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Eureka - California Strikes Gold with the Claim of Right Doctrine in Ackerman v. Franchise Tax Board

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EUREKA! CALIFORNIA STRIKES GOLD WITH THE CLAIM OF RIGHT DOCTRINE IN *ACKERMAN V. FRANCHISE TAX BOARD*[1]

I. INTRODUCTION

Imagine getting a sizeable end-of-the-year bonus from your employer. You received the check in December, which means that the money is taxable income for that year. Now imagine learning that part or all of the bonus was the unfortunate result of an accounting error, and you have to pay the money back in January. Under both federal and California tax law, you must still report the bonus as income in the year of receipt, even if you later pay the money back.[2] This is commonly known as the "claim of right doctrine," which views *any* income a taxpayer receives as reportable income if, at the time of receipt, the taxpayer has taken the money under a "claim of right and without restriction as to its disposition. . ."[3]

Ordinarily, the taxpayer's remedy is simple. Under both the federal statutory scheme and California's common law scheme, the taxpayer can deduct the money repaid from the taxable income in the year of repayment.[4] The result, generally, is a reduction in the tax liability for the repayment year, which offsets the taxes paid on the income in the year of receipt.[5]

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1. No. BC 296334 (Cal. Super. Ct. Aug. 17, 2004), *aff'd,* No. B178750 (Cal. Ct. App. 2005).

2. Both federal and California tax schemes have claim of right provisions. The federal provision is codified at 26 U.S.C. § 1341 (2004) (originally enacted 1954). California's approach, as held in *Ackerman*, follows the common law approach found in *North American Oil Consolidated v. Burnet*, 286 U.S. 417 (1932).

3. *N. Am. Oil*, 286 U.S. at 424.

4. *See infra* Part III.

5. A significant flaw of the common law scheme is that even where the amount deducted offsets the tax liability in the repayment year, it does not account for the change in the taxpayer's status from one year to the next. *See*

But what if you make less money in the year you repay that bonus than the amount of the bonus itself? What if you become unemployed? What if you are a small business owner and the income you received was a payment on a large contract that was subsequently cancelled? What if your business income in the repayment year is less than what you paid back?

These are not extreme or improbable situations in which a taxpayer might find herself. Under the federal claim of right scheme, the taxpayer may take advantage of an alternative calculation method that allows the taxpayer to re-open the previous years and recalculate the taxes owed based on the repayment.[6] Under California's common law scheme, however, a taxpayer is limited to deducting the amount repaid against her tax liability for the repayment year, however small that tax liability may be.[7] If the repayment amount exceeds the taxable income, the taxpayer can recover only the amount of taxes owed on the taxable income for the repayment year.[8]

Now imagine you take a new job in a different state in the repayment year. You have sufficient federal income so that the repayment deduction creates an offset for the taxes paid in the prior years. You, however, have little or no California source income for the repayment year. Under the California scheme, you may only use the deduction method.[9] The result is obvious: using the deduction method against *de minimis* or non-existent California source income produces the same effect as if you had earned nothing in the repayment year, and you virtually forfeit the taxes paid on that bonus to the State of California.

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infra note 45 and accompanying text.

6. Section 1341 allows for a traditional deduction method that is analogous to the common-law approach through subdivision (a)(4), but also allows taxpayers to recalculate their tax liability for the years in which income was received under subdivision (a)(5). *See infra* notes 42–48 and accompanying text.

7. The California Franchise Tax Board (FTB) argued, and the court agreed, that under the California Revenue & Taxation Code there is no analog to § 1341 of the I.R.C. As a result, California applies the common law—which is controlled by *North American Oil Consolidated v. Burnet*, 286 U.S. 417 (1932). *See infra* notes 30–48 and accompanying text (discussing the common law claim of right doctrine).

8. *See infra* notes 42–48 and accompanying text.

9. As was argued by the FTB and decided by *Ackerman*. *See* Ackerman v. Franchise Tax Bd., No. BC 296334 (Cal. Super. Ct. Aug. 17, 2004).

This unforgiving common law approach to the claim of right doctrine was precisely the issue in *Ackerman v. Franchise Tax Board.* The taxpayer argued that California had adopted the federal claim of right scheme when the California legislature enacted the Conformity Act of 1983, through which the state substantially conformed its tax code to the Internal Revenue Code (I.R.C.).[10] The court, however, held that California continues to follow the common law approach and further held that this approach was constitutionally sound.[11]

This Comment argues that California has, in fact, incorporated I.R.C. § 1341 as asserted in *Ackerman*[12] and, alternatively, reconsiders the constitutionality of the common law doctrine. Part II summarizes the facts of *Ackerman.* Part III traces the history of the claim of right doctrine in federal jurisprudence—from its common law origins through the enactment of § 1341—and also examines the doctrine's development in California. Part IV analyzes the trial court's holding and argues that through the Conformity Act of 1983, California substantially harmonized the Revenue and Taxation Code with the I.R.C. such that § 1341 has been incorporated by reference. Finally, Part V examines the constitutionality of the common law claim of right doctrine "as applied" when the taxpayer's residence changes between the year of receipt and the year of repayment.

II. FACTUAL BACKGROUND

Peter Ackerman[13] earned a substantial amount of capital gains

10. *Id.* at 11–12.
11. *Id.* at 15.
12. *Id.* at 11.
13. Peter Ackerman's background is summarized as follows:
Peter Ackerman is managing director of RockportCapital Inc., a private investment firm based in London and Washington D.C. Until 1990 Ackerman was director of capital markets at Drexel Burnham Lambert. In 1990 he was a visiting scholar at the International Institute for Strategic Studies in London where he completed *Strategic Nonviolent Conflict—The Dynamics of People Power in the Twentieth Century*, published January 1994. In addition to being a member of the Cato Institute's Board of Directors, Ackerman is chairman of the Board of Overseers of the Fletcher School of Law and Diplomacy and serves on the boards of CARE, Colgate University, and the Albert Einstein Institution. He is also an adviser to the Harvard Center for International Affairs. Ackerman holds a doctorate from the Fletcher

income during the tax years between 1986 and 1991.[14] During those years, Ackerman was a California resident and reported this income on both federal and California income tax returns.[15]

In 1992, Ackerman was sued by investors and entered into a settlement agreement whereby he repaid the investors $59,999,997.00 in 1992 and $17,000,000.00 in 1993.[16] In a Closing Agreement, the Internal Revenue Service (IRS) allowed Ackerman to treat the settlement payments as capital loss and deduct the amount against his capital gains in the repayment year.[17] Ackerman moved out of California in 1992 and had *de minimis* California source income in 1992 and 1993.[18] Originally, Ackerman did not attempt to deduct the settlement payments against his California source income in 1992 and 1993, but in 1997 he filed amended returns for both tax years, seeking refunds totaling just under five million dollars.[19]

The California Franchise Tax Board (FTB) claimed that it never received the 1992 amended return and thus never acted upon it.[20] The FTB, however, did act on the 1993 amended return, formally denying that claim in writing on October 23, 2001.[21] Ackerman brought suit against the FTB in superior court in 2003.[22] During a four day trial, Ackerman argued that the FTB improperly denied his refund because it wrongly disallowed the income calculations to be carried over from his federal returns.[23] Ackerman argued that § 1341 had been "incorporated by reference" into California's Revenue and

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School of Law and Diplomacy.
Cato Institute, Project Advisory Board, *at* http://www.socialsecurity.org/about/board.html.

14. *Ackerman*, No. BC 296334, at 2. The amount of Ackerman's capital gains was not noted in the decision; however, the amount repaid to investors approximated $77,000,000.00. *Id.* While the opinion does not explicitly state this, it seems from the discussion that the calculation method used on Ackerman's 1992 and 1993 federal tax returns derived from § 1341(a)(5). *See id.*

15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 1.
20. *Id.* at 2–3.
21. *Id.* at 9.
22. *Id.* at 1.
23. *Id.* at 11.

Taxation Code through the 1983 Conformity Act and pointed to the express incorporation of I.R.C. § 67 (which cross references § 1341 substantially) into Revenue and Taxation Code § 17076. Ackerman further argued that "[u]nder such a construction . . . the Tax Board's denial . . . was improper."[24] Alternatively, Ackerman argued that California's common law approach violates the Privileges and Immunities Clause of the United States Constitution[25] because it discriminates against non-resident taxpayers.[26]

Conversely, the FTB "maintain[ed] that there is no analog to I.R.C. § 1341 in the Rev. and Tax. Code," and that even if such an incorporation by reference existed, it would be limited in application to § 1341(a)(4) since Revenue and Taxation Code § 17024.5 specifically prohibits "applying Federal Tax Credits on California returns."[27] The FTB further requested that the court take judicial notice of pending legislation indicating that the Revenue and Taxation Code had not incorporated § 1341.[28] Finding no California authority supporting Ackerman's position on incorporation, the court ruled in favor of the FTB and held that Mr. Ackerman could not recover the taxes paid on income he repaid in full.[29]

III. THE CLAIM OF RIGHT DOCTRINE

A. Historical Background of the Federal Claim of Right Doctrine

Legal scholars commonly attribute the origin of the claim of right doctrine to Justice Brandeis's often quoted[30] announcement in

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24. *Id.*

25. U.S. CONST. art. IV, § 2, cl. 1.

26. *Ackerman*, No. BC 296334, at 15 (arguing that "but for his non-resident status he would be able to fully recover his losses").

27. *Id.* at 11.

28. *Id.* at 15. Assembly Bill 3072 (AB 3072), was designed to conform the Revenue and Taxation Code "to federal law regarding taxpayer relief within the context of claim of right." *Personal Income Tax: Claim of Right; Hearing of Assemb. B. 3072 Before the Assemb. Comm. on Rev. & Tax*, 2003–04 Leg., Reg. Sess. 2 (Cal. 2004), http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_3051-3100/ab_3073_cfa_20040721_101119_sen_floor.html [hereinafter Bill Analysis](enacted at Assemb. B. 3073, 2003–04 Leg., Reg. Sess. 2 (Cal. 2004)).

29. *Ackerman*, No. BC 296334, at 15.

30. *See* Harold DuBroff, *The Claim of Right Doctrine*, 40 TAX L. REV. 729,

North American Oil v. Burnet:

> If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.[31]

Brandeis went on to declare, "[S]hould it later appear that the taxpayer was not entitled to keep the money . . . he would be entitled to a deduction in the year of repayment."[32] Little could Justice Brandeis know that what he intended to be no more than a practical formula used to identify taxable income[33] would become a greatly debated subject.[34]

Martin Webster, summarizing the shortcomings of the common law approach in 1955, noted:

> [the] inability to adjust the earlier year obviously results in hardship where the taxpayer's tax bracket in the year of receipt is high and in the year of repayment low, for in such case adjustment to the year of repayment would not compensate the taxpayer adequately for the tax that he paid on the same item in the year of receipt.[35]

The Supreme Court was aware of this flaw when it decided *Healy v. Commissioner*[36] in 1953 but found it to be an "unavoidable consequence of the annual accounting system."[37]

In considering these inequities, the court concluded that:

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730 (1985); Martin H. Webster, *The Claim of Right Doctrine: 1954 Version*, 10 TAX L. REV. 381, 381 (1955).

31. N. Am. Oil Consol. v. Burnet, 286 U.S. 417, 424 (1932).

32. United States v. Skelly Oil, 394 U.S. 678, 680 (1969).

33. *See* C.E. Lister, *The Use and Abuse of Pragmatism: The Judicial Doctrine of Claim of Right*, 21 TAX L. REV. 263, 271 (1966).

34. *See* Webster, *supra* note 30, at 381. Webster also argues that the deduction scheme attributed to *North American Oil* is not truly of Brandeis's making, rather one of mistaken judicial interpretation. *Id.* at 384–85 (noting also that Justice Douglas argued in his dissenting opinion in *United States v. Lewis*, 340 U.S. 590 (1951), that "an adjustment to the original year of receipt would be proper").

35. *Id.* at 384; *see also* Jane Hendershott, *Restoration—Claim of Right—One Aspect of Section 1341*, 48 TAXES 585, 585 (1970).

36. 345 U.S. 278 (1953).

37. *Skelly Oil*, 394 U.S. at 681.

> In some cases, this treatment will benefit the taxpayer; in others it will not. Factors such as the tax rates in the years involved and the brackets in which the income of the taxpayer falls will be controlling. A rule which required that the adjustment be made in the earlier year of receipt instead of the later year of repayment would generally be unfavorable to taxpayers, for the statute of limitations would frequently bar any adjustment of the tax liability for the earlier year. Congress has enacted an annual accounting system under which income is counted up at the end of each year. It would be disruptive of an orderly collection of the revenue to rule that the accounting must be done over again to reflect events occurring after the year for which the accounting is made, and would violate the spirit of the annual accounting system. This basic principle cannot be changed simply because it is of advantage to a taxpayer or to the Government in a particular case that a different rule be followed.[38]

The controversy surrounding *North American Oil* and its progeny came to a head in *United States v. Lewis*.[39] In *Lewis*, the taxpayer received a cash bonus in 1944, the amount of which was in error.[40] Lewis reported the full amount as income in 1944, before the IRS notified him of the error, and repaid half the amount in 1946.[41] The Supreme Court held that Lewis could not reopen his 1944 income tax return to reflect the repayment, forcing him to deduct the repayment amount in 1946 and suffer a loss because the repaid income put him in a higher tax bracket in 1944.[42]

In 1954, Congress enacted § 1341, largely in response to *Lewis*.[43] Under the newly crafted statutory scheme, a taxpayer who received income under a claim of right, paid taxes on that money, and subsequently repaid the income as required, would be able to deduct that income against the taxable income in the repayment year

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38. *Healy*, 345 U.S. at 284–85 (footnote omitted).

39. 340 U.S. 590 (1951).

40. Patricia D. White, *Realization, Recognition, Reconciliation, Rationality and the Structure of the Federal Tax System*, 88 MICH. L. REV. 2034, 2059 (1990).

41. *Id.*; *see also* DuBroff, *supra* note 30, at 736.

42. White, *supra* note 40, at 2059.

43. *Id.*

as provided under the common law.[44] In contrast to the common law, however, § 1341 also allowed the taxpayer to recalculate his tax liability for the years in which the government originally taxed the repaid income.[45] In fact, under the federal scheme, the government *requires* the taxpayer to elect the more favorable of the two calculation methods.[46] Subsection (a)(3) clearly indicates that where the amount of such item exceeds $3,000, the "tax imposed *shall* be the *lesser* of" either subdivision (4) or subdivision (5).[47] Accordingly, Congress ultimately designed § 1341 to restore the taxpayer to substantially the same position he would have been in had he not received the erroneous income in the first place.[48]

B. California's Claim of Right Doctrine

Prior to the congressional enactment of I.R.C. § 1341, California adhered to the common law principles formulated in *North American*

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44. Justice Marshall noted in *Skelly Oil* that "it is clear that Congress did not intend to tamper with the underlying claim-of-right doctrine; it only provided an alternative for certain cases in which the new approach favored the taxpayer." 394 U.S. at 682.

45. Section 1341(a) provides, specifically that: If,

> (1) an item was included in gross income for a prior taxable year (or years) because it appeared that the taxpayer had an unrestricted right to such an item;
>
> (2) a deduction is allowable for the taxable year because it was established after the close of such prior taxable year (or years) that the taxpayer did not have an unrestricted right to such item or to a portion of such item; and
>
> (3) the amount of such item exceeds $3,000, then the tax imposed by this chapter for the taxable year shall be the *lesser* of the following:
>
> (4) the tax for the taxable year computed without such deduction; or
>
> (5) an amount equal to—
>
> > (A) the tax for the taxable year computed without such deduction, minus
> >
> > (B) the decrease in tax under this chapter (or the corresponding provisions of prior revenue laws) for the prior taxable year (or years) which would result solely from the exclusion of such item (or portion thereof) from gross income for such prior taxable year (or years).

26 U.S.C. § 1341 (2004) (emphasis added).

46. *See, e.g.*, Dept. of Revenue v. Seaboard Coastline R.R. Co., 480 So. 2d 1349, 1353 (Fla. Dist. Ct. App. 1985).

47. 26 U.S.C. § 1341 (2004).

48. *See id.*

Oil. An early reference is in a 1942 State Board of Equalization (SBE) ruling.[49] After Congress passed § 1341 in 1954, California's Revenue and Taxation Code did not incorporate the federal model nor did it create any state analog. In a 1959 case, *In the Matter of the Appeal of Mae M. Oury*,[50] the SBE again referenced *North American Oil* and noted that "[t]he principle thus stated has since been consistently applied by the courts where monies are in dispute."[51]

In a string of cases from 1966 through 1976, the SBE consistently held that there was no California analog to § 1341 and that relief under the federal scheme was not available to California taxpayers.[52] However, as the plaintiff in *Ackerman* noted, California attempted through legislative effort in 1983 to simplify the state's Revenue and Taxation Code and harmonize it, as best it could, with the Federal Internal Revenue Code.[53] In fact, the 1983 amendment to the Code provides, through Revenue and Taxation Code § 17024.5, that "[r]eferences to 'adjusted gross income' shall mean the amount computed in accordance with § 17072, except as provided in paragraph (2)."[54] Paragraph (2) states that "[r]eferences to 'adjusted gross income' for purposes of computing limitations based upon adjusted gross income, shall mean the amount required to be shown as adjusted gross income on the federal tax return for the same

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49. *In re* Appeal of Cent. Indus. Loan Co., 1942 Cal. Tax LEXIS 6 (State Board of Equalization Dec. 2, 1942). *In re Appeal of Central Industrial Loan, Co.*, involved the collection of "service charges" related to loans which were found to be excessive and by consent decree were credited to the principles on the loans. *Id.* at *2–*3. The case's taxpayer then amended his previous return to reflect the change in income. The court, however, distinguished accrual basis accounting from cash accounting in determining that the service charges were not reportable income. *Id.* at *5–*6.

50. 1959 Cal. Tax LEXIS 47 (State Board of Equalization Feb. 17, 1959) (holding that income held in trust pending a judicial approval of the terms of compensation provided for trustees was income in the year of disbursement/ receipt and thus liable for taxation).

51. *Id.* at *4.

52. *See In re* Vertullo, 1976 Cal. Tax LEXIS 45, at *6 (Cal. State Bd. of Equalization July 26,1976); *In re* the Appeal of Parker, 1969 Cal. Tax LEXIS 34, at *8 (Feb. 26, 1969); *In re* Appeal of Kirsch, 1967 Cal. Tax LEXIS 16, at *3 (Oct. 3, 1967); *In re* Appeal of Lovering, 1966 Cal. Tax LEXIS 63, at *6 (Cal. State Bd. of Equalization Apr. 21, 1966).

53. *See* Ackerman v. Franchise Tax Bd., No. BC 296334, at 12 (Cal. Super. Ct. Aug. 17, 2004).

54. CAL. REV. & TAX. CODE § 17024.5(h)(1) (Deering 2004).

taxable year."[55]

The legislative history of the 1983 Conformity Act reveals that when supporters introduced the bill to the Assembly on December 6, 1982, it included a Chapter 15 entitled "Readjustment of Tax Between Years."[56] Under that chapter, the tax code included an amendment to § 18241, which read, "The readjustment of tax between years shall be determined in accordance with Subchapter Q of Chapter 1 of Subtitle A of the Internal Revenue Code, except as otherwise provided in this chapter."[57]

This provision clearly would have incorporated § 1341, which resides under Part V of Subchapter Q.[58] This language, however, did not survive even the first amendment to the bill as it passed through the California Assembly and Senate. In fact, legislators completely repealed Chapter 15 and § 18241 in the first amended draft.[59] It is noteworthy, however, that prior to 1983 (and at no time subsequent) Chapter 15 did not include a claim of right provision.[60]

Legislative intent cannot be easily adduced from these facts alone. While the bill as initially proposed in 1983 would have directly incorporated § 1341 by way of subsection Q, it is unclear from the statutory language if legislators intended to incorporate subsection Q generally through Revenue and Taxation Code § 17024.5. It also is unclear whether the proposed amendments to Chapter 15 were originally intended to craft exceptions to the broader incorporation. Arguably, when the Legislature repealed

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55. *Id.* § 17024.5(h)(2).

56. Assemb. B. 36, 1983–84 Leg., Reg. Sess. (Cal. 1982).

57. *Id.*

58. *See* 26 U.S.C. § 1341 (2004).

59. Assemb. B. 36, 1983 Leg., Reg. Sess. (Cal. 1983). As amended, section 66 reads: "Chapter 15 (commencing with section 18241) of part 10 of Division 2 of the Revenue and Taxation Code is repealed."

60. In fact, the latest amendment to Chapter 15 prior to the 1983 repeal was 1971 and covered only "income averaging" as re-adjustment of taxes between years. Section 18241 of the Revenue and Taxation Code was amended to read:

> If an eligible individual has averageable [(sic)] income for the computation year, and if the amount of such income exceeds three thousand dollars ($3,000), then the tax imposed by Section 17041 for the computation year which is attributable to averageable income shall be five times the increase in tax under such section which would result from adding 20 percent of such income to 133 1/3 percent of average base period income.

1971 Cal. Stat. 120.1.

Chapter 15 in its entirety, it may well have intended to yield this title, "Readjustment of Tax Between Years," to the federal code.

Even absent direct incorporation, which would have occurred had the original Chapter 15 language survived, § 1341 may have been incorporated into the Revenue and Taxation Code by reference. Part IV of this Comment, more closely examines other provisions within the 1983 Conformity Act through which § 1341 may have been incorporated.

If the statutory scheme is unclear on the issue of incorporation, case law (through determinations by the SBE) on the matter is no more availing. Since 1983, only two cases appear to have been litigated under the banner of § 1341. The first, *In re Agnew*,[61] involved an attempt by the former Vice President of the United States to recover taxes paid on monies paid to him as bribes while holding state office in Maryland.[62] The court noted that "[w]ithout citation to any state authority, appellant seeks to draw on the equitable principles underlying the federal claim of right doctrine. . . ."[63]

But, the *Agnew* court did not compelled to investigate further and stated, "[i]t would hardly be 'equitable' for the taxpayers of California . . .to foot the bill for part of appellant's liability to the taxpayers of Maryland for bribes received while he was a resident and elected official of that state."[64] Thus, the issue remained unsettled.

In 2002, § 1341 made another brief appearance in *Ambrosselli*,[65] where the SBE wrote that "California generally follows federal law on the 'claim of right doctrine.'"[66] What "generally" means is not clear, and this cryptic proclamation can easily be construed to mean that in the SBE's view, the 1983 Conformity Act incorporated

61. No. 87R-0521-SS, 1989 Cal. Tax LEXIS 10 (Cal. State Bd. of Equalization Apr. 6, 1989).

62. *Id.* at *1–*2.

63. *Id.* at *6.

64. *Id.*

65. Ambrosselli v. Franchise Tax Bd., No. 27,108, 2002 Cal. Tax LEXIS 45 (Cal. State Bd. of Equalization Feb. 6, 2002). This case involved insurance fraud whereby various works of art were claimed to have been stolen from Appellant's home. The money paid on the claim was not reported as income and ultimately paid back after the fraud was discovered. The court held that the money was taxable income under the claim of right doctrine, but that it was not deductible in the year of restitution. *Id.* at *3–*4.

66. *Id.* at *3 (internal quotations omitted).

§ 1341 into the Revenue and Taxation Code.[67] On the other hand, as the *Ackerman* court points out, "*Ambrosselli* . . . is by no means a clear articulation that the state has *explicitly* adopted 1341, either in part or in full."[68] *Ackerman* thus stands before the California Court of Appeals as a case of first impression on this issue.

IV. ANALYSIS

The *Ackerman* court ultimately concluded that California's Revenue and Taxation Code did not incorporate § 1341.[69] The court premised this conclusion largely on the fact that the Revenue and Taxation Code does not explicitly provide that the federal scheme be adopted.[70]

The court accepted the FTB's arguments that there is no express language incorporating § 1341 into the Revenue and Taxation Code and that incorporation by reference, as argued by Ackerman, fails because the Revenue and Taxation Code specifically prohibits the application of "Federal Tax Credits."[71] The court also took judicial notice of Assembly Bill 3072 (AB 3072), pending legislation that seeks to clarify California's claim of right provisions by expressly adopting § 1341.[72]

While AB 3072 appears to bolster the FTB's argument that § 1341 has not been incorporated into the Revenue and Taxation Code,[73] some degree of scrutiny is appropriate when viewing this particular piece of pending legislation. Supporters introduced the bill to the State Assembly on March 11, 2003,[74] just two months before Ackerman filed his complaint (and after significant correspondence between Ackerman's tax attorneys and the FTB regarding the

67. In *Ambrosselli*, the issue, however, was moot because under both the common law and federal claim of right provisions, the repayment is not deductible when made "in lieu of incarceration or primarily to further rehabilitation." *Id.*

68. Ackerman v. Franchise Tax Bc., No. BC 296334, at 13 (Cal. Super. Ct. Aug. 17, 2004).

69. *Id.* at 14.

70. *Id.* at 15 (commenting that "[i]f it is the Legislature's intent that I.R.C. § 1341 be adopted in full, it should do so directly and unambiguously").

71. *Id.* at 11.

72. Assemb. B. 3072, 2003–04 Leg., Reg. Sess. (Cal. 2004) (proposed Mar. 11, 2004).

73. Bill Analysis, *supra* note 28.

74. *Id.*

matter.)[75] The FTB itself sponsored the bill and the Bill Analysis states that its purpose is "to clarify tax law and ease taxpayer compliance and administrative burdens regarding claim of right provisions."[76]

Even though the pending legislation states that § 1341 has not been incorporated into the Revenue and Taxation Code, this does not make it so. This statement is merely the opinion of the bill's drafter and lacks sufficient evidence to compel the court to find that § 1341 has not been incorporated. The legislative record does not contain indisputable evidence that when the legislature repealed chapter 15 in full, California sought to maintain the common law approach to the claim of right doctrine over the incorporation of § 1341. AB 3072 might be more properly viewed as "clarifying" the state's position that it *should* follow the federal claim of right approach, rather than establishing the fact that the state *does not* follow the federal approach.

Ackerman argued that § 1341 had been incorporated into the Revenue and Taxation Code generally by the 1983 Conformity Act, *either* directly *or* alternatively by reference.[77] The trial court first analyzed incorporation by reference from the plaintiff's position that the "substantial cross reference" to § 1341 in I.R.C. § 67 incorporated the federal provision.[78] This argument proved ultimately fatal.[79] Section 67 merely places a two percent floor on miscellaneous itemized deductions, requiring the aggregate of such deductions to exceed the taxpayer's adjusted gross income.[80] The reference to § 1341 relates to its exclusion as an itemized deduction.[81] Thus, Ackerman's argument that § 1341 passes through to Revenue and Taxation Code § 17076, which incorporates the two

75. *See Ackerman*, No. BC 296334, at 9.
76. Bill Analysis, *supra* note 28, at 3.
77. *See Ackerman*, No. BC 296334, at 11.
78. *Id.*
79. The trial court did not separately analyze the issue of incorporation by reference using § 67, but rather concluded that even if such incorporation could be found, it would be stripped of any value because Revenue & Taxation Code § 17024.5 prohibits applying federal tax credits. *See id.* at 11–12. The issue of whether or not § 1341(a)(5) constitutes a federal tax credit is discussed below. *See infra* notes 83–93 and accompanying text.
80. 26 U.S.C. § 67 (2004).
81. *Id.* § 67(b)(9).

percent floor from the federal scheme, fails by simple logic.

Section 1341, however, has its own internal cross-references to other parts of the I.R.C. through which it can easily be seen to have been incorporated into the Revenue and Taxation Code. In 1983, the legislature amended Revenue and Taxation Code § 17201 to incorporate Part VI of Subchapter B of Chapter 1 of Subtitle A of the I.R.C., except as otherwise provided by the code.[82] Under Part VI, "Itemized Deductions for Individuals and Corporations," § 172 covers net operating loss deductions.[83] Subsection (b)(5) of § 1341 reads:

> For purposes of this chapter, the net operating loss described in paragraph (4)(A) of this subsection, or the net operating loss or capital loss described in paragraph (4)(B) of this subsection, as the case may be, shall (after the application of paragraph (4) or (5)(B) of subsection (a) for the taxable year) *be taken into account under section 172. . .*[84]

Thus, a carryover or carryback that a taxpayer achieves through operation of § 1341 becomes a carryover or carryback under § 172. Since § 172 of the I.R.C. has been incorporated into the California code by operation of Revenue and Taxation Code § 17201, it logically follows that § 1341 has been incorporated by reference as a result of its cross-reference with Part VI of Subchapter B of Chapter 1 of Subtitle A of the I.R.C.

The FTB argued, alternatively, that even if such an incorporation by reference existed, § 17024.5 of the Revenue and Taxation Code would prohibit it from applying § 1341, subsection (a)(5) because that alternative calculation method creates what amounts to a federal tax credit.[85]

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82. 1983 Cal. Stat. 488.

83. Subsection (a), "DEDUCTION ALLOWED," states,

> There shall be allowed as a deduction for the taxable year an amount equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. For purposes of this subtitle, the term "net operating loss deduction" means the deduction allowed by this subsection.

26 U.S.C. § 172(a).

84. *Id.* § 1341 (emphasis added).

85. Ackerman v. Franchise Tax Bd., No. BC 296334, at 11 (Cal. Super. Ct. Aug. 17, 2004).

The Supreme Court of Oklahoma faced a similar situation in *Dugger v. Oklahoma*.[86] Athel W. and Anna Dugger received income totaling $426,567.00 from the sale of gas from 1984 through 1986.[87] The Duggers subsequently repaid $365,204.29 in 1987.[88] The Oklahoma Tax Commission (OTC) argued that § 1341(a)(5) created "a federal tax credit, which is not incorporated into our state income tax laws by virtue of our 'piggy-back' system, and that the state income tax code does not have a parallel credit."[89]

The court noted that the "OTC does not cite any federal authority establishing § 1341 as a tax credit statute and our research has revealed none."[90] It then remanded the case to determine whether the Duggers' federal income tax had been calculated under § 1341(a)(4) or (a)(5).[91]

Applying this judicial interpretation of the term "credit" found in subsection (a)(5), the FTB's argument that § 1341 can only have been partially incorporated, if at all, fails. Removing this obstacle, it becomes possible that § 1341 may have been incorporated in its entirety through Revenue and Taxation Code § 17201. The inferential steps in reaching such a conclusion are relatively simple and do not offend any traditional approach to statutory construction. As the *Ackerman* court notes, "[the] court is charged to enforce 'the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute.'"[92] Indeed, the court "wherever possible . . . 'will interpret a statute as consistent with applicable constitutional provisions, seeking to harmonize Constitution and statute.'"[93]

The general purpose of § 17201 of the Revenue and Taxation Code was to incorporate, with enumerated exceptions, Part VI of

86. 834 P.2d 964 (Okla. 1992).
87. *Id.* at 965.
88. *Id.*
89. *Id.* at 967 n.6.
90. *Id.*
91. *Id.* at 969.
92. Ackerman v. Franchise Tax Bd., No. BC 296334, at 8 (Cal Super Ct. Aug. 17, 2004) (citing Fujitsu IT Holdings v. Franchise Tax Bd., 120 Cal. App. 4th 459, 480 (2004)).
93. *Fujitsu IT Holdings*, 120 Cal. App. 4th at 480 (citing People v. Super. Ct., 23 Cal. 4th 183, 193 (2000)).

Subchapter B of Chapter 1 of Subtitle A of the I.R.C.[94] There is no specific, enumerated exception in the Revenue and Taxation Code indicating that § 1341 may not be applied as a carryover or carryback pursuant to § 172 as provided in the I.R.C. Furthermore, such a construction satisfies the goal that the statute be consistent with applicable constitutional provisions. As discussed below, there is a strong argument that the deduction-only approach adopted for by the FTB may violate the Takings Clause of the Fifth Amendment of the United States Constitution.

V. TAXES AND THE TAKINGS CLAUSE

The *Ackerman* court held that California's adherence to the common law claim of right doctrine did not violate the constitutional principles found in the Privileges and Immunities Clause of Article IV of the United States Constitution.[95] The court concluded that California's approach does not discriminate against out-of-state citizens. It noted that, with the exception of the state source income problem for non-residents, the common law doctrine is equally onerous on in-state residents when the income repaid is greater than the income received in the repayment year.[96]

The court's conclusion that the state's application of *North*

94. *See* 1983 Cal. Stat. 488, § 29.

95. *Ackerman*, No. BC 296334, at 15–17.

96. *Id.* at 16. Even though the trial court concluded that there was no discrimination, it analyzed the California scheme under a traditional substantial relationship test. The court cited *Davis v. Franchise Tax Board*, 139 Cal. Rptr. 797 (Cal. Ct. App. 1977), in which the taxpayer challenged a Revenue & Taxation Code provision on income-averaging as violating the Privileges and Immunities Clause because he was unable to take advantage of the provision as a non-resident. The case involved a taxpayer who had lived in California for a number of years and then moved to Nevada. The taxpayer sought to income-average three years of California income with one year of Nevada income, but was not allowed to do so because the statute requires the income averaged to include four "base years" in addition to the current tax year and Davis could not meet the base year requirement. The *Davis* court found that the discriminatory policy bore a substantial relationship to "the state's general policy of ignoring out-of-state income as a factor in progressive taxation." *Id.* at 799. The *Ackerman* court found the situation in *Davis* to be similar enough to follow its guidance, noting that "an occasional or accidental inequality due to circumstances personal to the taxpayer will not invalidate a nondiscriminatory general rule." *Ackerman*, No. BC 296334, at 16–17 (quoting *Davis*, 139 Cal. Rpt. at 800 (citing Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 80–81 (1920))).

American Oil does not violate the Privileges and Immunities Clause, however, does not automatically make the state's claim of right scheme constitutional. When the state, either directly or through a regulatory mechanism, confiscates a citizen's real or personal property without compensation, the action may implicate[97] the Takings Clause.[98]

"Takings" challenges in the tax realm are infrequent and consistently defeated.[99] This is largely the result of the nature of the challenges and the underlying constitutional power to lay and collect taxes found in Article 1, section 8, Clause 1 of the United States Constitution[100] and in the Sixteenth Amendment.[101] One takings argument is that the imposition of any tax violates the Fifth Amendment. One example is *Coleman v. Commissioner*,[102] where the taxpayer did not file returns for three years (after having previously filed timely returns) arguing that "wages are not income."[103] The IRS assessed taxes and penalties and Coleman sought review. Coleman argued that the income tax is a taking and violated his right to earn income, and thus was contrary to the Fifth Amendment.[104] The Seventh Circuit summarized the weaknesses of the argument by pointing out the constitutional basis for laying and collecting taxes found in Article 1, § 8, Clause 1 of the United States Constitution and the Sixteenth Amendment.[105]

The same textual arguments have been used to assert that the

97. *See* ALLAN IDES & CHRISTOPHER N. MAY, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS 121–25 (3d ed. 2004).

98. U.S. CONST. amend. V.

99. A handful of cases are discussed below, each revealing an unwillingness by the courts to find a taking where taxes are concerned. *See infra* notes 102–115 and accompanying text.

100. The Tax Clause provides that: "[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1.

101. The Sixteenth Amendment specifically provides that: "[t]he Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. CONST. amend. XVI.

102. 791 F.2d 68 (7th Cir. 1986).

103. *Id.* at 70.

104. *Id.*

105. *Id.*

government's failure to pay interest on taxes withheld but later refunded constitutes a taking. In 1974, *Jacobs v. Gromatsky* presented this precise issue to the Fifth Circuit.[106] The court announced that the Sixteenth Amendment provided Congress the power to "lay and collect taxes" including the power to "prescrib[e] the basic rates of taxation, the time and manner in which taxes are to be paid; [and] also . . . the means and methods for making refunds-with our without interest, which must be viewed realistically as no more than one function of the overall rate of such exaction."[107]

In 1998, however, the United States Supreme Court in *Phillips v. Washington Legal Foundation*[108] concluded that interest earned on principle constitutes "private property" for purposes of the Takings Clause,[109] a move that some believe "may have encouraged Takings Clause challenges to the tax withholding system."[110] The case involved a statute requiring attorneys to place client funds that could not generate positive interest earnings into "Interest on Lawyers Trust Account" (IOLTA).[111] The statute required that the interest from the pooled IOLTA accounts be paid to the Texas Equal Access to Justice Foundation.[112] The court held that the interest was the property of the client for whom the money was held in trust, but remanded the case for further proceedings.[113] More recently, however, the Court decided *Brown v. Legal Foundation of Washington*[114] and found, on similar facts, that although the statutory scheme requiring the IOLTA interest be paid to the Legal Foundation of Washington was a per se taking, it was not unconstitutional because it did not violate the Just Compensation Clause of the Fifth Amendment.[115]

While not dealing specifically with tax withholding or refunds, these cases make it clear that money is personal property and that

106. 494 F.2d 513 (5th Cir. 1974).
107. *Id.* at 514.
108. 524 U.S. 156 (1998).
109. *Id.* at 172 (Souter, J., dissenting).
110. Jeremy R. Polk, *Compensation for the Fruit of the Fund's Use: The Takings Clause and Tax Refunds*, 98 NW. U. L. REV. 657, 657 (2004).
111. *Phillips*, 524 U.S. at 159–62.
112. *Id.* at 162.
113. *Id.* at 172 (Souter, J., dissenting).
114. 538 U.S. 216 (2003).
115. *Id.* at 236–37, 240.

"[i]n the context of personal property, the government's seizure or confiscation of the property is the equivalent of a physical invasion."[116] In drawing a comparison between IOLTA accounts and interest earned on withheld income tax, the interest earned on the withheld tax may not be negligible depending on the amount of taxes withheld. Unlike IOLTA plans, where attorneys place the principle in the account only when it cannot generate sufficient interest on its own, IRS withholding has no such procedural safeguard. Absent the invocation of the Sixteenth Amendment, *Brown* indicates that a taking may occur where the interest generated on withholdings is not insignificant.

In light of this shift in jurisprudence, the salient question becomes whether the constitutional anchors of the Tax Clause and the Sixteenth Amendment protect a taxpayer's money from withholdings by the IRS. In *Van Sant v. United States*,[117] a district court concluded that "Congress' constitutional power to institute and operate an income tax disposes of plaintiff's takings claim even if it is true that the . . . tax withholding was wrongful."[118] In contrast, in *Washton v. United States*,[119] the court considered sua sponte the possibility that "the disallowance of a refund owed by the IRS pursuant to statute violated the just compensation clause of the Fifth Amendment."[120] The issue remains unresolved,[121] but there is some indication that the government's "failure to refund overpayments of income taxes may implicate the Takings Clause."[122]

California's claim of right scheme, "as applied" in this case, provides a rare example of how withheld taxes constitute a taking because a court cannot rationally construe the regulatory mechanism behind the taking as necessary for the "means and method for the

116. IDES & MAY, *supra* note 98, at 125.
117. No. 97-363, 2001 U.S. Dist. LEXIS 21871 (D.D.C. Dec. 31, 2001).
118. *Id.* at *19–*20.
119. No. 2:91CV00121, 1993 U.S. Dist. LEXIS 2863 (D. Conn. Feb. 12, 1993).
120. *Id.* at *12 n.2.
121. *See id.* (stating that: "[a] review of the parties [sic] briefs, however, proved inconclusive. Because it could not locate any relevant case law on the issue and because the submissions of both parties provided the court with little guidance on the issue, the court believes it best to leave this issue for another day").
122. Polk, *supra* note 110, at 664.

making of refunds."[123] Nor can the court consider a fair function of the exaction, as the *Gromatsky* court found the interest earned on withheld taxes to be.[124] The State tax received on income that is held under a claim of right and later found to be erroneously received (and subsequently repaid) is not inconsequential. Simply put, once the taxpayer repays the restricted income (in full, with no deductions made accounting for the taxes already paid on that income), the tax imposed on that money, which is no longer income, no longer falls within the protection of the state's power to lay and collect taxes on income. The federal government understood this and enacted § 1341. The State of California, however, by virtue of the decision in *Ackerman*, has been granted the extraordinary power to lay and collect tax on "non-income."

VI. CONCLUSION

The harm Peter Ackerman suffered as a result of the FTB's refusal to accept his refund calculations based on § 1341 is both real and substantial. While it may be tempting to allow the legislature to fix the problem through a confusing scheme of adopting portions of the I.R.C. and repealing sections of the Revenue and Taxation Code, such future corrective measures will not make Peter Ackerman whole. Nor are such measures guaranteed. As illustrated in the introduction, there are real and significant implications for the average taxpayer.

In today's global economy, we are beginning to see significant alterations to traditional employment models.[125] The modern workforce is increasingly mobile[126] and technologically savvy—

123. *See* Jacobs v. Gromatsky, 494 F.2d 513, 514 (5th Cir. 1974).

124. *See generally id.* (discussing that the power to withhold taxes without paying interest vests in Congress with the Sixteenth Amendment right to lay and collect income taxes); *supra* notes 106–07 and accompanying text.

125. *See* Jonathan Weisman, *Permanent Job Proves an Elusive Dream*, THE WASH. POST, Oct. 11, 2004, at A1 (noting that "[i]n a single generation, 'contingent employment arrangements' have begun to transform the world of work, not only for temp workers, but also for those in traditional jobs who are competing with a tier of employees receiving lower pay and few, if any, benefits").

126. According to the 2000 U.S. Census, forty-three million Americans moved residences between 1999 and 2000. Of those "migratory" Americans, nearly 20 percent moved between states. Of those 8.6 million Americans who moved interstate in that year, 31 percent stated the reason for their relocation

capable of working remotely via the Internet[127] and generating income from multiple sources (including multiple states). Over the past several years, there has been a steady rise in contract workers.[128] Offshoring is another factor that, in recent years, has resulted in significant job losses[129] that may contribute to individual migration out of the state and a shift in the traditional employment model (such as contingent and contract workers). In California, small businesses seeking to remain viable complain that the hostile business environment forces them to leave the state in order to take advantage of more favorable economic conditions in other states or countries.[130]

In this rapidly changing economic climate, the common law scheme may be losing relevance and, as demonstrated in *Ackerman*, has proven to be a burden on the taxpayer. The anecdotal evidence cited above and the paucity of SBE rulings dealing with the application of § 1341 to California personal income tax returns suggest that applying § 1341 calculations to state tax returns may not have been an issue with the FTB until it received a claim for an extremely large refund amount. Additionally, the timing of the

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as being work related. U.S. CENSUS BUREAU, POPULATION PROFILE OF THE UNITED STATES: 2000, http://www.census.gov/population/pop-profile/2000/Chap03.pdf (last visited Mar. 03, 2005).

127. A recent survey shows that over forty-four million Americans worked from home in 2004, a 7.5 percent jump from 2003. *See* Press Release, Int'l Telework Ass'n & Counsel, Work at Home Grows in Past Year by 7.5% in U.S. Use of Broadband for Work at Home Grows by 84%, *available at* http://www.workingfromanywhere.org/news/pr090204.htm (last visited Sept. 15, 2005).

128. *See* Victor Godinez, *Self-Employed, Freelance Workers on the Rise in New Job Market,* SEATTLE TIMES, Dec. 7, 2003, *available at* http://seattletimes.nwsource.com/html/businesstechnology/2001809467_freelance07.html.

129. The issue of offshoring was a consistent theme in the 2004 Presidential elections. Senator Kerry, the Democratic candidate, pointedly accused the Bush Administration of "deliver[ing] a double blow to America's workers, 3 million jobs destroyed on their watch, and now they want to export more of our jobs overseas . . . What in the world were they thinking?" Jonathan Weisman, *Bush, Advisor Assailed for Stance on "Offshoring" Jobs*, WASH. POST, Feb. 11, 2004, at A06. The California legislature in August 2004 passed AB 1829, designed to prevent the loss of more California jobs to foreign competitors. Jordon Rau, *Offshore Jobs Bill Is OKd*, L.A. TIMES, Aug. 24, 2004, at B1.

130. *See, e.g.*, Peronet Despeignes, *Exodus Shows California Not Golden for All*, USA TODAY, Aug. 25, 2003, *available at* http://www.usatoday.com/news/nation/2003-08-25-golden-state-exodus_x.htm.

proposed legislation, the fact that the FTB sponsored it and drafters used language tailor made for the FTB's argument make the bill somewhat suspicious. As demonstrated above, there is ample evidence that § 1341 has already been incorporated into the Revenue and Taxation Code by reference, through the operation of Revenue and Taxation Code § 17201 and its incorporation of I.R.C. § 172. There is also a compelling argument that the California common law approach as applied in this case violates the Takings Clause of the Fifth Amendment.

The California claim of right scheme is hostile to the fundamental principles of economic freedom upon which both the United States and California constitutions are founded. Few would argue that the state has the power to lay and collect taxes from its citizens. But the idea that the state can take money that clearly belongs to its citizens offends our most basic democratic ideals.

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