BOARD OF EQUALIZATION
STATE OF CALIFORNIA

In the Matter of the Appeal of: **ROBERT E. WESLEY AND** **JERRY J. COUCHMAN**	**FORMAL OPINION** **2005-SBE-002** Case No. 262544 Case No. 281854

Representing the Parties:

For Appellant-Wesley:	Robert E. Wesley
For Appellant-Couchman:	Jerry J. Couchman
For Respondent:	Dennis J. Haase, Tax Counsel Andrew O'Boyle, Staff Service Manager
Counsel for Board of Equalization:	Dorothy Lo, Legal Intern Craig Shaltes, Tax Counsel III

O P I N I O N

These appeals are made pursuant to section 19045[1] of the Revenue and Taxation Code from the action of the Franchise Tax Board (FTB or respondent) on the protests of Robert E. Wesley (Wesley) and Jerry J. Couchman (Couchman) against proposed assessments of additional personal income tax in the amount of $4,425 and $3,393, respectively, for the year 2001. Respondent also

[1] Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the year in issue.

imposed a late filing penalty against Wesley ($1,106.25) and Couchman ($848.75), and a notice and demand penalty against Couchman ($848.25). Although appellants advance different arguments, the frivolous issues raised in both appeals are similar to those this Board has previously rejected.

These appeals are consolidated for the convenience of this Board, under the authority of California Code of Regulations, title 18, section 5074. The issues involved in both appeals are similar, and no substantial right of either appellant will be prejudiced. After an oral hearing held on March 9, 2005, this Board concluded that appellant-Wesley's arguments were frivolous and groundless, and we imposed a $1,000 frivolous appeal penalty. With this opinion, we also order imposition of a frivolous appeal penalty against appellant-Couchman in the amount of $5,000.

Background and Contentions

Robert E. Wesley

It appears that Wesley timely filed his 2001 California personal income tax return. However, Wesley entered zeros on the lines for income and all other financial information (i.e., a "zero-return").

Respondent received information from California's Employment Development Department (EDD), which disclosed that Wesley received the following income amounts in 2001: 1) $70,570 in wages from the California State Controller's Office; 2) $626 in wages from Evergreen Aviation Ground Logistics; and 3) $15 in interest from Wells Fargo Home Mortgage, Inc. On May 24, 2002, respondent informed appellant that his 2001 return was frivolous and invalid. Wesley replied and disagreed, stating that his return was valid.

As a result, respondent sent Wesley a Request for Tax Return. After he failed to respond and file a valid return by the deadline date, respondent issued a Notice of Proposed Assessment (NPA), based on the available information from EDD. Wesley protested the NPA, and after holding a protest hearing, respondent issued a Notice of Action (NOA), affirming the NPA.

Wesley makes several contentions on appeal, including the following:

1. The United States (U.S.) Supreme Court has determined the word "income" as used in the 16th Amendment to the U.S. Constitution means profits earned by a corporation;
2. He has no taxable "income" under the applicable U.S. Supreme Court rulings;
3. No one working for respondent has ever determined that he was liable for the proposed tax, or identified the law which makes him liable for the tax;
4. Respondent accepted his 1998 tax return (which also was apparently a "zero return"), and gave appellant a full refund of withheld taxes;[2]
5. "Zero returns" are valid under federal case law; and
6. The California legislature cannot adopt the Internal Revenue Code provisions.

Respondent asserts that its determination is presumed correct and contends that Wesley misconstrues the U.S. Supreme Court cases he cites, as later federal cases make clear his wages are subject to income tax. Further, this Board is precluded from deciding constitutional issues. In addition, respondent contends that Wesley fails to show error in the imposition of the late filing penalty, and to show that a "zero return" is a valid return. Consequently, respondent requests imposition of the frivolous appeal penalty.

<u>Jerry J. Couchman</u>

Couchman failed to file a 2001 California income tax return, and we concluded he has not filed a tax return since his 1998 return.[3] Respondent subsequently learned from the EDD that Couchman earned $60,169 in wages from Swinerton & Walberg Co. during 2001. Because his income amount was sufficient to trigger the filing requirement, respondent mailed a letter to Couchman on February 10, 2003, demanding that he file a return or explain why no return was required. He did not reply to the demand letter. Respondent then issued a Notice of Proposed Assessment (NPA) on February 9, 2004, proposing a tax liability of $3,472, which respondent reduced to $3,393 by a personal

---

[2] This appears to be an "estoppel" type argument. (See discussion, *infra*.)

[3] Respondent states that Couchman's last-filed tax return was for 1998. Notices of Proposed Assessments were issued for the years 1999-2000. Also, this Board has previously ruled on appeals for 1999 (Case No. 173715, decided on April 23, 2003) and 2000 (Case No. 224276, decided on November 4, 2004), wherein we imposed a $1,000 and $2,500 frivolous appeal penalties, respectively.

exemption credit of $79. The NPA also imposed a late filing penalty of $848.25, a notice and demand penalty of $848.25, and interest. After an oral protest hearing, the NPA was affirmed with the issuance of a NOA. This appeal followed.

Couchman's contentions in this appeal include:

1. Respondent's proposed assessment is arbitrary, thereby shifting the burden of proof from appellant to respondent.
2. Respondent failed to comply with the Information Practices Act (IPA).[4]
3. Respondent did not afford due process.
4. Filing a tax return would have caused Couchman to commit a crime of perjury, and interfered with his right to an administrative appeal.
5. Appellant has shown reasonable cause for abatement of the late filing penalty.

Respondent contends that Couchman failed to demonstrate error in the assessment. It also asserts that this Board previously rejected most of appellant-Couchman's assertions. In addition, respondent also asserts that constitutional issues raised are outside the parameters of this appeal. Finally, respondent asks this Board to impose a maximum frivolous appeal penalty ($5,000) against Couchman.

<u>Discussion</u>

Section 18501 requires every individual subject to the Personal Income Tax to make and file a return with respondent "stating specifically the items of the individual's gross income from all sources and the deductions and credits allowable . . . ." Sections 17071 and 17072 define "gross income" and "adjusted gross income" by referring to and incorporating into California law Internal Revenue Code (IRC) sections 61 and 62, respectively. IRC section 61 provides that unless otherwise provided "gross income means all income from whatever source derived," including compensation for services. Income includes any "accession to wealth." (*Commissioner v. Glenshaw Glass Co.* (1955) 348 U.S. 426, 431.) Taxable income is gross income minus allowed deductions. (Rev. & Tax. Code, §

---

[4] See Civil Code section 1798 et seq.

17073; Int.Rev. Code, § 63.) Section 17041 imposes a tax "upon the entire taxable income of every resident of this state" and "upon the entire taxable income of every nonresident or part-year resident which is derived from sources in this state." Section 17014 provides that a "resident" is one who is in California for other than a temporary or transitory purpose.[5] Section 19087 provides, in pertinent part:

> "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."

Respondent's initial burden is to show why its assessment is reasonable and rational. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2004 (*Myers*).) Federal courts and this Board have held that the taxing agency need only introduce some evidence linking the taxpayer with the unreported income. (See *Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932, 935; *Leggett v. Commissioner*, T.C. Memo. 2005-185; *Appeal of Michael E. Myers, supra.*) Thereafter, respondent's determination of an assessment is presumed correct, and appellants have the burden of proving it to be wrong. (*Todd v. McColgan, supra*; *Appeal of Michael E. Myers*, *supra*.) Unsupported assertions are not sufficient to satisfy appellants' burden of proof. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence of uncontradicted, credible, competent, and relevant evidence showing error in respondent's determinations, they must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.) Appellants' failure to produce evidence that is within their control gives rise to a presumption that such evidence is unfavorable to their appeals. (*Appeal of Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.)

Here, respondent relied upon EDD income information for both appellants sufficient to prompt an accurate return filing requirement for both. When appellants failed to file a valid return, respondent used income information from appellants' employers to estimate appellants' taxable incomes and propose assessments for both. Respondent's use of that income information is

[5] It appears that both appellants lived and worked in California during 2001.

reasonable and rational. (See *Appeals of Walter R. Bailey*, 92-SBE-001, Feb. 20, 1992 (*Bailey*); *Appeals of R. and Sonia Tonsberg*, 85-SBE-034, Apr. 9, 1985.) Thus, respondent has met its initial burden, the proposed assessments are presumed correct, and the burden is on appellants to prove error.

Appellant-Wesley erroneously cites *Merchants' Loan & Trust Co. v. Smietanka* (1921) 255 U.S. 509; *Stratton's Independence, Ltd. v. Howbert* (1913) 231 U.S. 399, and other cases for the proposition that the income tax is imposed only on corporate profits. In *Merchants' Loan & Trust Co., supra*, the Supreme Court adopted the definition of "income" used in the Corporate Excise Tax Act, not because the income tax applies only to corporations, but because the definition was useful in the income tax context. Furthermore, both *Merchants' Loan & Trust Co.* and *Stratton's Independence, Ltd.* discussed the definition of income in the context of taxing corporations, rather than individuals, because the parties involved were corporations.

Appellant-Wesley apparently only partially read the cases and statutes he cites. Contrary to Wesley's contention, the court in *Merchants' Loan & Trust Co*., *supra*, could not have meant that "income," referred only to corporate profits, as that would have been contrary to the actual holding of the case. Part of the holding was that a trustee was a "taxable person" who, under the income tax statutes in effect at the time, was required to pay tax on trust income as though it had been distributed to the trust beneficiaries, who were not corporations. (*Merchants' Loan & Trust Co.*, *supra*, at p. 517.)

Had appellant-Wesley read the entire opinion in *Merchants' Loan & Trust Co.*, (or any of the other cases he cites in his brief) he would have seen that the Supreme Court, in its extensive definition of "income," cites *Eisner v. Macomber* (1920) 252 U.S. 189 (*Eisner*), which states:

> "'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through sale or conversion of capital assets."

(*Eisner, supra*, at p. 207, quoting *Doyle v. Mitchell Bros. Co.* (1918) 247 U.S. 179, 185 (*Doyle*).) Although the court in *Eisner* again referred to definitions of "income" from the *Doyle* case, the court did not mean that "income" refers only to corporate profits because *Doyle* also discussed whether an individual person was subject to tax on a certain gain. The court eventually held that the party in *Doyle* was not subject to the tax, but *not* on the basis that she was not a corporation.

Appellant-Wesley fails to recognize that corporate profits are only one type of income subject to tax, and that discussions of "income" in the context of the Corporation Excise Tax Act is useful in other contexts. In fact, *Eisner* refers to language from *Doyle* because *Doyle* "indicates the characteristic and distinguishing attribute of income," as "the gain derived from capital, from labor, or from both combined . . . ." (*Eisner, supra*, at p. 207.) Wesley should note the "distinguishing attribute" is that income includes gain derived from capital or labor, <u>not</u> the fact that it might occur in a corporate context.

Section 17071, through incorporating IRC section 61, identifies specific items of income in a non-exhaustive list that includes "compensation for services." Gain derived from labor is also gross income. (*United States v. Buras* (9th Cir. 1980) 633 F.2d 1356.) Gain is the entire amount received from the sale of one's labor. (*Abrams v. Commissioner* (1984) 82 T.C. 403; *Reading v. Commissioner* (1978) 70 T.C. 730.) Moreover, wages and compensation for services are gross income within the meaning of IRC section 61. (*United States v. Romero* (9th Cir. 1981) 640 F.2d 1014.) Appellants' contentions that wages and salary are not income thus have no merit.

Another case that appellant-Wesley relies upon (but again apparently failed to read in its entirety) clearly supports respondent's position. Appellant-Wesley points out that the Supreme Court in *Bowers v. Kerbaugh-Empire Co.* (1926) 271 U.S. 170 (*Bowers*), states:

> "The Sixteenth Amendment declares that Congress shall have the power to levy and collect taxes on income, 'from whatever source derived' without apportionment among the several states, and without regard to any census or enumeration. It was not the purpose or effect of that amendment to bring any new subject within the taxing power." (*Bowers, supra*, at p. 174.)

Appellant-Wesley cites this sentence as evidence that the Supreme Court did not authorize taxation on any new types of incomes. However, appellant-Wesley failed to read the following sentence, which unambiguously states, "Congress already had the power to tax all incomes." (*Bowers, supra.* at p. 174.) Our review of Wesley's contentions clearly supports our conclusion that Wesley conveniently chooses to ignore the relevant portions of cases and applies his subjective view of the law by taking certain phrases out of context to assert his frivolous arguments. The Supreme Court in *Bowers* makes it clear that the Sixteenth Amendment authorizes a direct non-apportioned tax upon all United States citizens, and Congress has always had the authority to exercise their inherent taxing power. (*Bowers, supra.* at p. 174.)

Neither appellant has produced any substantial evidence to show error in either the proposed assessments or any of respondent's underlying factual determinations, in particular respondent's determinations as to appellants' 2001 incomes, deductions and credits. Instead, they rely on the type of arguments that have been consistently rejected by respondent, the courts and this Board. (See, e.g., *Boyce v. Commissioner,* T.C. Memo. 1996 – 439, affd. (9 th Cir. 1997) 122 F.3d 1069; *Appeal of Michael E. Myers, supra; Appeal of Alfons Castillo*, 92-SBE-020, July 30, 1992; *Appeals of Walter R. Bailey, supra*; *Appeals of Fred R. Dauberger, et al*; 82-SBE-082, Mar. 31, 1982 (*Dauberger*).) In these circumstances, we therefore conclude that appellants have not met their burden to prove error in the proposed assessments, and that they have not rebutted the presumed correctness of the proposed assessments and respondent's underlying determination.

Appellants' remaining contentions are either procedural[6] or constitutional in nature. This Board lacks the authority to decide those procedural issues. In *Dauberger, supra,* this Board held that:

> "[T]he only power that this Board has is to determine the correct amount of an appellant's California personal income tax liability for the appeal years. We have no power to remedy any other real or imagined wrongs that taxpayers believe they may have suffered at the hands of the Franchise Tax Board."

However, appellant-Couchman continues to adamantly assert that respondent failed to comply with the IPA and that violations of the IPA void all his tax due. Although this is a procedural argument, we will briefly address it because taxpayers are raising this argument more frequently, and we

[6] By "procedural," we mean complaints appellants raise regarding their dealings with the FTB during audit and/or protest.

want to take this opportunity to reject it as a basis for future appeals. In *Bates v. Franchise Tax Board* (2004) 124 Cal.App. 4^{th} 367 (*Bates*), the court clearly states that the California Revenue and Taxation Code expressly authorizes the use of non-personal information to estimate income for taxpayers who decline to provide information by way of a tax return and respondent is one of the agencies authorized to use that information to estimate income. In addition, the *Bates* court concluded that "the Revenue and Taxation Code provisions governing the estimation of income for persons who do not file tax returns, and the related provisions for the assessment and collection of taxes based on that estimate, are not superseded by the IPA." (*Bates*, *supra,* at p. 377.) Therefore, the IPA does not prohibit or prevent respondent from collecting information about persons to attempt to accurately assess tax due. Civil Code section 1798.17 also does not provide that the income tax deficiency notice is made invalid as a consequence of any violation.[7] Accordingly, we have no power to remedy any perceived violation of appellant's procedural rights under the IPA or any other law, and we cannot consider any alleged violation in the determination of appellant's tax liability.

In *Myers*, this Board held that the argument of not being able to file a tax return because it would subject a person to perjury was groundless. Further, we need not discuss the issue of whether Wesley's "zero" return is valid; we have already determined such returns are invalid. (See *Appeal of LaVonne A. Hodgson*, 2002-SBE-001, Feb. 2, 2002.)

This Board is also precluded from determining the constitutional validity of California statutes. Even though appellant-Couchman puts forth a due process contention, we have an established policy of declining to consider constitutional issues. (Cal. Const., art. III, § 3.5; *Appeal of Aimor Corporation*, 83-SBE-221, Oct. 26, 1983; *Appeals of Walter R. Bailey*, *supra*.) Furthermore, we held in *Bailey* that "due 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." We conclude that Couchman has been provided a full opportunity to present his contentions and have them considered—including in the present appeal. Thus, Couchman has received due process of law.

---

[7] Although not applicable to the year at issue, section 19570 now prohibits the application of the IPA to the determination of any liability under the California Personal Income Tax Law.

In addition, R&TC section 19044 requires respondent to reconsider the assessment at a protest hearing, not to determine whether the assessment procedure is proper. Appellants have provided nothing to demonstrate that the assessment is invalid because of its amount or procedure.

As to the imposition of the penalties, the late filing penalty is imposed when a person fails to make and file a return on or before the due date or extended due date of the return, unless it is shown that such failure was due to reasonable cause and not willful neglect. (Rev. & Tax. Code, § 19131.) The notice and demand penalty is imposed on any taxpayer failing or refusing to furnish information requested in writing by respondent, or failing or refusing to make and file a return upon notice and demand by respondent. (Rev. & Tax. Code, § 19133.) Without evidence to the contrary, it is presumed that respondent's determination of a penalty is correct. (*Appeal of Robert Scott*, 83-SBE-094, Apr. 5, 1983.) Appellants bear the burden of showing that reasonable cause prevented them from timely filing (or timely filing after demand) a 2001 California return. (*Appeal of Kerry and Cheryl James*, 83-SBE-009, Jan. 3, 1983.) In this context, "reasonable cause" means such cause as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Appeal of Robert T. and M. R. Curry*, 86-SBE-048, Mar. 4, 1986.)

Appellants have not submitted any evidence, let alone substantial evidence, showing that respondent improperly imposed the late filing penalty, or that reasonable cause for relief from the penalty exists. In addition to not showing reasonable cause for relief, appellant-Couchman has yet to file a 2001 California tax return and appellant-Wesley has yet to file a valid tax return; accordingly, there is no basis to abate the late filing penalty. Further, Couchman has not demonstrated reasonable cause exists for his failure to file a return after he received a notice and demand (to file a return), and therefore no basis exists to abate the notice and demand penalty.

Appellant-Wesley contends that respondent should be estopped from imposing tax liabilities upon him. As a general rule, equitable estoppel (i.e., stopping respondent from enforcing the law because of something done by respondent) applies against the government only when all the elements of estoppel are present and the application of estoppel is necessary to prevent manifest injustice. (*United States Fidelity and Guaranty Co. v. State Board of Equalization* (1956) 47 Cal.2d

384.) The four elements of the doctrine of estoppel are (1) the party to be estopped [respondent] must be apprised of the facts; (2) respondent must intend that its conduct shall be acted upon, or must so act that the party asserting the estoppel [appellant] has a right to believe it was so intended; (3) appellant must be ignorant of the true state of facts; and (4) appellant must rely upon the conduct to his injury. (*Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 725.)

Even if a taxpayer is misled by actions of respondent, this alone is not sufficient to warrant application of the doctrine of estoppel. (*Appeal of Priscilla L. Campbell*, 79-SBE-035, Feb. 8, 1979.) Detrimental reliance must also be established by appellant. (*Appeal of Arden K. and Dorothy S. Smith*, 74-SBE-045, Oct. 7, 1974.) Detrimental reliance is present only if respondent's actions cause appellant to take action which leads to increased tax liability. (*Appeal of Robert C. and Betty L. Lopert*, 82-SBE-011, Jan. 5, 1982.) Wesley, as the party claiming the application of estoppel, has the burden of proving that all of the elements are present. (*Appeal of Western Colorprint*, 78-SBE-071, Aug. 15, 1978; *Appeal of U.S. Blockboard Corporation*, 67-SBE-038, July 7, 1967.) Appellant-Wesley has failed to show that estoppel should apply in his case.

As to the frivolous appeal penalty, R&TC section 19714 provides that a penalty of up to $5,000 shall be imposed whenever it appears to this Board that proceedings before it have been instituted or maintained primarily for delay, or that an appellant's position is frivolous or groundless, or that an appellant unreasonably failed to pursue available administrative remedies. (*Appeal of Michael E. Myers, supra.*)

We take this opportunity to again discuss the types of issues and/or arguments we consider frivolous when raised in an appeal to this Board. Initially, we note that the imposition of a frivolous appeal penalty does not violate a person's right to free speech. (*Neufeld v. State Board of Equalization* (2004) 124 Cal.App. 4th 1471, 1474.)

This Board previously determined that the following arguments are frivolous:

- Wages do not constitute income;
- Federal reserve notes do not constitute legal tender;
- There is no legal obligation to file personal income tax returns;

- An alleged denial of constitutional rights under the 5th, 7th and/or the 14th Amendments to the U. S. Constitution;
- This Board and/or the FTB does not have jurisdiction to administer and/or rule on income tax matters;
- An appellant is not a "taxpayer" as defined by statute; and
- Personal income tax is an unapportioned direct tax in violation of the U.S. Constitution.

(See *Appeals of Fred R. Dauberger, et al., supra.*)

- Only gold and silver coins are legal tender.

(See *Appeals of Frank D. and Else O'Neill*, 83-SBE-269, Dec. 13, 1983.)

- The monetary system is unconstitutional.

(See *Appeal of Donald H. Lichtle*, 76-SBE-097, Oct. 6, 1976.)

- Wages, salaries and/or commissions are not taxable because these are immune from an unapportioned direct tax; and
- Compensation received from personal labor/services cannot be "income" subject to tax.

(See *Appeal of Fred H. and Wilma Suggs*, 82-SBE-034, Feb. 1, 1982.)

- The incorrect division of the FTB requested information from an appellant;
- FTB could not use EDD information, except in cases involving governmental employees;
- It would be perjury to sign a tax return; and
- FTB's protest hearing denied due process rights.

(See *Appeals of Walter R. Bailey*, *supra*.)

- Appellant, although living and working in the State of California was not a "resident" subject to taxation by California;
- Appellant claimed to be a "citizen" of the "Republic of California," not a resident of the State of California; and
- Not in a trade/business in California that is subject to taxation.

(See *Appeal of Alfons Castillo*, *supra*.)

- The only income taxable must be from a "source" listed in IRC section 871 and its regulations;
- IRC section 861 prevents taxation by California;
- IRC section 911 prevents taxation by California; and
- IRC section 61 restricts tax to income gained only from agricultural activities.

(See *Appeal of Michael E. Myers*, *supra*.)

Further, the FTB (by adopting a list compiled by the IRS) has made a list of frivolous arguments for purposes of imposing frivolous return penalties pursuant to section 19179. The IRS has also issued several notices and rulings regarding arguments, which may be considered "frivolous." Items on that list and (in the rulings) include the following:[8]

- The IRC section 911 argument, whereby income earned in California is excluded via the foreign earned income exclusion. (Rev. Rul. 2004-28, 2004-12 I.R.B. 624, Mar. 21, 2004.)
- The IRC section 861 argument regarding the source of taxable income. (Rev. Rul. 2004-30, 2004-12 I.R.B. 622, Mar. 22, 2004.)
- Persons allegedly removed from the tax system who the government (fraudulently) attempts to collect "debts" from. (Rev. Rul. 2004-31, 2004-12 I.R.B. 617, Mar. 22, 2004.)

In another notice (IRS Notice 2005-30, I.R.B. 2005-14, Mar. 14, 2005), the IRS sets out common frivolous arguments used, which include:

- Filing a zero return;
- Referring to a separate entity created by the spelling of an individual's name in government notices;
- Claiming wages are not taxable;
- Claiming the 16th Amendment is invalid;
- Deducting the value of labor;

---

[8] Section 19179, subdivisions (c)(5) and (6), state that the list of frivolous positions included is not intended to be exhaustive.

- Misinterpreting the meaning of person or citizen, residents of states, territories, etc., as not being residents of the U.S.;
- Claiming no statute requires the filing of a return;
- Filing a return is voluntary; and,
- Filing documents in-lieu of a return.

A federal court, in discussing the imposition of the federal "frivolous appeal" penalty, stated the following:

> "Some people believe with great fervor preposterous things that just happen to coincide with their self-interest. . . . These beliefs all lead. . . to the elimination of their obligation to pay taxes. . . . The government may not prohibit the holding of these beliefs, but it may penalize people who act on them.
> "[¶]…[¶]"
> "A petition to the Tax Court, or a tax return, is frivolous if it is contrary to established law and unsupported by a reasoned, colorable argument for change in the law. . . ."

(*Coleman v. Commissioner* (7th Cir. 1986) 791 F.2d 68, 69-71 (*Coleman*).)

We also put potential appellants on notice that we consider the following types of arguments frivolous as well:

- The action of FTB is barred by operation of the Uniform Commercial Code (UCC); in general, we see no contract between FTB and taxpayers.
- FTB has not submitted a "verified" or signed tax bill; we know of no California statutory requirement for such verification.
- Computer-created income information is not valid evidence to support a NPA. This Board accepts in appeals "any relevant evidence, including . . . hearsay . . . if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (Cal. Code Regs, tit. 18, § 5079, subd. (d).) We believe that

information included on employer forms (such as W-2 or 1099 forms) or employer information submitted to EDD is such evidence.

- The Uniform Commercial Code (UCC) (somehow) prevents a person's income from being subject to tax. (See: Rev-Rul. 2004-31, Mar. 1, 2004.)

By no means are the foregoing lists exhaustive. To provide taxpayers with further guidance in these matters, we also note, as the court in *Coleman* stated: "The inquiry is objective. If a person should have known that his position is groundless, a court may and should impose sanctions . . . . 'Should have known' is an objective test." (*Coleman v. Commissioner* (7th Cir. 1986) 791 F.2d, at p. 71.) With all of this in mind, we conclude that appellants needlessly consumed state resources: by failing to file valid 2001 California tax returns; by filing frivolous appeals; by, continuing to pursue appeals even after receiving notices from both respondent and this Board that the appeals appeared to be frivolous and that frivolous appeal penalties could be imposed; and, by failing to produce any substantial evidence to meet their respective burdens to prove error in the proposed assessments of taxes and penalties.

With respect to appellant Wesley, we determined at the March 9, 2005 hearing to impose a $1,000 frivolous appeal penalty. We therefore impose a $1,000 penalty against appellant-Wesley, pursuant to section 19714. With respect to appellant-Couchman, we note that in April 2004 and November 2004, the Board imposed $1,000 and $2,500 frivolous appeal penalties, respectively, for 1999 and 2000. Appellant-Couchman was notified that if he filed any further appeals raising the same frivolous arguments, we would then impose the maximum penalty under section 19714. Despite this notice, appellant-Couchman filed and maintained the present appeal in which he espouses the same groundless and frivolous positions. We therefore impose a $5,000 penalty against appellant-Couchman, pursuant to section 19714.

<u>Conclusion</u>

For the foregoing reasons, respondent's actions are sustained, with the addition of a $1,000 frivolous appeal penalty to appellant-Wesley, and a $5,000 frivolous appeal penalty to appellant-Couchman.

Wesley_Couchman_dl.crs

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 therefore,

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 Robert E. Wesley and Jerry J. Couchman against a proposed assessment of additional personal income tax in the amount of $4,425 and $3,393 respectively, for the year 2001 be and the same is hereby sustained. In addition, we impose a frivolous appeal penalty against Wesley and Couchman, in the amounts of $1,000 and $5,000, respectively.

Done at Sacramento, California, this 15th day of November 2005, by the State Board of Equalization, with Board Members Mr. Chiang, Ms. Yee*, Mr. Leonard, Mr. Parrish and Ms. Mandel present.

John Chiang, Chairman

Betty T. Yee*, Member

Bill Leonard, Member

Claude Parrish, Member

Marcy Jo Mandel**, Member

*Acting Member, First District

**For Steve Westly per Government code section 7.9