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7 **BOARD OF EQUALIZATION**
8 **STATE OF CALIFORNIA**

10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **SEAN BRUNSKE**¹) Case No. 597425

	<u>Year</u>	<u>Proposed Assessment</u>
	2004	\$15,551

16 Representing the Parties:

17 For Appellant: Sean Brunske
18 For Franchise Tax Board: Leah McElhatton, Tax Counsel

20 QUESTION: Whether appellant has shown error in respondent's proposed assessment based on
21 federal adjustments.

22 HEARING SUMMARY

23 Background

24 Appellant filed a timely 2004 California joint tax return with his spouse reporting
25 adjusted gross income (AGI) of \$180,381, itemized deductions of \$17,654, and taxable income of
26 \$162,727. The resulting tax liability of \$11,182 was reduced by \$700 in exemption credits for a total tax
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28 ¹ Appellant resides in Montclair, San Bernardino County, California.

1 of \$10,482. After applying reported withholding credits of \$58,703, appellant and his spouse claimed a
2 refund of \$48,221, which respondent issued to them. (Resp. Op. Br., exhibit A.)

3 Subsequently, respondent received information from the Internal Revenue Service (IRS)
4 indicating appellant's 2004 return had been audited by the IRS, and adjustments had been made to
5 appellant's partnership income, Schedule A itemized deductions, and exemptions. (Resp. Op. Br.,
6 exhibit B.) Respondent made corresponding adjustments to appellant's California tax account
7 increasing his partnership income by \$159,980, disallowing appellant's Schedule A itemized deductions
8 of \$414, and disallowing appellant's Schedule A itemized deduction limitation of \$2,667.² After these
9 adjustments of \$163,061, appellant's California taxable income was revised to \$325,788. Respondent
10 issued a Notice of Proposed Assessment (NPA) to appellant and his spouse reflecting these adjustments
11 and proposing an additional tax assessment of \$15,551, plus interest. (*Id.* at exhibit C.)

12 Appellant protested the NPA, stating he was able to reduce his 2004 tax liability with
13 carryback net operating losses (NOLs) from his 2009 tax year account, and provided his federal Form
14 1045, "Application for Tentative Refund." (Resp. Op. Br., exhibits D & E.) Respondent sent appellant
15 a letter asking for a revised federal report in support of appellant's position, and subsequently issued a
16 Notice of Action affirming the NPA. Appellant filed this timely appeal.³

17 Contentions

18 Appellant has provided a copy of his joint federal Form 1045, "Application for Tentative
19 Refund," for 2009. Appellant contends NOLs from 2009 should carryback to 2004 and result in a tax
20 liability of zero dollars. (Appeal Letter.) Appellant asserts he was directed to accept the IRS's audit
21 with the understanding that he could amend his 2009 federal tax return and wipe out any gains on his
22 2004 tax year account. (App. Reply Br.) Appellant contends he was told it would cost \$100,000 to go

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26 ² Respondent made adjustments disallowing some of appellant's itemized deductions. Because appellant's income was
27 increased by the partnership income, his allowable deduction amount was reduced, thus causing the itemized deduction
28 limitation of \$2,667 in addition to the disallowed deduction amount of \$414.

³ The proposed assessment was issued to both appellant and his wife jointly. This appeal was filed by appellant only, without his spouse's participation.

1 to trial on these issues, and that it was therefore easier to settle and amend his 2009 return.⁴ Appellant
2 states he does not agree with the approximate \$160,000 increase in partnership income. (*Id.*)

3 Respondent asserts appellant has the burden of proof and has failed to show error in the
4 federal adjustments to his 2004 tax year account, or error in respondent's proposed assessment based on
5 those adjustments. (Resp. Op. Br., p. 2-3.) Respondent contends it is not required to follow federal
6 actions, but does so to the extent the actions apply under California law. Respondent asserts it properly
7 denied appellant's claimed 2009 NOL carrybacks, because California, unlike the IRS, does not allow
8 carrybacks. Respondent references R&TC section 17276, which generally adopts Internal Revenue
9 Code (IRC) section 172 allowing for NOLs but specifically states that NOL carrybacks are not allowed
10 for any tax years beginning before January 1, 2013. (See Rev. & Tax. Code § 17276, subd. (c)(1).)
11 Respondent asserts it properly proposed the additional assessment based on the federal audit and
12 properly denied the claimed NOL carrybacks. (Resp. Op. Br., p. 3.)

13 Applicable Law

14 R&TC section 18622 provides that a taxpayer shall either concede the accuracy of a
15 federal determination or state wherein it is erroneous. It is well-settled that a deficiency assessment
16 based on a federal audit report is presumptively correct and the taxpayer bears the burden of proving the
17 determination is erroneous. (*Appeal of Sheldon I. and Helen E. Brockett*, 86-SBE-109, June 18, 1986;
18 *Todd v. McColgan* (1949) 89 Cal.App.2d 509.) While respondent has a rebuttable presumption of
19 correctness when it follows a federal determination, respondent is not bound to follow a federal
20 determination which it believes to be erroneous. (*Appeal of Der Wienerschnitzel International, Inc.*,
21 79-SBE-063, Apr. 10, 1979.) Unsupported assertions are not sufficient to satisfy appellant's burden of
22 proof with respect to an assessment based on federal action. (*Appeal of Aaron and Eloise Magidow*,
23 82-SBE-274, Nov. 17, 1982.) While a taxpayer's claim that he only acquiesced in the federal
24 adjustments because of coercion or economic reasons explains a taxpayer's motivation, it has no bearing
25 on whether the federal determination was correct. (*Appeal of Robert J. and Evelyn Johnston*, 75-SBE-
26 030, Apr. 22, 1975; *Appeal of Ronald J. and Eileen Bachrach*, 80-SBE-011, Feb. 6, 1980; *Appeal of*
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28 ⁴ Appellant mentions he "was directed" to accept the IRS's audit and that he "was told" going to trial would be too costly, but does not indicate from whom he received this advice.

1 *Barbara P. Hutchinson*, 82-SBE-121, June 29, 1982.) In the absence of credible, uncontradicted,
2 competent, and relevant evidence showing that respondent's determinations are incorrect, they must be
3 upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.)

4 California law generally incorporates IRC section 172, providing NOL deductions, with
5 some modifications. (Rev. & Tax. Code §§ 17276, et. seq.)⁵ Unlike the federal provisions, however,
6 California law does not allow for NOL carrybacks. (Rev. & Tax. Code § 17276, subd. (c)(1).) Thus, for
7 purposes of California law, NOLs generally may only be carried forward.

8 STAFF COMMENTS

9 Appellant appears to make two general contentions: 1) the NOLs from 2009 should
10 carryback to eliminate the tax liability for 2004, and 2) he disagrees with the addition of partnership
11 income. California law does not allow NOL carrybacks, and therefore appellant cannot apply any NOLs
12 from 2009 to his 2004 tax year. Appellant asserts he agreed to the federal determination based on
13 economic advice, and not necessarily because he agreed with the determination, but this explanation
14 does not show fault in the determination. (See *Appeal of Robert J. and Evelyn Johnston, supra.*) To
15 date, appellant has not provided any evidence to show error in the addition of partnership income or the
16 disallowed itemized deductions in the proposed assessment. Appellant has the burden to show error in
17 this assessment, and should be prepared to support his contentions with evidence.⁶

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26 ⁵ The California modifications of the NOL deductions change frequently. For example, R&TC section 17276 was repealed
27 effective October 19, 2010, by Chapter 721, Laws 2010. The applicable law presented in this summary represents the law as
in effect for the 2004 tax year.

28 ⁶ If appellant has any additional exhibits or evidence to provide, such exhibits should be provided at least 14 days prior to the
oral hearing to Claudia Madrigal, Board Proceedings Division, State Board of Equalization, P.O. Box 942879 (MIC: 80),
Sacramento, CA 94279-0080