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7 **BOARD OF EQUALIZATION**

8 **STATE OF CALIFORNIA**

9  
10 In the Matter of the Appeal of:

) **HEARING SUMMARY**

) **PERSONAL INCOME TAX APPEAL**

11  
12 **DAVID R. MILLS<sup>1</sup>**

) Case No. 715376  
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)

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	<u>Year</u>	<u>Proposed</u>
	2007	<u>Additional Tax</u>
		\$6,035

16 Representing the Parties:

17 For Appellant: David R. Mills

18 For Franchise Tax Board: Mary Yee, Tax Counsel III

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20 **QUESTIONS:** (1) Whether appellant has demonstrated error in the Franchise Tax Board's (FTB or  
21 respondent) assessment, which was based upon federal adjustments.

22 (2) Whether the Board should impose a frivolous appeal penalty.<sup>2</sup>

23 **HEARING SUMMARY**

24 Background

25 Appellant filed a timely 2007 California income tax return, reporting zeros in the fields  
26

27 <sup>1</sup> Appellant currently resides in Los Angeles County, California.

28 <sup>2</sup> This appeal (for 2007, case no. 715376) is appellant's first appeal of this nature.

1 for wages, federal and state adjusted gross income (AGI), total tax, and payments. (FTB opening brief  
2 (FTB OB), Ex. B.) Appellant also reported itemized deductions of \$7,032.<sup>3</sup> (*Id.*) Appellant filed his  
3 return listing two dependents and a filing status of head of household (HOH). (*Id.*) Included with his  
4 return was a Substitute for Form W-2 (Form 3525) in which appellant reported zero wages from his  
5 employer, Keyes Acura. (*Id.*) Appellant indicated on the Form 3525 that he determined the zero  
6 amounts from records provided by his employer and that the documents provided to taxing authorities  
7 were incorrect as to the wages that were reported, but accurately reflected the zero withholding credits  
8 and the \$500 State Disability Insurance withheld. (*Id.*) On the Form 3525, appellant listed “n/a or  
9 unknown” where he was asked to explain his efforts to obtain a Form W-2 or Form W-2c, Corrected  
10 Wage and Tax Statement. (*Id.*)

11 Later, the FTB learned that the Internal Revenue Service (IRS) made the following  
12 adjustments to appellant’s 2007 federal return, which increased appellant’s federal AGI from zero to  
13 \$93,042: (a) wages of \$91,453, (b) schedule C-1 gross receipts or sales of \$1,710, and (c) a net  
14 self-employment tax (subtraction) of \$121. (*Id.*, p. 2 & Ex. C.)

15 On September 6, 2011, the FTB issued a Notice of Proposed Assessment (NPA) that  
16 conformed to the federal adjustments above by adding \$93,042 to appellant’s 2007 California taxable  
17 income of -\$7,031. (*Id.*, p. 2; see also, exhibits attached to the appeal letter (AL).) In addition, the NPA  
18 added a standard deduction of \$3,516. (See exhibits attached to AL.) Accordingly, based on these  
19 adjustments, the NPA increased appellant’s 2007 California taxable income to \$89,527,<sup>4</sup> resulting in an  
20 additional tax of \$6,035.00, plus interest (from April 15, 2008 to October 26, 2010) of \$869.24. (*Id.*)

21 Appellant timely protested the NPA, arguing that (i) “your presumptions are based on  
22 erroneous, unsworn third party information and are untimely,” and (ii) “the IRS failed to follow proper  
23 procedure by creating an SFR under the presumption that there was no original return filed by me.”  
24 (FTB OB, p. 2; see also, exhibits attached to AL.)

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26 <sup>3</sup> The FTB states that, because a taxpayer must have at least \$1 of income to deduct any claimed itemized deductions,  
27 appellant’s resulting reported taxable income was -\$7,031.

28 <sup>4</sup> -\$7,031 reported California taxable income + \$93,042 federal adjustments + \$3,516 adjustment for the standard deduction =  
\$89,527 revised California taxable income.

1 By letter dated December 6, 2012, the FTB informed appellant that, because the FTB's  
2 assessment was based on federal information, the assessment was presumed correct. (*Id.*) Included with  
3 that letter was a copy of appellant's federal transcript. (FTB OB, p. 2.)

4 In a letter dated December 10, 2012, appellant asserted that the federal transcript  
5 information was incorrect and was based on (and was itself) hearsay evidence. (*Id.*, pp. 2-3.) Appellant,  
6 however, did not provide any evidence showing that the IRS revised or reduced the federal adjustments.  
7 (*Id.*)

8 After considering appellant's arguments, the FTB affirmed the NPA in a Notice of Action  
9 (NOA) dated January 17, 2013. (*Id.*, p. 3; see also exhibit to AL.) The NOA sets forth an additional tax  
10 of \$6,035.00, plus interest of \$1,184.63 (\$869.24 + \$315.39). (See exhibits to AL.) This timely appeal  
11 followed. (FTB OB, p. 3.)

## 12 Contentions

### 13 Appellant

14 Appellant asserts that the FTB's adjustments are not valid because the adjustments are  
15 based on appellant's federal transcript, which is hearsay. (AL, p. 1.) Specifically, appellant states in  
16 part:

17 Unless someone at the Franchise Tax Board has personal firsthand knowledge to  
18 contradict my previous sworn testimony, quit harassing and attempting to extort property  
from me. Your legal team should recognize that third party allegations have no standing.

19 With his appeal letter, appellant attaches correspondence with the FTB stating that any attempts to  
20 "coerce or harass [him] based on unsubscribed, unsworn third party information . . . will be considered  
21 evidence . . . of constructive fraud, and will strip said actor(s) of any presumed sovereign immunity."  
22 He also provides a "Notice of Demand for Verified Assessment for Year 2007," addressed to various  
23 FTB personnel, demanding "written verified assessment(s)" within 30 days and "the immediate  
24 cessation of abusive practices . . . ."

### 25 The FTB

26 The FTB contends that its proposed assessment correctly conforms to the IRS's  
27 adjustments. In support, the FTB provided a recent copy of appellant's 2007 federal transcript (dated  
28 March 18, 2013). (FTB OB, pp. 3-4 & Ex. E.)

1           The FTB states that R&TC section 18622 requires a taxpayer to concede the accuracy of  
2 the federal changes or to state wherein the changes are erroneous. (FTB OB, p. 3.) Also, the FTB states  
3 that deficiency assessments based on federal adjustments to income are presumed to be correct and the  
4 taxpayer bears the burden of proving that the FTB’s determination is erroneous. (Citing *Appeal of*  
5 *Frank J. and Barbara D. Burgett*, 83-SBE-127, June 21, 1983.)<sup>5</sup> (*Id.*) The FTB argues that appellant  
6 failed to provide evidence showing that the IRS’s adjustments (as set forth in the federal transcript), and  
7 the California assessment based thereon, were made in error. Thus, the FTB contends that appellant  
8 failed to carry his burden of proving error. (*Id.*, pp. 3-4.) Furthermore, in relation to appellant’s hearsay  
9 argument, the FTB asserts that the Board has stated that “[a]ny relevant evidence, including affidavits,  
10 declarations under penalty of perjury, and hearsay evidence, may be presented to the Board at a  
11 hearing,” citing California Code of Regulations, title 18, section 5523.6. (*Id.*, p. 4.)

## 12           Applicable Law

### 13                   Federal Adjustments

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

### 22                   Hearsay Evidence

23           California Code of Regulations, title 18, section 5523.6, provides that “[a]ny relevant  
24 evidence, including affidavits, declarations under penalty of perjury, and hearsay evidence, may be  
25 presented to the Board at a hearing.”

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28 <sup>5</sup> Board of Equalization cases are generally available for viewing on the Board’s website ([www.boe.ca.gov](http://www.boe.ca.gov)).

1                   Frivolous Appeal Penalty

2                   The Board may impose a penalty of up to \$5,000 whenever it appears to the Board that  
3 proceedings before it have been instituted or maintained primarily for delay or that the position is  
4 frivolous or groundless. (Rev. & Tax. Code, § 19714; Cal. Code Regs., tit. 18, § 5454.) The following  
5 factors are considered in determining whether, and in what amount, to impose the penalty: (1) whether  
6 the appellant is making arguments that have been previously rejected by this Board in a Formal Opinion  
7 or by courts, (2) whether the appellant is repeating arguments that he made in prior appeals, (3) whether  
8 the appellant filed the appeal with the intent of delaying legitimate tax proceedings or the legitimate  
9 collection of tax owed, and (4) whether the appellant has a history of filing frivolous appeals or failing  
10 to comply with California's tax laws. (Cal. Code Regs. tit. 18, § 5454.) The Board may consider other  
11 relevant factors in addition to the factors listed above. (*Id.*)

12                   STAFF COMMENTS

13                   Federal Adjustments

14                   The FTB's use of information from the IRS is both reasonable and rational (see *Appeal of*  
15 *Sheldon I. and Helen R. Brockett, supra; Appeal of Aaron and Eloise Magidow, supra*), and appellant  
16 has not provided any evidence to date demonstrating error in the IRS adjustments (as set forth in  
17 appellant's federal transcript) or in the California assessment based thereon. Here, appellant's  
18 unsupported assertions (as set forth in his tax return, Form 3525, etc.) are insufficient to carry his burden  
19 of proof. (*Appeal of Aaron and Eloise Magidow, supra; Bruno v. Commissioner, T.C. Memo*  
20 *1990-109.*) Pursuant to California Code of Regulations, title 18, section 5523.6, if appellant has any  
21 additional evidence that he wants the Board to consider, appellant should provide his evidence to the  
22 Board Proceedings Division at least 14 days prior to the oral hearing.<sup>6</sup>

23                   Frivolous Appeal Penalty

24                   As noted above, appellant contends that information from the IRS is inadmissible  
25 hearsay. In response, the FTB notes that California Code of Regulations, title 18, section 5523.6,  
26 provides that "[a]ny relevant evidence, including affidavits, declarations under penalty of perjury, and  
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28 <sup>6</sup> 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.

1 hearsay evidence, may be presented to the Board at a hearing.” Based on the foregoing regulation,  
2 appellant’s hearsay argument is meritless. This Board has previously rejected as frivolous arguments in  
3 which an appellant claims zero wages from his employer, asserts that an assessment based on third-party  
4 wage and income reports is hearsay, and asserts that FTB must produce a “verified” assessment. (See,  
5 e.g., *Appeals of Robert E. Wesley, et al.*, 2005-SBE-002, Nov. 15, 2005.) At the oral hearing, the parties  
6 should be prepared to discuss whether the Board should impose a frivolous appeal penalty. If the Board  
7 decides that a frivolous appeal penalty should be imposed, the Board may wish to consider that this is  
8 appellant’s first appeal of this nature.

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