid, if not outright corrupt as well.

It also means that the indirect income tax, which is -- which is specifically on an excise of governmental -- I'm sorry -- which is specifically an excise on the gainful exercise of governmental privileges as expressly stated by the U.S. Supreme Court in Brushaber 110 years ago and 2 years ago in Moore, cannot be construed or applied as an un-apportion capitation or other direct tax. That is, a tax on all that comes in on revenue generally, or on generally or commonly defined wages or other payments or gains. Wages as defined at 26 USC section 3401(a) and section 3121(a) are income, and completely and fully taxable.

JUDGE VASSIGH: Mr. Fehdrau.

MR. FEHDRAU: Yes.

JUDGE VASSIGH: I don't want you to feel too rushed.

MR. FEHDRAU: Okay.

JUDGE VASSIGH: Go ahead and slow down.

MR. FEHDRAU: Okay. Instead, the tax can only apply on the gains from particular kinds of privileged activities not conducted as matters of right. Activities, which Appellants have declared themselves to have not engaged in for federal purposes, or where Mrs. Davis has engaged in such activities -- in such privileged activities for California purposes, such amounts are not includable in gross income as defined at California and Revenue & Taxation Code section 17071, currently as detailed in Appellants' additional reply brief, which details the definitional history of the term gross income for California purposes, and against which sworn declaration, Respondent has offered no evidence to the contrary.

Respondent relies only upon what it means to be taken as implications from assertions made on Forms W-2 and Forms 1099 and the fact that money was withheld from Appellants without any independent supporting evidence for those assertions or the propriety of that withhold -- withholding. Respondent's reliance on an information return that Appellants have rebutted as insufficient because the tax is an excise falling only on the gains produced from distinguished privileged activities and payments received in any form by Mr. Davis for activities performed in his relationship with Three Way Chevrolet, Co., and payments received in any form by Mr. Davis for activities performed in her relationship with California Capital Insurance and California Insurance Group CIG.

And payments received in any form by Mrs. Davis for activities performed in her relationship with the State of California are not gains from those distinguished federally privileged activities. They are not income for federal income tax purposes, and thus, not included in federal gross income. Since the California legislature has mandated and incorporated federal gross income be the definition for California gross income, Respondent must legally show how payments Appellants receive for activities in association with these relationships should be included in federal gross income and also, by California gross income by this connection. And for lack of it, Respondent's claims, determinations, and arguments must all be deemed invalid.

California has statutorily amended and incorporated -- I'm sorry.

California has statutorily mandated and incorporated the definition of federal gross income as its own definition of California gross income. While no longer making any exception to also include payments of the kind and class received by Mrs. Davis, which it has the constitutional authority to tax but has not exercised this authority since 1983 as detailed in Appellant's brief.

Section 61 of the Internal Revenue Code general definition, "Except as otherwise provided in the subtitle, gross income means all income from whatever source derived, including but not limited to following items," end quote. Gross income means all income from whatever source derived with income being excise tax on specific activities or privileges as discussed previously and thoroughly settled by the U.S. Supreme Court. Income cannot take any other meanings besides how it's specifically defined within the U.S. Constitution as detailed by the Supreme Court. Income has always been an excise tax on governmental privilege since the inception and never a direct tax on all payments that one receives. This applies at the federal and California level. California by its nature of its relationship to the federal government has authority by its constitution to tax both federal and California level exercise of governmental privileged activities, should it exercise this authority in the California Revenue & Taxation Code. But the federal government only has authority to tax governmental privilege at the federal level.

Payments received by Appellants for activities performed in their relationship are not the gainful exercise of fridge -- federal privilege property power, so they're not included in gross income. And since California mandates and incorporates the definition that the federal government uses, it's not includable in California either. And since they no longer continue to expand its definition to include the kind and class of payments received by Mrs. Davis, which they did from 1935 to 1930 -- 1935 to 1983. It's fully detailed. They're no longer includable in California gross income.

As far as concerns on retirement accounts and the payments decisions on what is part of a taxable income and what were capital contributions, the pro rata rule as dictated by the U -- the IRS when a retirement account balance contains both pretax and after tax amounts as any distribution will generally include a pro rata share of both. They included the amounts that were gains, profit, or income, in their income, and their capital contributions they did not since they are not income. Federal adjusted gross income is a starting place for filing a California return. Appellants' IRS account transcript, Exhibit 23, reflects their federal adjusted gross income of $22,533 as recorded on their California return.

The IRS processed Appellants' 2020 amended federal return and made an adjustment stating in Exhibit 24, when completing your Form 1040-X, line 17, was incorrect. We have corrected these figures and adjusted your claim. You should receive your refund within four to six weeks. In order to correct the figures on the amended return and make an adjustment, the legal soundness of the amended return had to be judged, and the IRS had to make the correction and adjustment in accordance with the law. Otherwise, Appellants' claims would not have been honored and adjustments would not have been made for the full amount of the refund claim, minus what had already been paid as a refund previously.

According to the IRS' own calculations and adjustments, the validity of Appellants' amended federal return is sound. If there is anything frivolous about Appellants' amended federal return, this -- the IRS would have flagged the return at this point and held the refund.

Let me skip over some here.

Appellants did not provide a corrected Form W-2 or other information return. Appellants claimed -- Appellants rebutted claims filed about them by third parties. Appellants did not rely upon any frivolous positions identified under section 26 USC section 6207(c) or California R&TC section 19179(d)(1) for any of their claims. It should also be noted that not only did Appellants receive back all their federal income tax paid in 2020 but also, received the full refund of all FICA income taxes, commonly known as Social Security tax and Medicare tax paid back as well. If their return was frivolous, why would the IRS give back their FICA income tax and not label the return as such.

Appellants held the same relationship with Three Way Chevrolet Co., and the State of California in 2020 as they held in 2019. The same facts and circumstances where Appellants received a full refund in 2020 by the IRS applied to 2019 as well, but they were unable to file a amended return for tax year 2019 due to the statute of limitations for the IRS only being three years. Appellants to this appeal did not rely upon any frivolous positions in their return, either for the federal level or the California level.

None of the FTB has failed to identify a frivolous opinion -- a frivolous position before actually assessing the penalties. It should just noted again, that the terms as defined in the law are only as they're defined, and anything that is excluded is excluded by design. And income only is, as it always has been, and excise on the federal privilege or at the state level, state level privilege, and this is the only thing that is taxable. With that, Appellants' claims are in line with the law, and there should be no reason the frivolous return penalties have been charged against them.

And that is all I have to say today. Thank you.

JUDGE VASSIGH: Thank you, Mr. Fehdrau. I'm just going to check with my co-panelists one final time to see if they have any questions for you.

Judge Hosey?

JUDGE HOSEY: No questions. Thank you.

JUDGE VASSIGH: Judge Le?

JUDGE LE: No questions. Thank you.

JUDGE VASSIGH: Okay.

MR. MURADYAN: Judge Vassigh?

JUDGE VASSIGH: Yes.

MR. MURADYAN: So, can I just make a clarification. I stated earlier that the proposed deficiency should be sustained. Of course, this is a claim for refund, so I meant to say FTB's denial of Appellants' claim for the refund should be sustained.

JUDGE VASSIGH: Thank you for that clarification.

MR. MURADYAN: Thank you so much. Appreciate it.

JUDGE VASSIGH: Okay. We've heard arguments on both sides. This case is now submitted on April 7th, 2026. The hearing is concluded, and our record is closed.

I'd like to thank everybody for participating today and thank the parties for their presentations.

I thank Ms. Alonzo for capturing the

presentations for the record.

The judges will meet and deliberate and decide your case. We will issue a written opinion within 100 days of today.

And today's hearing in the Appeal of Davis is now concluded.

Thank you everyone.

(Proceedings concluded at 11:29 a.m.)

HEARING REPORTER'S CERTIFICATE

I, Ernalyn M. Alonzo, Hearing Reporter in and for the State of California, do hereby certify:

That the foregoing transcript of proceedings was taken before me at the time and place set forth, that the testimony and proceedings were reported stenographically by me and later transcribed by computer-aided transcription under my direction and supervision, that the foregoing is a true record of the testimony and proceedings taken at that time.

I further certify that I am in no way interested in the outcome of said action.

I have hereunto subscribed my name this 29th day of April, 2026.

____
ERNALYN M. ALONZO
HEARING REPORTER