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10 **BOARD OF EQUALIZATION**
 11 **STATE OF CALIFORNIA**

12 In the Matter of the Appeal of:) **HEARING SUMMARY²**
 13) **PERSONAL INCOME TAX APPEAL**
 14) **STEVEN T. WALTNER AND**) Case No. 468742
 15) **SARAH V. WALTNER¹**)

	<u>Year</u>	<u>Claim for Refund</u>	<u>Penalty³</u>
16	2004	\$2,122.18	\$500.00
17	///		
18	///		
19	///		

20 _____
 21 ¹ Appellants reside in Avondale, Arizona.

22 ² This appeal was postponed from the February 23, 2010, hearing calendar and rescheduled to the June 15, 2010 hearing
 23 calendar to allow additional time for appellants to submit essential documents for their case. At the request of appellants, the
 24 appeal was later postponed to the October 19, 2010 hearing calendar because appellants were unable to fund the trip to
 25 California from Arizona. On April 4, 2010, respondent submitted a copy of appellants' Individual Master File (IMF) for the
 26 2004 tax year to the Board and appellants. Appellants subsequently submitted additional copies of their amended 2004
 27 federal and California returns, which are consistent with the copies of their amended federal and California returns that are
 28 attached to their Appeal Letter.

³ The penalty is a frivolous return penalty. (Rev.& Tax. Code § 19179.) As discussed below, respondent notified Ms.
 Waltner of the penalty in a letter dated June 24, 2008. Staff notes, however, that it appears appellants have not yet either paid
 the penalty amount nor filed a claim for refund of the penalty amount with respondent, both of which are prerequisites to the
 Board's jurisdiction to review the penalty (as discussed, *infra.*). The parties should notify the Board prior to the oral hearing
 if these circumstances have changed (see footnote 13 for instructions on submitting exhibits).

1 Representing the Parties:

2
3 For Appellants Steven and Sarah Waltner

4 For Franchise Tax Board: Mary Yee, Tax Counsel

5
6 QUESTIONS: (1) Whether appellants have shown error in respondent's denial of their claim for refund
7 of \$2,122.18.

8 (2) Whether the Board has jurisdiction to review respondent's imposition of the frivolous
9 return penalty.

10 (3) Whether the Board should impose a frivolous appeal penalty.⁴

11 HEARING SUMMARY

12 Background

13 Appellants timely filed a 2004 joint California Resident Income Tax Return (Form
14 540).⁵ On their return, appellants reported \$70,694 of wages, California adjusted gross income (AGI)
15 of \$83,653, itemized deductions of \$23,051, taxable income of \$60,602, and a total tax of \$2,010.
16 After applying total exemption credits of \$700 and \$2,362 of California income tax withholdings,
17 appellants claimed a refund due in the amount of \$1,052. (Resp. Opening Br., exhibit B.)⁶
18 Respondent processed appellants' return and remitted a refund of \$1,052.

19 On or about February 19, 2008,⁷ appellants filed a timely amended 2004 California
20

21 ⁴ According to respondent, appellants have (in addition to their 2004 return filings) filed multiple frivolous Forms 540X for
22 the 2007 tax year.

23 ⁵ In their Appeal Letter, appellants state that their original 2004 return was filed timely on or before April 15, 2005. In its
24 opening brief, respondent asserts that appellants' return was *timely* filed on approximately April 28, 2005. (Resp. Opening
25 Br., p. 1, exhibit B.)

26 ⁶ A copy of appellants' 2004 Form 540 is not in the file.

27 ⁷ According to respondent's opening brief, the 2004 Form 540X was filed on February 7, 2008, but the Appeal Letter states
28 that it was "filed timely" on February 12, 2008, and "received" by respondent on February 19, 2008. Staff notes that
appellants signed both the 2004 Form 540X and a federal 2004 Form 1040X with the same date, February 7, 2008, and Mr.
Waltner signed the attached Form 3525 with the corresponding date February 8, 2008. The attached Affidavit of Mailing
indicates that the 2004 Form 540X and attachments were mailed on February 12, 2008, and the copy of the certified mail
receipt indicates that respondent received the Form 540X and attachments on February 19, 2008. (App. Opening Br.,
Attachments.) The differences in the dates are not determinative with respect to the timeliness of the claim for refund.

1 return (Form 540X),⁸ on which they reduced their state wages from \$70,694.00 to \$370.00, their
2 California AGI from \$83,653.00 to zero, their tax from \$2,010.00 to zero, and they claimed a refund
3 of \$2,122.18, which consists of their California income tax withholdings of \$2,362.00 plus claimed
4 excess withheld state disability insurance (SDI) of \$812.18 less overpaid tax of \$1,052.00. In Part II,
5 line 5 of the amended return, appellants provided the following explanations for the changes made on
6 the amended return: “FEDERAL DETERMINATION OF 1040X PENDING. Line 1a: See attached
7 Form 3525; Line 1b: See attached copy of 1040X and supporting documents and see amended Form
8 541; Line 5: Taking standard deduction only.” (App. Opening Br., Attachment.) Attached to the
9 Form 540X are the following:

- 10 • copies of Substitute for Form W-2, Wage and Tax Statement (Form 3525) stating the payer
11 listed on line 5, New Century Mortgage Corp., provided a Form W-2 erroneously alleged
12 payments of Internal Revenue Code (IRC) Section 3401(a) and 3121(a) wages, which
13 appellants are disputing because Mr. Waltner did not receive any such wages;
- 14 • a 2004 amended federal return (Form 1040X); and
- 15 • an Affidavit of Mailing.

16 Attached to the submitted Form 1040X are the following:

- 17 • a copy of an Employment Development Department (EDD) Form 1099G Rev. 21 reporting
18 taxable unemployment compensation payments of \$370 for Ms. Waltner;
- 19 • a corrected copy of a 2004 Form 1099-Div listing Citigroup Global Markets Inc. as payer, Mr.
20 Waltner as recipient and zero dividend income;
- 21 • a corrected copy of a 2004 Form 1099-Int listing Keypoint Credit Union as payer, Mr. Walter
22 as recipient and zero interest income;
- 23 • a corrected copy of a 2004 Form 1099-Int listing Countrywide Home Loans as payer, Mr.
24 Walter as recipient and zero interest income; and
- 25 • a copy of a 1099-Misc. (the corrected box is not checked) listing National Safety Associates,
26

27
28 ⁸ R&TC section 19306 requires a taxpayer to file a claim for refund within four years of the date the return was filed (if filed within the time prescribed by R&TC section 18567 or 18604, whichever is applicable); four years of the due date of the return (without regard to any extension for filing the return); or within one year from the date of overpayment, whichever period expires later.

1 Inc. as payer, Ms. Waltner as recipient and zero nonemployee compensation.

2 Each of these four 1099 Forms states that it “is submitted to rebut a document known to
3 have been submitted by the party identified above as the ‘PAYER’ which erroneously alleged a
4 payment to the party identified above as the ‘RECIPIENT’” and the original document “should not
5 have been issued as NO such payments were received[,]” and is signed by the appellant listed as
6 recipient under penalty of perjury. (*Ibid.*; Resp. Opening Br., p. 1.)⁹

7 In a letter dated June 24, 2008, respondent denied appellants’ claim for a refund
8 because it was purportedly based on a frivolous amended return. (App. Opening Br., Attachment.) On
9 this same date, respondent issued a notice to Ms. Waltner stating that it was imposing a frivolous
10 return penalty in the amount of \$500 pursuant to Revenue and Taxation Code (R&TC) section 19179.
11 Respondent also issued a Notice of State Income Tax Due dated July 1, 2008, which shows a balance
12 due of \$516.55. (*Ibid.*). In a letter to respondent dated July 5, 2008, Ms. Waltner stated,

13 Yesterday I telephoned the Franchise Tax Board, Accounts Receivable Department at
14 the number provided to me on the notices I received, and ‘Angie’ in that department
15 assured me that all I had to do was send in a copy of the amended return with the words
16 ‘PROTECTIVE RETURN’ written in red ink at the top, and the Franchise Tax Board
17 would abate the penalty and wait for me to send in my final determination from the IRS. .
18 . .

19 In this letter, Ms. Waltner requested that respondent replace the original Form 540X with the attached
20 copy of the Form 540X, which is marked as a protective return at the top of the first page. (*Ibid.*) In a
21 letter dated July 25, 2008, respondent acknowledged appellants’ July 5, 2008, letter, asserted that it
22 had determined the amended return is frivolous, and apologized for any incorrect information
23 appellants may have received from one of its employees. (*Ibid.*) Appellants filed a Request for Chief
24 Counsel to Relieve Penalties (Form 626 C2) dated August 22, 2008, requesting relief from the
25 frivolous return penalty of \$500. (*Ibid.*) In a letter addressed to respondent’s Chief Counsel dated

26 ⁹The Affidavit of Mailing states that a spreadsheet entitled, “Sample of Refunds Issued from California Franchise Tax
27 Board,” was also mailed to respondent. In its opening brief, respondent asserts that the referenced spreadsheet and a letter
28 requesting, “the same treatment . . . as was given to all the other people listed on the spreadsheet” were submitted to it with
the Form 540X and attachments. Staff notes, however, that copies of the referenced spreadsheet and corresponding letter are
not in the file.

¹⁰ We note that July 4, 2008, the day before July 5, 2008, was a federal and state holiday, which would mean that the FTB’s
office would be closed on that date.

1 September 18, 2008, appellants argue that they are entitled to abatement of the frivolous return
2 penalty. (*Ibid.*) Appellants then filed this timely appeal.

3 Contentions

4 Appellants' Contentions

5 Appellants argue the following:

- 6 • The issue before this Board is whether appellants' amended return is prima facie a frivolous
7 return. If not, then respondent must stop delaying and process appellants' amended return.
8 There is no basis in law for respondent's denial of appellants' claim for refund on the ground
9 that the amended return is frivolous. Appellants filed an amended return in good faith because
10 they realized after they began to read the revenue statutes that both they and the companies for
11 whom they worked in 2004 made a mistake of law by characterizing appellants as employees
12 who received wages or income from a trade or business. The amended return represents
13 appellants' best understanding of the facts and the law, it is internally consistent and
14 mathematically accurate to the best of their knowledge and belief, and it does not in any way
15 state or assert any position that respondent or the Internal Revenue Service (IRS) has
16 determined to be frivolous. (App. Opening Br., pp. 1-3)
- 17 • Appellants' amended return does not constitute a "zero return," such as the type that is
18 commonly seen in frivolous return cases, because it only contains four zeros and does not have
19 a zero for state wages or federal AGI line items. Appellants have never stated that wages are
20 not taxable. They have not attempted to define taxable income or anything else or to exclude
21 their income or wages from taxation on their 2004 amended return. Rather, they declared the
22 amount of "wages" received on line 1a. (App. Reply Br., p. 6.)
- 23 • They have not taken a position that "income" they received was not subject to California tax,
24 unless California law itself specifically excludes that income from taxation. Respondent is not
25 legally entitled to dictate the contents of appellants' return or sworn testimony, to choose
26 which return it prefers, or to label an amended return frivolous because respondent does not
27 like the numbers included on the amended return and prefers other numbers, such as those
28 asserted by third parties in filed information returns. Appellants submitted an affidavit, which

1 they both signed on September 18, 2008, which asserts that they have not received any taxable
2 income from 1976 to the present. (App. Opening Br., Attachment.)

- 3 • The amended return constitutes a protective return, as indicated by the notation in red ink on
4 the top of the second copy of the amended return they sent to respondent on July 5, 2008,
5 pending final determination by the IRS regarding their 2004 federal amended return.
6 Respondent should therefore await the federal determination of the federal amended return
7 before taking any action, such as imposing a frivolous return penalty, because the California
8 AGI is based upon the federal AGI.
- 9 • Appellants have no burden of proof in this appeal. Under IRC section 7491, the burden of
10 proof with respect to any factual issue relevant to ascertaining the underlying tax liability shifts
11 to respondent because appellants produced credible evidence in the form of sworn rebuttals
12 that were included in their amended return. These sworn rebuttals constitute credible evidence,
13 which rebut any presumption of correctness of third parties' information returns and establish
14 that appellants had no tax liability in tax year 2004. Respondent is not entitled to disregard an
15 amended return just because the original return is considered to be more financially favorable
16 to the state. Appellants do not have to prove that respondent's denial of their claim for refund
17 is incorrect when the denial is not actually a denial of the refund claim per se but rather a
18 refusal to treat it as a refund claim at all. Respondent's denial of the refund claim is a refusal
19 to process the amended return, or a decision to treat it as a nullity because it is purportedly
20 frivolous.
- 21 • Respondent misstates the law with respect to the frivolous return penalty. In order to impose
22 the frivolous return penalty, respondent has the burden under IRC section 6703 and R&TC
23 section 19180 of proving that appellants' amended return is frivolous, and it must furnish
24 appellants with a copy of the formal assessment made to reach that determination. The only
25 evidence that is relevant for purposes of the frivolous return penalty is the amended return.
26 Respondent has failed to meet its burden of proof and therefore this Board must find in
27 appellants' favor.
- 28 • By refusing to process appellants' amended return or by denying the claim for refund,

1 respondent is violating federal statutes, e.g., Title 18, U.S. Code sections 242, 1512(b)(1) 2(a)
2 & (d)(1), and 7214(a), and appellants' rights under the U.S. constitution's Fifth and Fourteenth
3 Amendments to due process and equal protection. Respondent acted improperly and attempted
4 to violate appellants' due process rights by suggesting they had no legal right to protest the
5 frivolous return penalty. Appellants are entitled to due process and equal protection with
6 respect to the filing of their amended return and require meaningful clarification as to the
7 nature of and the reason for respondent's action. (App. Opening Br., pp. 6-7.)

- 8 • Congress did not intend for the frivolous return penalty to apply to appellants because they are
9 not tax protesters, are not refusing or neglecting to pay any internal revenue or state tax for
10 which they are lawfully subject to or liable for, and they support a fair, consistent and lawful
11 application of the income tax system. (App. Opening Br., pp. 8-9.)
- 12 • Respondent is in error when it argues that this appeal is not properly before this Board because
13 appellants have not remitted the frivolous return penalty amount of \$500. This Board has
14 already determined that the appeal is properly before it. Otherwise, it would have declined to
15 hear the appeal. "The reference to a denial of a claim for refund or inaction after six months
16 leading to the right to appeal before this Board is actually a reference to the amended return
17 itself as a claim for refund, NOT a reference to a claim for a refund of an improperly collected
18 civil penalty!" (App. Reply Br., p. 12.)
- 19 • This Board has no cause to impose a frivolous appeal penalty under R&TC section 19714.
20 Respondent improperly mentions the filing history of appellants for other tax years, which is
21 irrelevant to the instant issue before this Board, respondent makes unsupported accusations that
22 these amended returns are also frivolous returns and appellants are somehow guilty of
23 continued non-compliance with the return filing requirements. (App. Reply Br., p. 12.)

24 Respondent's Contentions

25 Respondent argues that appellants have not met their burden to prove entitlement to the
26 claimed refund or credit. Respondent contends that appellants' 2004 amended return does not
27 constitute a valid return because it does not contain sufficient information from which a tax liability
28 can be computed and it does not demonstrate an honest and reasonable attempt to satisfy tax law

1 requirements. Assuming that the IRS processes appellants' 2004 Form 1040X and remits a refund,
2 respondent contends that neither it nor this Board would be bound to follow the federal determination.
3 Respondent contends there is no merit to appellants' position that the income they received in 2004
4 was not subject to California tax. Respondent contends that the courts, the Department of Treasury,
5 the IRS and this Board have found appellants' position to be frivolous. Citing Notice 2008-14, I.R.B.
6 2008-4, Jan. 28, 2008, and the IRS publication, "The Truth About Frivolous Tax Arguments," section
7 I(C)(4),¹¹ respondent asserts that the IRS published and respondent adopted a list of positions that are
8 frivolous, including any argument asserting that wages are not taxable. Citing IRC section 7701(c),
9 respondent also contends that it is frivolous for appellants to assert that the words "includes" and
10 "including" are terms of exclusion rather than inclusion when used in the IRC. (Resp. Opening Br., pp
11 3-4.)

12 With respect to the frivolous return penalty, respondent argues that the matter is not
13 properly before this Board. Respondent contends that R&TC section 19180 requires appellants to pay
14 the entire penalty amount and then file a claim for refund with respondent; if the claim for refund is
15 subsequently denied or deemed denied, then appellant would be entitled to file an appeal with this
16 Board with respect to the frivolous return penalty. (Resp. Opening Br., pp. 4-5.)

17 Lastly, respondent requests this Board to impose a frivolous appeal penalty due to
18 appellants' continued non-compliance with the return filing requirements. Respondent contends that
19 appellants filed multiple frivolous Forms 540X for tax year 2007, plus the frivolous amended Form
20 540X that is the subject of this appeal. (Resp. Opening Br., p. 5.)

21 Applicable Law

22 Claim for Refund

23 In resolving an issue on appeal, respondent's determination is presumed correct and
24 appellants have the burden of proving it wrong. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509.)
25 Unsupported assertions are not sufficient to satisfy appellants' burden of proof. (*Appeal of Aaron and*
26 *Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence of uncontradicted, credible, competent,
27

28 ¹¹ See <http://www.irs.gov/taxpros/article/0,,id=159853,00.html>.

1 and relevant evidence showing error in respondent's determinations, they must be upheld. (*Appeal of*
2 *Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.) Appellants' failure to produce
3 evidence that is within their control gives rise to a presumption that such evidence is unfavorable to
4 their appeal. (*Appeal of Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.) Further, in a refund action, the
5 taxpayer not only must show that respondent's determination is incorrect, but also must prove the
6 correct amount of tax owed. (*Appeal of Edward Durley*, 82-SBE-154, July 26, 1982 [citing *Griffin v.*
7 *United States* (1979) 588 F.2d 521].) The Board has previously determined that "zero" returns are not
8 valid. (See *Appeal of LaVonne A. Hodgson*, 2002-SBE-001, Feb. 6, 2002.)

9 R&TC section 17041, subdivision (a), imposes a tax upon the entire income, from all
10 sources, of every California resident.¹² R&TC section 17041, subdivision (b), imposes a tax upon the
11 California-source income of part-year residents. R&TC section 18501 requires every individual
12 subject to the Personal Income Tax to make and file a return with respondent "stating specifically the
13 items of the individual's gross income from all sources and the deductions and credits allowable[.]"
14 R&TC sections 17071 and 17072 define "gross income" and "adjusted gross income" by referring to
15 and incorporating into California law IRC sections 61 and 62, respectively. IRC section 61 provides
16 that unless otherwise provided "gross income means all income from whatever source derived"
17 including compensation for services. Taxable income is gross income minus allowable deductions.
18 (Rev. & Tax. Code, § 17073; Int. Rev. Code, § 63.) The Board and federal courts have consistently
19 held that wages and compensation for services are gross income within the meaning of IRC section 61.
20 (*United States v. Koliboski* (7th Cir. 1984) 732 F.2d 1328; *United States v. Romero* (9th Cir. 1981) 640
21 F.2d 1014; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.)

22 It is well established that respondent and the Board are not bound to adopt the
23 conclusion reached by the IRS in any particular case, even when the determination results from a
24 detailed audit. (*Appeal of David G. Bertrand*, 85-SBE-071, July 30, 1985; *Appeal of Raymond and*
25 *Rosemarie J. Pryke*, 83-SBE-212, Sept. 15, 1983; *Appeal of Kenneth J. Aparicio*, 80-SBE-143,
26 Nov. 18, 1980; *Appeal of Der Weinerschnitzel International, Inc.*, 79-SBE-063, Apr. 10, 1979.)

27 _____
28 ¹² It appears undisputed that appellants lived and worked in California in 2004.

1 Due Process and Constitutional Arguments

2 Appellants make constitutional arguments in their appeal. However, the Board is
3 precluded from determining the constitutional validity of California statutes or regulations, and has an
4 established policy of declining to consider constitutional issues. (Cal. Const., art. III, § 3.5; *Appeal of*
5 *Aimor Corp.*, 83-SBE-221, Oct. 26, 1983; *Appeals of Walter R. Bailey*, 92-SBE-001, Feb. 20, 1992
6 (*Bailey*).

7 In addition, the Board's Rules for Tax Appeals, Chapter 4, section 5412, subdivision
8 (b), provides that the Board does not have jurisdiction to consider: 1) whether a California statute or
9 regulation is invalid or unenforceable under the federal or California constitution, unless a federal or
10 California appellate court has already made such a determination; or 2) whether the appellant is
11 entitled to a remedy for the FTB's actual or alleged violation of any substantive or procedural right,
12 unless the violation affects the adequacy of a notice, the validity of an action from which a timely
13 appeal was made, or the amount at issue in the appeal. (Cal. Code Regs., tit. 18, § 5412, subd. (b).)
14 To the extent that appellants are making constitutional arguments, those arguments should be made in
15 the appropriate court of law.

16 Furthermore, the Board held in *Bailey*, as follows:

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

21 Frivolous Return Penalty

22 R&TC section 19179 provides for a penalty to be imposed for the filing of a frivolous
23 return in accordance with IRC section 6702. IRC section 6702 provides that a person shall pay a
24 frivolous return penalty if he or she files what purports to be a tax return but which does not contain
25 information on which the substantial correctness of the self-assessment may be judged, or it contains
26 information that on its face indicates that the self-assessment is substantially incorrect; and the above-
27 referenced conduct is based on a position that the IRS has identified as frivolous or reflects a desire to
28 delay or impede the administration of federal tax laws.

 Once the FTB imposes the frivolous return penalty under R&TC section 19179, the

1 Chief Counsel of the FTB has the non-delegable discretion to exercise the authority to rescind all or
2 any portion of a frivolous return penalty. (Rev. & Tax. Code, § 19179, subs. (e)(1) & (2).) Any
3 determination made by the Chief Counsel of the FTB under subdivision (e) cannot be reviewed in any
4 administrative or judicial proceeding, notwithstanding any other law or rule of law. (Rev. & Tax.
5 Code, § 19179, subd. (e)(3).) Furthermore, the Board has jurisdiction to consider a frivolous return
6 penalty only where the taxpayer pays the penalty in full, files a claim for refund, and then appeals
7 from respondent's denial of that claim. (See Rev. & Tax. Code, §§ 19179, 19180 & 19322-19324.)

8 Frivolous Appeal Penalty

9 R&TC section 19714 provides that a penalty of up to \$5,000 shall be imposed
10 whenever it appears to the Board that proceedings before it have been instituted or maintained
11 primarily for delay, or that an appellant's position is frivolous or groundless, or that the appellant
12 unreasonably failed to pursue available administrative remedies. (*Appeal of Michael E. Myers, supra.*)
13 California Code of Regulations, title 18, section 5454 provides a non-exclusive list of factors to be
14 referenced when determining whether, and in what amount, to impose a frivolous appeal penalty.
15 (Cal. Code Regs., tit. 18, § 5454, subd. (b).) These factors include whether appellant is (1) making
16 arguments that have been previously rejected by the Board in a formal opinion; (2) repeating
17 arguments from his prior appeals; (3) filing the appeal with the intent to delay legitimate tax
18 proceedings or tax collection; and (4) whether appellant has a history of filing frivolous appeals or
19 failing to comply with California tax laws. (*Id.*) The Board has considered arguments similar to
20 appellants' arguments and rejected each of the contentions as frivolous and without merit. (See
21 *Appeals of Robert E. Wesley, et al.*, 2005-SBE-002, Nov. 15, 2005; *Appeal of Michael E. Myers,*
22 *supra.*) Appellants' argument that their wages are not subject to tax is an argument that has been
23 consistently rejected by the IRS, the federal courts, respondent, and the Board, over long periods of
24 time. (See, e.g., *Appeal of Michael E. Myers, supra*; *Appeal of Alfons Castillo*, 92-SBE-020, July 30,
25 1992; *Appeals of Walter R. Bailey, supra*; *Appeals of Fred R. Dauberger, et al.*, 82-SBE-082, Mar. 31,
26 1982.)

27 Both the NOA and the Board's letter dated January 20, 2009, notified appellants that
28 the Board may impose the frivolous appeal penalty.

1 STAFF COMMENTS

2 Appellants should provide to the Board and respondent at least 14 days prior to the
3 hearing evidence that substantiates their contentions that they received only \$370 of income subject to
4 California taxation in the 2004 tax year, notwithstanding their original return reporting total wages of
5 \$70,694 and a self-assessed tax liability of \$1,310, as well as Form 1099-DIV from Citigroup Markets,
6 Inc., Form 1099-MISC from National Safety Associates, Inc., Form 1099-INT from Countrywide
7 Home Loans, and Form 1099-INT from Keypoint Credit Union.¹³ Appellants should also provide a
8 copy of any final federal determination for the 2004 tax year. Respondent has provided appellants'
9 2004 Individual Master File transcript; the parties should be prepared to discuss the status of
10 appellants' pending federal claim for refund and the relevance, if any, to this appeal, since the federal
11 claim for refund mirrors the California claim for refund, which is based on arguments the courts and
12 the Board have consistently found to be frivolous.

13 Staff notes that this Board does not appear to have jurisdiction to address the issue of
14 the frivolous return penalty because appellants have not first paid the frivolous return penalty amount
15 in full and then filed a written claim for refund with respondent. (Rev. & Tax. Code, §§ 19322, 19180,
16 subd. (b).)

17 Both parties should be prepared to discuss whether, and in what amount, a frivolous
18 appeal penalty should be imposed. In this regard, staff notes this is the first appeal of appellants that
19 the Board has considered, although respondent's records indicate they filed multiple amended returns
20 for the 2007 tax year which respondent contends are frivolous. Respondent should be prepared to
21 describe those amended returns at the hearing.

22 ///

23 ///

24 ///

25 Waltner_lf

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27
28 ¹³ Exhibits should be submitted to: Claudia Madrigal, Board of Equalization, Board Proceedings Division, P. O. Box 942879
MIC: 80, Sacramento, CA 94279-0080