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7 **BOARD OF EQUALIZATION**

8 **STATE OF CALIFORNIA**

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10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **PHILLIP E. ZEPP**¹) Case Nos. 710837, 728324, 741880²
13)

	<u>Years</u>	<u>Proposed Assessments</u>
	2007	\$1,118
	2008	\$1,032
	2009	\$ 826

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17 Representing the Parties:

18 For Appellant: Phillip E. Zepp

19 For Franchise Tax Board: Nancy E. Parker, Tax Counsel III

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21 **QUESTION:** Whether appellant has demonstrated error in the Franchise Tax Board's (FTB or
22 respondent) assessments for tax years 2007-2009, which were based upon federal
23 adjustments.

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27 ¹ Appellant currently resides in Sacramento County, California.

28 ² These appeals were consolidated by the Board Proceedings Division in accordance with California Code of Regulations, title 18, section 5522.4.

1 HEARING SUMMARY

2 Background

3 2007

4 Appellant filed a timely 2007 California Resident Income Tax Return, reporting a federal
5 adjusted gross income (AGI) of \$40,097, California itemized deductions of \$26,752, and a California
6 taxable income of \$13,345. (FTB opening brief (FTB OB), p. 1 & Ex. A.) After taking into account
7 appellant's withholdings, appellant reported a refund due of \$1,233, which the FTB refunded. (*Id.*)

8 Later, the FTB learned that the Internal Revenue Service (IRS) made the following
9 adjustments to appellant's 2007 federal return: (i) disallowed Schedule A miscellaneous deductions (i.e.,
10 other expenses subject to the two percent AGI limitation) of \$24,820, and (ii) allowed a standard
11 deduction of \$5,350. (*Id.*, pp. 1-2 & Ex. C.) On November 28, 2011, the FTB issued a Notice of
12 Proposed Assessment (NPA) that conformed to the federal adjustments above by making the following
13 adjustments to appellant's 2007 California taxable income: (a) adding \$24,018, representing a
14 disallowed Schedule A miscellaneous deductions that were claimed on appellant's 2007 California
15 return, (b) subtracting \$3,516, representing the standard deduction amount, and (c) adding \$2,734,
16 representing the remaining amount of itemized deductions (i.e., \$26,752 - \$24,018 = \$2,734) that were
17 disallowed because the FTB was allowing the higher standard deduction amount. (*Id.*, p. 2 & Ex. D.)
18 Based on these adjustments, the NPA increased appellant's 2007 California taxable income by \$23,236
19 (i.e., \$24,018 + \$2,734 - \$3,516) from \$13,345 to \$36,581. (*Id.*, Ex. D.) The NPA set forth an
20 additional tax of \$1,118.00, plus interest of \$212.55. (*Id.*)

21 Appellant timely protested the NPA, arguing that (i) he was not present when his tax
22 returns were prepared by his prior tax preparer, Ms. Peeling, and (ii) he had no knowledge of any
23 wrongdoing. (*Id.*, Ex. E.)

24 In a letter dated August 14, 2012, the FTB stated that "information"³ recently received by
25 the FTB showed that the IRS made adjustments to appellant's 2007 federal return. (*Id.*, Ex. E.) The
26 FTB's letter also stated that, if appellant had any information showing that the IRS reduced or cancelled
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28 ³ The FTB's letter does not set forth the specific "information" the FTB is relying upon. However, as discussed below, it appears that the FTB is referring to appellant's federal transcript.

1 its adjustments, appellant should provide such information to the FTB. (*Id.*) When the FTB did not
2 receive further information, the FTB affirmed the NPA in a Notice of Action (NOA) dated
3 December 10, 2012. (*Id.*, p. 2.) The NOA set forth an additional tax of \$1,118.00, plus interest of
4 \$261.26. This timely appeal followed.

5 2008

6 Appellant filed a timely 2008 California Resident Income Tax Return, reporting a federal
7 AGI of \$42,611, California itemized deductions of \$30,235, and a California taxable income of \$11,373.
8 (FTB OB, p. 2 & Ex. G.) After taking into account appellant's withholdings, appellant reported a refund
9 due of \$1,196, which the FTB refunded. (*Id.*)

10 Later, the FTB learned that the IRS disallowed "other expenses" subject to the two
11 percent AGI limitation of \$24,262. (*Id.*, pp. 2-3 & Ex. I.) On July 25, 2012, the FTB issued an NPA
12 that conformed to the federal adjustment by disallowing Schedule A miscellaneous deductions (i.e.,
13 other expenses subject to the two percent AGI limitation) of \$24,262, which increased appellant's 2008
14 California taxable income from \$11,373 to \$35,635. (*Id.*, p. 3 & Ex. J.) The NPA set forth an additional
15 tax of \$1,032.00, plus interest of \$146.23. (*Id.*, Ex. J.)

16 Appellant timely protested the NPA, arguing that (i) he was told that the proposed
17 assessment is due to unclaimed income, (ii) the proposed assessment is erroneous because he did not
18 receive any unclaimed income, (iii) he has since changed his deductions, and (iv) he had problems with
19 his prior tax preparer and is now using a different tax preparer. (*Id.*, Ex. K.) Specifically, appellant
20 states:

21 I am protesting the assessment you have made for my 2008 tax year. A representative
22 told me its (sic) due to unclaimed income. I have had no such thing. I have since
23 changed my deductions and my tax attorney says that I shouldn't encounter any more
issues. I was using a different tax preparer through 2010. (FTB OB, Ex. K.)

24 In a letter dated December 18, 2012, the FTB stated that appellant's federal audit report
25 showed that the IRS disallowed itemized deductions on appellant's 2008 federal return. (*Id.*, Ex. L.)
26 The FTB's letter also stated that, if appellant had any information showing that the IRS reduced or
27 cancelled its adjustment, appellant should provide such information to the FTB. (*Id.*) When the FTB
28 did not receive further information, the FTB affirmed the NPA in an NOA dated March 21, 2013. The

1 NOA set forth an additional tax of \$1,032.00, plus interest of \$169.56. This timely appeal followed.

2 2009

3 Appellant filed a timely 2009 California Resident Income Tax Return, reporting a federal
4 AGI of \$47,976, California itemized deductions of \$24,251, and a California taxable income of \$22,529.
5 (FTB OB, p. 3 & Ex. M.) After taking into account appellant's withholdings, appellant reported a
6 refund due of \$1,249, which the FTB refunded. (*Id.*, Ex. M.)

7 Later, the FTB learned that the IRS disallowed "other expenses" subject to 2 percent AGI
8 limitation of \$14,400. (*Id.*, pp. 3-4 & Ex. O.) On August 23, 2012, the FTB issued a NPA that
9 conformed to the federal adjustment above by disallowing Schedule A miscellaneous deductions (i.e.,
10 other expenses subject to the two percent AGI limitation) of \$14,400, which increased appellant's 2008
11 California taxable income from \$22,529 to \$36,929. (*Id.*, p. 4 & Ex. P.) The NPA set forth an
12 additional tax of \$826.00, plus interest of \$75.77. (*Id.*)

13 Appellant timely protested the NPA, arguing that (i) he was told that the proposed
14 assessment is due to unclaimed income, (ii) the proposed assessment is erroneous because he did not
15 receive any unclaimed income, and (iii) he had problems with his prior tax preparer and is now using a
16 different tax preparer. (*Id.*, p. 4 & Ex. P.) Specifically, appellant states:

17 I am protesting your assessment for my 2009 tax year. I am told by your representative
18 that it is due to unclaimed income. There was no income that I made for any tax year that
19 was unclaimed. . . . My tax preparer was Debra Peeling through 2010. . . . (FTB OB,
Ex. Q.)

20 Although appellant timely protested the 2009 NPA, the FTB inadvertently billed
21 appellant for the 2009 tax year. (*Id.*, p. 4.) As a result of that billing, appellant remitted a payment of
22 \$908.30 on November 19, 2012. (*Id.*) Because the proposed assessment was not yet final and billable,
23 the FTB refunded that payment, including additional interest, to appellant in the amount of \$915.33 on
24 March 18, 2013. (*Id.*)

25 In a letter dated May 9, 2013, the FTB stated that appellants' federal audit report showed
26 that the IRS disallowed itemized deductions totaling \$14,400 on appellant's 2009 federal return. (*Id.*,
27 p. 4 & Ex. R.) The FTB's letter also stated that, if appellant had any information showing that the IRS
28 reduced or cancelled its adjustment, appellant should provide such information to the FTB. (*Id.*) When

1 the FTB did not receive further information, the FTB affirmed the NPA in a NOA dated June 21, 2013.
2 The NOA set forth an additional tax of \$826.00, plus interest of \$98.41. This timely appeal followed.

3 Contentions

4 Appellant

5 Appellant assert that (i) he was not present when his tax returns were prepared by his
6 prior tax preparer, Ms. Peeling, and (ii) he had no knowledge of any wrongdoing, and (iii) Ms. Peeling
7 should be held responsible because appellant did not know what she was doing. (Appeal Letters for tax
8 years 2007-2009.)

9 The FTB

10 Federal Adjustment

11 The FTB contends that its proposed assessments correctly conform to the IRS's
12 adjustments. In support, the FTB provided recent copies of appellant's federal transcripts for the tax
13 years 2007-2009. (FTB OB, pp. 1-6 & Exs. C, I & O.)

14 The FTB states that R&TC section 18622 requires a taxpayer to concede the accuracy of
15 the federal changes or to state wherein the changes are erroneous. (*Id.*) Also, the FTB states that
16 deficiency assessments based on federal adjustments to income are presumed to be correct and the
17 taxpayer bears the burden of proving that the FTB's determination is erroneous, citing the *Appeal of*
18 *Donald G. and Franceen Webb*, 75-SBE-061, decided by the Board on August 19, 1975.⁴ (*Id.*) The
19 FTB argues that appellant failed to provide evidence showing that the IRS's adjustments (as set forth in
20 the federal transcripts) and the California assessments based thereon, were made in error. Thus, the FTB
21 contends that appellant failed to carry his burden of proving error. (*Id.*)

22 Erroneous Refund – 2009 Tax Year Only

23 As stated in the facts for tax year 2009 above, the FTB inadvertently billed and received
24 payment of \$908.30 for the 2009 tax year. (FTB OB, p. 6.) However, that payment was refunded with
25 interest to appellant in the amount of \$915.33 on March 18, 2013. (*Id.*)

26 The FTB states that, if appellant intended for the FTB to retain his payment as a deposit
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28 ⁴ Board of Equalization cases are generally available for viewing on the Board's website (www.boe.ca.gov).

1 for appellant's 2009 tax year, appellant may remit the \$915.33 as a tax deposit within 30 days of the
2 FTB's opening brief. (*Id.*) In addition, the FTB asserts that, if appellant remits that \$915.33 as a deposit
3 while this appeal is pending, then R&TC section 19104, subdivision (c) provides, in pertinent part, that
4 the FTB shall abate the assessment of interest resulting from the erroneous refund until 30 days after the
5 demand for repayment is made. (*Id.*) As such, the FTB asserts that its opening brief constitutes a
6 demand for repayment so that if appellant repays the \$915.30 within 30 days from the date of the FTB's
7 opening brief, then the FTB will not charge interest from March 18, 2013 (the date of the erroneous
8 refund) to the date of the FTB's opening brief plus 30 days. (*Id.*)

9 Applicable Law

10 A taxpayer must concede the accuracy of federal changes or prove that those changes,
11 and any California deficiency assessment based thereon, are erroneous. (Rev. & Tax. Code, § 18622,
12 subd. (a); *Appeal of Sheldon I. and Helen R. Brockett*, 86-SBE-109, June 18, 1986; *Appeal of Aaron and*
13 *Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) It is well-settled that a deficiency assessment based
14 upon federal adjustments to income and deductions is presumed correct and the taxpayer bears the
15 burden of proving that the FTB's determination is erroneous. (*Appeal of Sheldon I. and*
16 *Helen R. Brockett, supra.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of
17 proof. (*Appeal of Aaron and Eloise Magidow, supra.*)

18 STAFF COMMENTS

19 The FTB's use of information from the IRS is both reasonable and rational (see *Appeal of*
20 *Sheldon I. and Helen R. Brockett, supra*; *Appeal of Aaron and Eloise Magidow, supra*), and appellant
21 has not provided any evidence to date demonstrating error in the IRS adjustments or in the California
22 assessments based thereon.

23 Here, the FTB only assessed additional tax, plus applicable interest, against
24 appellant--i.e., the FTB did not assess any penalties. Although appellant asserts that he relied upon the
25 guidance of his tax return preparer to file his returns correctly, there is no reasonable cause exception to
26 the payment of tax and interest owed. In short, the FTB has not assessed penalties, for which a
27 reasonable cause exception might apply.

28 Pursuant to California Code of Regulations, title 18, section 5523.6, if appellant has any

1 evidence that he wants the Board to consider, appellant should provide such evidence to the Board
2 Proceedings Division at least 14 days prior to the oral hearing.⁵

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⁵ Evidence exhibits should be sent to: Khaaliq Abd'Allah, Associate Governmental Programs Analyst, Board Proceedings Division, State Board of Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.