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**BOARD OF EQUALIZATION**

**STATE OF CALIFORNIA**

In the Matter of the Appeals of:

) **HEARING SUMMARY**

) **PERSONAL INCOME TAX APPEALS**

**WILLIAM JUSTICE AND**

) Case No. 573575

**LISA BLINDERMAN; DAVID STIRLING;**

) Case No. 585513

**MICHAEL L. PANEK AND TRACY PANEK;**

) Case No. 585508

**MARK CRONIN AND LOIS CRONIN.<sup>1</sup>**

) Case No. 586117

Representing the Parties:

For Appellants:

Rodney J. Guarino E.A. MST

For Franchise Tax Board:

Shail Shah, Tax Counsel

**CONSOLIDATED APPEALS**

These consolidated appeals are made pursuant to section 19324 of the Revenue and Taxation Code (R&TC) from the actions of the Franchise Tax Board (FTB or respondent) in denying

<sup>1</sup> Although the respective claims for refund at issue were filed on behalf of William Justice and Lisa Blinderman, David Stirling, Michael L. Panek and Tracy Panek, and Mark Cronin and Lois Cronin, the excluded income at issue is only attributable to William Justice's, David Stirling's, Michael L. Panek's, and Mark Cronin's, wages as Los Angeles city police officers. In summarizing their position in this appeal, "appellant," will refer collectively only to William Justice, David Stirling, Michael L. Panek, and Mark Cronin.

1 each appellant's claim(s) for refund as set forth in the exhibits below. For the balance of this hearing  
2 summary, the several appellants in this appeal are referred to collectively as "appellant".  
3

4 QUESTION: Whether portions of amounts received as salary by appellant are excludable from gross  
5 income under Internal Revenue Code (IRC) section 104(a)(1).

6 HEARING SUMMARY

7 Background

8 The facts for each appellant are set forth in exhibits that are at the end of this Hearing  
9 Summary.

10 Contentions

11 For each respective appeal, appellant and the FTB assert the contentions below.

12 Appellant

13 Appellant argues that, because in a prior tax year, he received a workers' compensation  
14 payment for a permanent partial disability, based on a permanent disability factor assigned by the  
15 California Department of Workers Compensation, he is entitled to exclude from gross income a portion  
16 of amounts received as salary in the tax year(s) at issue. In his appeal letter, appellant cites California  
17 Labor Code sections 4850 and 4583, IRC section 104(a), and Internal Revenue Service Revenue Ruling  
18 68-10 in support of his position. He also lists four court decisions, a "CA Workers' Comp Appeal Board  
19 Award Letter," plus a letter from the Internal Revenue Service (IRS) Office of the Chief Counsel ("IRS  
20 letter") that he asserts "all clearly support the taxpayer's position for a deduction of wages based on the  
21 degree of his disability." The four listed court decisions are the following: 1) *Hawthorn v. City of*  
22 *Beverly Hills* (1952) 111 Cal.App.2d 723; 2) *Givens v. Commissioner* (1988) 90 T.C. 1145; 3) *Bakken v.*  
23 *Commissioner*, T.C. Summary Opinion 2011-55; and 4) *Duncan v. United States* (1996) 78 AFTR 2d  
24 (RIA) 7313. Although he claims to have enclosed copies of these documents, they are not attached to  
25 the appeal letter. A copy of *Hawthorn v. City of Beverly Hills, supra*, 111 Cal.App.2d 723 is attached to  
26 appellant's reply brief and the referenced IRS letter is attached to the FTB's opening brief. In his protest  
27 letter to the FTB, appellant claimed that *Hawthorn v. City of Beverly Hills*, 111 Cal.App.2d 723, *supra*,  
28 is his legal precedent for filing a claim for refund in this appeal. According to appellant, the issue in this

1 case was whether “payments that are equal to a firemen’s [sic] or policeman’s salary [are] still able to be  
2 treated as workmen’s compensation payments based on a percentage of disability under Section  
3 104(a)(1) of the Internal Revenue Code of 1954.” The IRS filed an order of non-acquiescence (1989-2  
4 C.B. 1; 1989 IRB Lexis 712) relative to the decision rendered in *Givens v. Commissioner, supra*, 90 T.C.  
5 1145.<sup>2</sup> In *Bakken v. Commissioner, supra*, T.C. Summary Opinion 2011-55, the Tax Court ordered,  
6 “Pursuant to Internal Revenue Code Section 7463(b), this opinion may not be treated as precedent for  
7 any other case.” In *Duncan v. United States, supra*, 78 AFTR 2d (RIA) 7313, the federal district court  
8 held that the Kentucky Police and Firefighters’ Retirement and Benefit Fund (KRS § 67A.360 *et seq.*) is  
9 a statute in the nature of a workers’ compensation statute, and benefits received thereunder are excluded  
10 from gross income under IRC section 104(a)(1). (Appeal Letter, pp. 1-2; App. Reply Br., pp. 2-6,  
11 Attachment; Resp. Opening Br., exhibit F.)

12 With respect to the IRS letter, appellant asserts that his representative, Rodney Guarino,  
13 sent United States Senator Diane Feinstein’s office a request for clarification on the income exclusion,  
14 which was forwarded to the IRS Chief Counsel’s office in Washington, D.C. In the IRS letter, which is  
15 date stamped April 1, 2010, from the IRS Office of Chief Counsel to Senator Feinstein, the IRS states  
16 that it is responding to Senator Feinstein’s inquiry of March 2, 2010, on behalf of her constituent,  
17 Mr. Guarino. The IRS letter provides that, although “[a]n employee who is receiving disability as a  
18 percentage of wages may, in fact, be able to exclude those amounts from gross income,” such a  
19 “determination will depend on the specific statute under which the award was made as well as other  
20 factors.” The IRS letter further states, “If Mr. Guarino has a client in this situation, he may want to  
21 submit a private letter ruling request to the IRS by following the procedures in Revenue Procedure 2010-  
22 1.” According to appellant, the IRS letter verifies “that even if a policeman is receiving his or her full  
23 salary it may be considered disability award payments based on his or her particular circumstances.”  
24 (Appeal Letter, p. 2; App. Reply Br., pp. 1-2; Resp. Opening Br., exhibit G.)

25 In addition, appellant appears to argue that the FTB is required to grant the refund(s) at  
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27 <sup>2</sup> In *Givens v. Commissioner, supra*, the taxpayer received a full year’s salary pursuant to Labor Code section 4850 plus  
28 accumulated sick leave payments under Los Angeles County Code, section 6.20.070. The IRS treated the former amount as  
nontaxable compensation under IRC section 104(a)(1), and the latter as taxable compensation. The court reversed the IRS’s  
determination, holding that the sick leave payments were also nontaxable compensation under IRC section 104(a)(1).

1 issue because it issued refunds in similar situations to other taxpayers. In his reply brief, appellant  
2 states, “We are aware of over 300 amended returns that have been filed on behalf of injured policemen  
3 over the last ten years and the FTB has consistently issued refunds based on the same income  
4 exclusion.” Appellant indicates that the FTB audited the amended returns of several taxpayers who  
5 claimed an IRC section 104(a)(1) exclusion and informed these taxpayers that the audit division  
6 completed their audits and determined that they were entitled to their claimed refunds, and issued refund  
7 checks to them. (App. Reply Br., p. 5.)

#### 8 The FTB

9 In each respective appeal, the FTB contends that appellant has not met his burden of  
10 proving that the FTB’s denial of his claim(s) for refund is erroneous. The FTB contends that there is no  
11 evidence that appellant received workers’ compensation payments during the tax year(s) at issue. The  
12 FTB argues that IRC section 104(a)(1) and Labor Code sections 4850 and 4853 do not allow appellant  
13 to exclude a percentage of his salary from gross income in the tax year(s) at issue based on a permanent  
14 partial disability determination and payment that he received in a prior tax year. Citing *Morris v.*  
15 *Commissioner*, T.C. Memo 1987-7, the FTB asserts that “the IRS has consistently noted, and the Tax  
16 Court has agreed, that there are no provisions in the IRC, Treasury regulations, or Revenue Rulings that  
17 permit prior workers’ compensation awards to affect current earnings.” (Underscore original.)  
18 (Resp. Opening Br., pp. 3-4.)

19 The FTB also contends that Labor Code sections 4850 and 4853 are inapposite to this  
20 appeal because Labor Code section 4850 only applies to a paid leave of absence in lieu of disability  
21 payments for the first year after a taxpayer is awarded disability benefits and Labor Code section 4853  
22 only applies to the period following such a paid leave of absence. The FTB asserts that appellant has  
23 failed to provide any requested documents showing that workers’ compensation payments were  
24 erroneously included in his Form W-2 for the tax year(s) at issue. The FTB contends that workers’  
25 compensation payments would not be included in a Form W-2 because such payments are paid directly  
26 from a third-party insurance company. (Resp. Opening Br., pp. 4-5.)

27 Lastly, the FTB argues that appellant has not provided any legal support for the use of the  
28 permanent disability factor assigned by the California Department of Workers Compensation as a

1 measure to exclude a portion of the salary or wages that appellant received during the tax year(s) at  
2 issue. Citing Labor Code section 4660(a), the FTB asserts that the California Department of Workers  
3 Compensation uses the permanent disability percentage to measure the degree of injury based on the  
4 employee's occupation, age, and future earning capabilities. The FTB contends that the permanent  
5 disability percentage sets the maximum weekly compensation limits and that there is no federal or  
6 California law that allows it to be applied to exclude a portion of wages from gross income in any tax  
7 year under IRC section 104(a)(1). (Resp. Opening Br., pp. 5-6, fn. 9.)

### 8 Applicable Law

#### 9 Burden of Proof

10 "In a refund suit the taxpayer bears the burden of proving the amount he is entitled to  
11 recover." (*United States v. Janis*, 428 U.S. 433, 440.) It is also well-established that deductions and  
12 exclusions are a matter of legislative grace and are allowable only where the conditions established by  
13 the Legislature have been satisfied. (*New Colonial Ice Co. v. Helvering* (1934) 292 U.S. 435; *Appeal of*  
14 *George R. II and Edna House*, 93-SBE-016, Oct. 28, 1993.) Respondent's determination that a  
15 deduction or exclusion should be disallowed is presumed correct and an appellant must prove his  
16 entitlement to the claimed deductions or exclusions (*Welch v. Helvering* (1933) 290 U.S. 111; *Appeal of*  
17 *George R. II and Edna House, supra.*) Unsupported assertions cannot satisfy that burden of proof.  
18 (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence of uncontradicted,  
19 credible, competent, and relevant evidence showing that respondent's determinations are incorrect, such  
20 proposed assessments must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov.  
21 18, 1980.) An appellant's failure to produce evidence that is within his control gives rise to a  
22 presumption that such evidence is unfavorable to his case. (*Appeal of Don A. Cookston*, 83-SBE-048,  
23 Jan. 3, 1983.)

#### 24 IRC section 104(a)(1)

25 R&TC section 17071 incorporates IRC section 61. IRC section 61(a) provides that gross  
26 income includes all income from whatever source derived, except as otherwise expressly provided by  
27 statute. Although IRC section 61(a) broadly defines as income any accession to wealth, statutory  
28 exclusions from income are narrowly construed. (*Commissioner v. Schleier* (1995) 515 U.S. 313, 328;

1 *United States v. Burke* (1992) 504 U.S. 229, 233.) This general rule has been specifically applied to  
2 claimed exclusions for asserted workers' compensation awards. (*McDowell v. Commissioner*, T.C.  
3 Memo 1997-500.)

4 R&TC section 17131 incorporates IRC section 104. IRC section 104(a)(1) excludes from  
5 gross income, among other items, amounts received under workers' compensation acts as compensation  
6 for personal injuries or sickness.<sup>3</sup> The regulation interpreting IRC section 104 provides that payments  
7 made under a statute that is in the nature of a worker's compensation act are also excludable from gross  
8 income; however, the exclusion does not apply to a retirement pension to the extent that it is determined  
9 by reference to the employee's age or length of service, even though the employee's retirement is  
10 occasioned by an occupational injury or sickness. The exclusion also does not apply to amounts  
11 received as compensation for an occupational injury or sickness to the extent that the amounts received  
12 are in excess of the amount provided in the applicable worker's compensation act or acts. (Treas. Reg.  
13 § 1.104-1(b).) (See also *Nielsen v. United States* (1993) 820 F.Supp. 484, 487.)

14 In *Take v. Commissioner* (9th Cir. 1986) 804 F.2d 553, the Ninth Circuit Court of  
15 Appeals addressed the issue of whether a section of a municipal ordinance met the definition of a  
16 workers' compensation act for purposes of IRC section 104(a)(1). The municipality of Anchorage,  
17 Alaska enacted by ordinance a Retirement Plan for Police Officers and Fire Fighters of Anchorage,  
18 Alaska (retirement plan), which included benefits for occupational disability. The Ninth Circuit held  
19 that the section of the municipal ordinance providing for the retirement plan was not a statute in the  
20 nature of a workers' compensation act because it provided compensation even for sickness or injury not  
21 incurred in the course of employment. (*Id.* at p. 557.) The Ninth Circuit stated:

22 If it is to come within the definition of a "workmen's compensation act" for the purposes  
23 of section 104, a statute must require, as a precondition to eligibility for benefits, that the  
24 injury be incurred in the course of employment. Statutes that do not restrict the payment  
25 of benefits to cases of work-related injury or sickness are not considered to be  
26 "workmen's compensation acts" under section 104.

27 (*Ibid.* (citations omitted.)) The Ninth Circuit affirmed the Tax Court's decision that benefits received  
28 under the retirement plan are included in gross income. (*Id.* at p. 558.) (See also Revenue Ruling

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<sup>3</sup> Unlike IRC section 104(a)(2), IRC section 104(a)(1) does not require a "physical" injury or a "physical" sickness for amounts received to qualify for exclusion from gross income.

1 80-137 (The payments the city made to the disabled police officer during the time he performed “light  
2 duty” are not excludable from the gross income under IRC section 104(a)(1) because the payments are  
3 salary payments made in exchange for services performed.)

4 California Labor Code sections 4850, 4853, and 4854, which are part of California’s  
5 Workers’ Compensation Act (California Labor Code § 3200 *et seq.*), provide for payments to a public  
6 safety officer due to a temporary or permanent disability arising out of and in the course of his or her  
7 duties. Labor Code section 4850 provides a public safety officer, who is temporarily or permanently  
8 disabled by injury or illness arising out of and in the course of his duties, with a one-year paid leave of  
9 absence before going on permanent disability. Labor Code Section 4850, subdivision (a), as in effect  
10 prior to January 1, 2010,<sup>4</sup> provides:

11 Whenever any person listed in subdivision (b) who is a member of the Public Employees’  
12 Retirement System or the Los Angeles City Employees’ Retirement System or subject to  
13 the County Employees Retirement Law of 1937 . . . is disabled, whether temporarily or  
14 permanently, by injury or illness arising out of and in the course of his or her duties, he or  
15 she shall become entitled, regardless of his or her period of service with the city, county,  
16 or district, to a leave of absence while so disabled without loss of salary in lieu of  
temporary disability payments or maintenance allowance payments under Section 139.5, if  
any, which would be payable under this chapter, for the period of the disability, but not  
exceeding one year, or until that earlier date as he or she is retired on permanent disability  
pension, and is actually receiving disability pension payments, or advanced disability  
pension payments pursuant to Section 4850.3.

17 “The purpose of section 4850 is to provide special benefits to police, sheriffs, and firefighters.”  
18 (*Biggers v. Workers’ Compensation Appeals Board et al.*, 69 Cal.App.4th 431, 440 (a county  
19 correctional officer assigned to work as a courtroom bailiff is entitled to the same benefits of Labor  
20 Code section 4850 as police and firefighters.)) (See also *Austin v. City of Santa Monica* (1965) 234  
21 Cal.App.2d 841 (city not entitled to deduct a day of accumulated sick leave for each day of workers’  
22 compensation it paid to a disabled police officer under Labor Code section 4850.)) Unlike the municipal  
23 ordinance at issue in *Take v. Commissioner*, 804 F.2d 553, *supra*, “California Labor Code section 4850  
24 provides for compensation only for sickness or injury that arises out of and is incurred in the course of  
25 the employee’s duties.” (*Nielsen v. United States, supra*, 820 F. Supp. at p. 488.)

26  
27  
28 <sup>4</sup> Effective January 1, 2010, Labor Code section 4850 was amended to eliminate the requirement that the employees be  
members of the Public Employees’ Retirement System or the Los Angeles City Employees’ Retirement System or subject to  
the County Employees Retirement Law of 1937. (Stats. 2009, ch. 389 § 1 (AB 1227).)

1 Labor Code section 4853 provides that public safety officers who exhaust their one-year  
2 paid leave of absence under Labor Code section 4850 are entitled thereafter to draw regular workers'  
3 compensation benefits until the end of their disability or the start of their retirement:

4 Whenever such disability of any such officer or employee continues for a period beyond  
5 one year, such member shall thereafter be subject as to disability indemnity to the  
6 provisions of this division other than Section 4850 during the remainder of the period of  
said disability or until the effective date of his retirement under the Public Employees'  
Retirement Act, and the leave of absence shall continue.

7 Payments made to a public safety officer pursuant to Labor Code sections 4850 and 4853  
8 due to an occupational injury or illness arising out of and in the course of his or her duties are in the  
9 nature of and in lieu of workmen's compensation, and are thus excludable from his or her gross income  
10 under IRC section 104(a)(1). (See *City of Martinez v. Workers' Comp. Appeals Bd.* (2000) 85 Cal. App.  
11 4th 601, 614; *Boyd v. City of Santa Ana* (1971) 6 Cal. 3d 393, 397; *Hawthorn v. City of Beverly Hills*  
12 (1952) 111 Cal.App.2d 723; Rev. Rul. 68-10; Appeal of *George R. II and Edna House, supra.*)  
13 However, Labor Code section 4854 provides that "No disability indemnity shall be paid to any such  
14 officer or employee concurrently with wages or salary payments."

15 Labor Code section 4660, subdivision (a), provides: "In determining the percentages of  
16 permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the  
17 occupation of the injured employee, and his or her age at the time of the injury, consideration being  
18 given to an employee's diminished future earning capacity." A permanent disability rating of a certain  
19 percentage means that a worker is permanently excluded, because of his disability, from competing for  
20 that percentage of the jobs on the open market. (*Morris v. Commissioner*, T.C. Memo 1987-7, *supra.*)

21 In *Morris v. Commissioner*, T.C. Memo 1987-7, *supra*, Rodney D. Morris, Gordon B.  
22 Barrett, Bennie Ward, Jr., and Florence E. Harms (the taxpayers) were employed as officers of the Los  
23 Angeles County Sheriff's Department at all relevant times. The California Worker's Compensation  
24 Appeals Board (WCAB) awarded each of the taxpayers workers' compensation benefits based on a  
25 permanent disability rating due to injuries they sustained in the course of their duties. In March 1970,  
26 the WCAB awarded Morris benefits of \$1,470 based on a permanent disability rating of 7 percent due to  
27 a back injury he sustained in January 1969 while he was on duty as a patrol officer. In January 1981, the  
28 WCAB awarded Barrett benefits of \$21,280 based on a permanent disability rating of 59 percent due to



1 a back injury he sustained in March 1980 while on duty. In November 1981, the WCAB awarded Ward  
2 benefits of \$5,722.50 based on a permanent disability rating of 22.1 percent due to an Achilles tendon  
3 injury he sustained in October 1977 while serving as coordinator for the technical schools unit of the  
4 Sheriff's Department. In June 1976, the WCAB awarded Harm benefits of \$14,752.50 based on a  
5 permanent disability rating of 45 percent due to arms and neck injuries she sustained in June 1976 while  
6 on duty. On their 1981 federal return, Ward and his spouse reported a salary of \$29,739 from Los  
7 Angeles County but excluded 22.1 percent of this amount from gross income due to Ward's permanent  
8 disability rating. On her 1979, 1980, and 1981 federal returns, Harms reported a salary of \$29,359,  
9 \$31,627, and \$34,790, respectively, from Los Angeles County. On a 1979 amended federal return and  
10 on the original 1981 federal return, she excluded 45 percent of this amount from gross income due to  
11 Harm's permanent disability rating. On her 1980 federal return, Harm did not exclude any of her salary.  
12 In her petition, however, she claimed an overpayment of taxes for 1981.

13 For each of the tax years at issue, the IRS determined deficiencies in each of the  
14 taxpayers' reported federal income taxes due to the amounts of salary each of these individuals excluded  
15 from gross income based on their permanent disability rating. The Tax Court rejected the taxpayers'  
16 argument that they were overpaid and that the overpayment amount was excludable as workers'  
17 compensation because they continued to receive the same salary after they became disabled and were  
18 unable to perform some of their duties. The Tax Court found that the taxpayers failed to show that any  
19 portion of their salaries constituted personal injuries compensation. Instead, the Tax Court determined  
20 "that the payments were for services and they were totally dependent thereon." The Tax Court also  
21 found that the taxpayers failed to show that any portion of their salaries was paid pursuant to a statute in  
22 the nature of a workers' compensation act. The Tax Court stated:

23 They have cited no statute providing benefits paid to officers in the form of salary when  
24 they continue to work after an injury. They cite section 4850 of the California Labor  
25 Code, but it only states that disabled officers on leave of absence are entitled to a full  
26 salary for up to one year. Petitioners, however, did not receive payments under this  
27 statute, and it is not relevant to the case before us. We conclude, therefore, that section  
28 104(a)(1) is inapplicable to their situation.<sup>5</sup>

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<sup>5</sup> The Tax Court further held that IRC sections 104(a)(2) and 105(c) are inapplicable because all of the payments the taxpayers received were strictly for services, not for injuries or the loss of use of a member of function of the body.

1 In *George R. II and Edna House, supra*, a 1993 Board opinion, a California Highway  
2 Patrol officer was granted industrial disability retirement (IDR) due to an occupational injury or illness.  
3 Prior to the effective date of the IDR, the officer was paid a full year's salary pursuant to Labor Code  
4 section 4800, and he was paid all of his accumulated sick leave in 1986 and 1987. On his 1986 and  
5 1987 California returns, the officer reported the accumulated sick leave payments as part of his gross  
6 income. He later filed amended 1986 and 1987 returns, claiming refunds because the accumulated sick  
7 leave payments were nontaxable as worker's compensation. The FTB denied the officer's claims for  
8 refund and the officer appealed. The Board stated that the officer received the sick leave payments "not  
9 because he suffered an injury or illness in the line of duty as a highway patrol officer, but simply  
10 because he was too sick to work, and was thus entitled to payment of his accumulated sick leave." The  
11 Board thus concluded that the sick leave payments the officer received for accumulated sick leave  
12 earned while he was a state employee did not qualify as nontaxable worker's compensation payments  
13 under IRC section 104(a)(1).

14 Appellant relies on *Hawthorn v. City of Beverly Hills*, 111 Cal.App.2d 723, *supra*, in  
15 support of his position. In that case, a firefighter employed by the City of Beverly Hills sustained an  
16 injury on December 21, 1949, arising out of and in the course of his duties resulting in a temporary  
17 disability until October 30, 1950. Pursuant to the city's civil service ordinance and the rules adopted  
18 thereunder, the city terminated the firefighter's employment on January 31, 1950, because he became 50  
19 years of age on January 13, 1950. The city paid the firefighter his salary through January 31, 1950.  
20 After that date, the city's insurer paid him temporary disability compensation but the city did not pay  
21 him any salary. The city refused to pay the firefighter his salary during the full period of disability  
22 because it claimed that Labor Code section 4850 is unconstitutional. The city also claimed that the  
23 salary was not workers' compensation. The Los Angeles County Superior Court ordered the city to  
24 grant the firefighter a leave of absence from his former employment with full salary less a credit for the  
25 temporary disability payments he received from the city's insurer pursuant to Labor Code section 4850.  
26 On appeal, the California Court of Appeal held that Labor Code section 4850 was constitutional and  
27 affirmed the Superior Court's order.

28 Appellant also relies on an IRS letter that discusses IRC section 104(a)(1), Labor Code

1 4850, and Revenue Ruling 68-10 without applying these statutes to any specific set of facts. An  
2 “information letter” is a written statement issued by the IRS that does no more than call attention to a  
3 well-established interpretation or principle of tax law, without applying it to a specific set of facts.  
4 (Treas Reg., § 601.201(a)(5).) In contrast, a private letter ruling or a “determination letter” is a written  
5 statement issued by the IRS in response to a written inquiry by a taxpayer that interprets and applies the  
6 tax laws or any nontax laws applicable to the taxpayer’s specific set of facts. (Treas. Reg.,  
7 § 601.201(a)(3).) A request for a determination letter must contain a complete statement of all relevant  
8 facts relating to the transaction, including the names, addresses, and taxpayer identifying numbers of all  
9 interested parties. (Treas. Reg., § 601.201(e)(2).) Once issued, a letter ruling may be revoked or  
10 modified for any number of reasons, unless it is accompanied by a “closing agreement.” (Treas. Reg.,  
11 § 601.201(l)(1).) A “closing agreement” is a final agreement between the IRS and a taxpayer on a  
12 specific issue or liability, which is final unless fraud, malfeasance, or misrepresentation of a material  
13 fact can be shown. (Int.Rev. Code, § 7121; Treas. Reg., § 601.201(a)(7).) Although private letter  
14 rulings have no precedential force (Int.Rev. Code, § 6110(k)(3); Treas. Reg. § 301.6110-7(b)), such  
15 rulings reveal the interpretation of the statute by the agency responsible for administering the revenue  
16 laws. (*Rowan Cos. v. United States* (1981) 452 U.S. 247, 261 fn. 17; *Hanover Bank v. Commissioner*  
17 (1962) 369 U.S. 672, 686-687; *Estate of Cristofani v. Commissioner* (1991) 97 T.C. 74, 84 fn. 5; *Woods*  
18 *Inv. Co. v. Commissioner* (1985) 85 T.C. 274, 281 fn. 15; *Thurman v. Commissioner*, T.C. Memo. 1998-  
19 233; *Byrne v. Commissioner*, T.C. Memo 2002-319.)

#### 20 STAFF COMMENTS

21 As discussed above, Labor Code sections 4850 provides that salary payments made to a  
22 public safety officer during a leave of absence from work for one year or less due to an occupational  
23 injury or illness arising out of and in the course of his duties are in the nature of and in lieu of  
24 workmen’s compensation, and are thus excludable from his gross income under IRC section 104(a)(1).  
25 Labor Code section 4853 provides that, upon the exhaustion of the paid leave of absence set forth in  
26 Labor Code section 4850, a public safety officer is entitled to draw regular workers’ compensation  
27 payments until the end of the disability or the start of retirement; the regular workers’ compensation  
28 payments would also be excluded from tax under IRC section 104(a)(1). Here, appellant does not claim

1 that he took a leave of absence from his employment with full salary for one year or less in lieu of  
2 temporary disability payments before drawing regular permanent disability payments. Labor Code  
3 sections 4850 and 4853 and the cases which apply these statutes, such as Revenue Ruling 68-10 and  
4 *Hawthorn v. City of Beverly Hills*, 111 Cal.App.2d 723, *supra*, thus appear to be inapposite to this  
5 appeal.

6 At the oral hearing, the parties should be prepared to discuss whether the Ninth Circuit  
7 and the Tax Court's holdings in *Take v. Commissioner*, 804 F.2d 553, *supra*, and *Morris v.*  
8 *Commissioner*, T.C. Memo 1987-7, *supra*, respectively, as well as the Board's decision in the *Appeal of*  
9 *George R. II and Edna House*, *supra*, are controlling in this appeal. As discussed above, the Ninth  
10 Circuit, the Tax Court, and the Board in these cases determined that payments received in compensation  
11 for services performed are not payments made under a statute that is in the nature of a worker's  
12 compensation act and, therefore, the payments do not qualify for exclusion under IRC section 104(a)(1).  
13 Appellant should be prepared to show whether, during the tax year(s) at issue, he received amounts over  
14 and above his regular salary to compensate him for on the job injuries and whether his W-2 form(s)  
15 erroneously reported such amounts. If not, then it appears that the benefit received was contingent upon  
16 services rendered, which means that there was no workers' compensation benefit for tax purposes and  
17 thus no exclusion of amounts from gross income. Based on the evidence in the appeal record, it appears  
18 that appellant has not provided persuasive evidence that any portion of the salary he received during the  
19 tax year(s) at issue meets the requirements for exclusion under IRC section 104(a)(1).

20 Additionally, it appears that the IRS letter, which is addressed to Senator Feinstein on  
21 behalf of Mr. Guarino, is not controlling in this appeal. First, the IRS letter states that, if Mr. Guarino  
22 has a client in this situation, he may submit a request for a private letter ruling. In the absence of such  
23 a private letter ruling, it appears that the IRS letter is no more than an information letter, "which does  
24 no more than call attention to a well-established interpretation or principle of tax law, without  
25 applying it to [the] specific set of facts" at issue in this appeal. (Treas. Regs., § 601.201(a)(5).)  
26 Second, assuming that the IRS letter constitutes a written statement issued by the IRS in response to a  
27 written inquiry by appellant that applies the principles and precedents previously announced by the  
28 IRS to the particular facts involved, it is well established that the FTB and the Board are not bound to

1 adopt the conclusion reached by the IRS in any particular case. (*Appeal of David G. Bertrand*,  
2 85-SBE-071, July 30, 1985; *Appeal of Raymond and Rosemarie J. Pryke*, 83-SBE-212, Sept. 15, 1983;  
3 *Appeal of Kenneth J. Aparicio*, 80-SBE-143, Nov. 18, 1980; *Appeal of Der Weinerschnitzel*  
4 *International, Inc.*, 79-SBE-063, Apr. 10, 1979.)

5 Appellant should be prepared to provide evidence and legal authority for his apparent  
6 argument that the FTB is required to grant the refund claims in this appeal because it purportedly  
7 granted refund claims in over 300 other cases based on the same arguments asserted in this appeal.  
8 The parties may wish to discuss whether appellant claimed, and the FTB allowed, an IRC section  
9 104(a)(1) exclusion of a portion of appellant's salary from gross income for any tax year other than the  
10 tax year(s) at issue in this appeal.

11 Pursuant to California Code of Regulations, title 18, section 5523.6, if a party wishes to  
12 provide additional evidence to the Board, that party should submit the additional evidence to the Board  
13 Proceedings Division at least 14 days prior to the oral hearing.<sup>6</sup>

14 Attachments: Exhibits 1-4.

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18 Justice, et al.\_lf

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<sup>6</sup> Evidence exhibits should be sent to: Claudia Madrigal, Appeals Analyst, Board Proceedings Division, State Board of Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.

Exhibit 1 – Mark Cronin and Lois Cronin, Case No. 586117

Claims For Refund.

Appellant and his spouse filed claims for refund for tax years 2007 and 2009 in the amounts of \$1,216 and \$2,799, respectively.

Facts

During the tax years at issue, appellant was employed by the City of Los Angeles as a police officer. Appellant and his spouse filed joint California income tax returns for tax years 2007 and 2009 reporting wages from the City of Los Angeles in the amounts of \$69,309 and \$91,414, respectively. Appellant and his spouse subsequently filed amended returns for tax years 2007 and 2009 that excluded wages from the City of Los Angeles in the amounts of \$31,882 and \$42,040, respectively. In the 2007 and 2009 amended returns, appellant explained the exclusion of a portion of the wages with the following statement:

Taxpayer is a police officer injured on the job and awarded a partial permanent disability from the CA Workers' Comp Appeal Board. We are excluding 46% of his LAPD wages from income based on that disability.

The FTB sent appellant a letter confirming the receipt of the amended returns and requesting documentation showing that the workers' compensation benefits were erroneously included in appellant's Form W-2 wages during tax years 2007 and 2009. In a letter, appellant informed the FTB that the City of Los Angeles would not prepare amended Forms W-2 because the California Workers' Compensation Appeal Board awarded the claim in a lawsuit filed against the City of Los Angeles. Appellant stated that the California Workers' Compensation Appeal Board awarded appellant permanent disabilities equal to 46 percent. In addition, appellant attached a copy of the IRS letter discussed above. The FTB subsequently sent a letter to appellant denying his claims for refund for tax years 2007 and 2009. (Resp. Opening Br., pp. 1-3, exhibits A-H.)

This timely appeal followed.

## Exhibit 2 – David Stirling, Case No. 585513

Claim For Refund.

Appellant and his spouse filed a claim for refund for tax year 2007 in the amount of \$5,243.

Facts

During the tax year at issue, appellant was employed by the City of Los Angeles as a police officer. Appellant and his spouse filed joint California income tax return for tax year 2007 reporting wages from the City of Los Angeles in the amount of \$127,068. Appellant and his spouse subsequently filed amended returns for tax year 2007 that excluded wages from the City of Los Angeles in the amount of \$57,489. In the 2007 amended return, appellant explained the exclusion of a portion of the wages with the following statement:

Taxpayer is a police officer injured on the job and awarded a partial permanent disability from the CA Workers' Comp Appeal Board. We are excluding 45.25% of his LAPD wages from income based on that disability.

The FTB sent appellant a letter confirming the receipt of the amended return and requesting documentation showing that the workers' compensation benefits were erroneously included in appellant's Form W-2 wages during tax year 2007. When no response was received, the FTB sent another letter to appellant requesting the same information. In a letter to the FTB, appellant's representative, Mr. Guarino, stated, "Your office on several occasions has audited other claims and found in favor of the taxpayer." Attached to Mr. Guarino's letter is a statement entitled, "Chronological [sic] Events Surrounding State Of California Franchise Tax Board 2005 and 2006 Tax Years." The statement is not signed and does not identify the author of the statement, except that it references a recorded message from the FTB for *David Jacoby* informing him that he is getting a refund for tax years 2005 and 2006. The FTB subsequently sent a letter to appellant denying his claim for refund for tax year 2007. (Resp. Opening Br., pp. 1-3, exhibits A-F.)

This timely appeal followed.

## Exhibit 3 – William Justice, Case No. 573575

Claims For Refund.

Appellant and his spouse filed a claim for refund for tax years 2005, 2006, 2007, and 2008 in the amounts of \$7,871, \$8,086, \$6,521, and \$7,571, respectively.

Facts

During the tax years at issue, appellant was employed by the City of Los Angeles as a police officer. Appellant and his spouse filed joint California income tax returns for tax years 2005, 2006, 2007 and 2008 reporting wages from the City of Los Angeles in the amounts of \$142,174, \$142,867, \$123,103 and \$140,127, respectively. Appellant and his spouse subsequently filed amended returns for tax years 2005, 2006, 2007 and 2008 that excluded wages from the City of Los Angeles in the amounts of \$79,617, \$80,005, \$68,937, and \$78,471, respectively. In each of these amended returns, appellant explained the exclusion of a portion of the wages with the following statement:

Taxpayer is a police officer injured on the job and awarded a partial permanent disability from the CA Workers' Comp Appeal Board[.] We are excluding 56% of his LAPD wages from income based on that disability.

The FTB sent appellant a letter confirming the receipt of the amended returns and requesting documentation showing that the workers' compensation benefits were erroneously included in appellant's Form W-2 wages during tax years 2005, 2006, 2007 and 2008. In a letter, appellant informed the FTB that the City of Los Angeles would not prepare amended Forms W-2 because the California Workers' Compensation Appeal Board awarded the claim in a lawsuit filed against the City of Los Angeles. Appellant stated that the California Workers' Compensation Appeal Board awarded appellant permanent disabilities equal to 56 percent. Appellant also stated, "Since California has issued over 300 refunds for other taxpayers on the same income exclusion basis, any decision other than agreement with the exclusion will amount to selective enforcement." In addition, appellant attached a copy of the IRS letter discussed above. The FTB subsequently sent a letter to appellant denying his claims for refund for tax years 2005, 2006, 2007 and 2008. (Resp. Opening Br., pp. 1-3, exhibits A-L.)

This timely appeal followed.



## Exhibit 4 – Michael L. Panek, Case No. 585508

Claim For Refund.

Appellant and his spouse filed a claim for refund for tax year 2009 in the amount of \$4,361.

Facts

During the tax year at issue, appellant was employed by the County of Ventura as a sheriff. Appellant and his spouse filed joint California income tax return for tax year 2009 reporting wages from the County of Ventura in the amount of \$123,115. Appellant and his spouse subsequently filed amended returns for tax year 2009 that excluded wages from the County of Ventura in the amount of \$84,949. In the 2009 amended return, appellant explained the exclusion of a portion of the wages with the following statement:

Taxpayer is a police officer injured on the job and awarded a partial permanent disability from the CA Workers' Comp Appeal Board. We are excluding 69% of his Ventura County wages from income based on that disability.

The FTB sent appellant a letter confirming the receipt of the amended return and requesting documentation showing that the workers' compensation benefits were erroneously included in appellant's Form W-2 wages during tax year 2009. When no response was received, the FTB sent another letter to appellant requesting the same information. In a letter to the FTB, appellant's representative, Mr. Guarino, stated, "Your office on several occasions has audited other claims and found in favor of the taxpayer." Attached to Mr. Guarino's letter is a statement entitled, "Chronological [sic] Events Surrounding State Of California Franchise Tax Board 2005 and 2006 Tax Years." The statement is not signed and does not identify the author of the statement, except that it references a recorded message from the FTB for *David Jacoby* informing him that he is getting a refund for tax years 2005 and 2006. The FTB subsequently sent a letter to appellant denying his claim for refund for tax year 2009. (Resp. Opening Br., pp. 1-3, exhibits A-F.)

This timely appeal followed.