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

10 In the Matter of the Appeals of:) **HEARING SUMMARY²**
11) **PERSONAL INCOME TAX APPEAL**
12 **WILSON MONTEVILLA¹**) Case No. 550849
13)

	<u>Year</u>	<u>Proposed Assessment</u>
	2006	\$628 ³

17 Representing the Parties:

19 For Appellant: Wilson Montevilla
20 For Franchise Tax Board: Anjali Balasingham, Tax Counsel

22 **QUESTION:** Whether appellant has established error in the proposed assessment, which is based
23 on a federal determination.

25 ¹ Appellant resides in Pacoima, Los Angeles County.

26 ² Due to a Board member inquiry, which is discussed below, this appeal was postponed from the October 25-28, 2011 hearing
27 calendar and rescheduled to the January 31-February 2, 2012 hearing calendar.

28 ³ In a December 14, 2011 letter (discussed in respondent's contentions below), respondent reduced the additional tax
assessment from \$628 to \$276.

1 HEARING SUMMARY

2 Background

3 Appellant filed a timely 2006 California return. On the return, appellant claimed head of
4 household (HOH) filing status,⁴ one personal exemption credit and zero dependent exemption credits.
5 He reported wages of \$65,630, a federal adjusted gross income (AGI) of \$55,270, California
6 adjustments (subtractions) of \$752, California AGI of \$54,518, and, after applying claimed itemized
7 deductions of \$8,648, he reported taxable income of \$45,870. (Resp. Opening Br., exhibit A.) On the
8 2006 Schedule CA (540), appellant calculated his claimed itemized deductions of \$8,648 based on his
9 total federal itemized deductions of \$10,666 less reported state and local income taxes of \$2,018. (*Id.*,
10 exhibit A, pp. 3-4.) On his federal 2006 return, appellant claimed a deduction of \$8,112 for alimony
11 paid. (*Id.*, exhibit A, p. 8.) On his federal 2006 Schedule A, appellant claimed total itemized deductions
12 of \$10,666 consisting of the following items: 1) \$1,774 of medical expenses⁵ based on \$5,919 of
13 reported medical expenses less \$4,145, i.e., seven and one-half percent of appellant's federal AGI of
14 \$55,270; 2) \$2,194 of paid taxes consisting of \$2,018 of state and local income taxes and \$176 of
15 personal property taxes; 3) \$1,346 of gifts to charity; 4) \$5,352 of job expenses and certain
16 miscellaneous deductions based on \$6,457 of job expenses and certain miscellaneous deductions less
17 \$1,105, i.e., two percent of appellant's federal AGI of \$55,270. The \$6,457 of claimed job expenses and
18 certain miscellaneous deductions consist of \$215 of tax preparation fees, \$3,112 of job seeking
19 expenses, \$910 of job supplies expenses; \$308 of safety equipment expenses, and \$1,912 of uniforms
20 cleaning expenses. (*Id.*, exhibit A, pp. 10, 13.) Appellant reported a tax liability of \$1,093 (tax of
21 \$1,184 less a personal exemption credit of \$91). He claimed an income tax withholding credit of
22 \$2,018, and a refund of \$925. (*Id.*, exhibit A, pp. 1-2.)

23 Respondent processed appellant's 2006 return and issued him a refund of \$925.

24 Respondent subsequently received information from the Internal Revenue Service (IRS) indicating the
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27 ⁴ On the 2006 HOH Schedule (FTB Form 4803e), appellant claimed his son, Kenneth Montevilla, who was 17 years old as of
28 December 31, 2006, as the individual qualifying him for purposes of the HOH filing status. (Resp. Opening Br., exhibit A,
p. 6.)

⁵ For purposes of brevity, staff refers to medical expenses as inclusive of both medical and dental expenses. (See Int. Rev.
Code, § 213(a).)

1 IRS disallowed appellant's claimed payment of \$8,112 of alimony, which increased appellant's 2006
2 federal AGI from \$55,270 to \$63,382. (Resp. Opening Br., p. 2, exhibit E.) The IRS also disallowed
3 \$609 of claimed medical expenses deduction, and \$163 of employee business expenses deduction.
4 (*Ibid.*) As a result of these adjustments, the IRS assessed additional tax of \$2,212. (*Ibid.*) According to
5 respondent's records, appellant failed to notify respondent of any federal determination for the 2006 tax
6 year. (Resp. Opening Br., p. 2.) Based on this information, respondent issued a Notice of Proposed
7 Assessment (NPA) dated February 17, 2010, which disallows the claimed alimony deduction of \$8,112,
8 the claimed medical deduction of \$609 and the claimed unreimbursed employee expenses deduction of
9 \$163. The NPA increases appellant's taxable income from \$45,870 to \$54,754 and proposes additional
10 tax of \$628 plus interest. (*Id.*, exhibit F.)

11 Appellant filed a timely protest of the NPA and apparently submitted to respondent a
12 copy of appellant's IRS "Record of Account." (Resp. Opening Br., p. 2, exhibit G.) In a letter to
13 appellant dated July 8, 2010, respondent acknowledged receiving appellant's protest letter and a copy of
14 his federal "Record of Account." In its July 8, 2010 letter, respondent asserted that the NPA is correct
15 based on the information shown on the enclosed copies of the Fedstar IRS Data Sheet and the "Record
16 of Account.," and requested that appellant provide it with a copy of an "Account Transcript," in the
17 event the IRS later changes its adjustments to appellant's 2006 federal AGI or taxable income. (Resp.
18 Opening Br., exhibit H.) Appellant did not respond to respondent's July 8, 2010 letter. (Resp. Opening
19 Br., p. 2.) On August 24, 2010, respondent issued a Notice of Action (NOA) affirming the NPA.
20 (Appeal Letter, Attachment.) Appellant filed this timely appeal.

21 Board Member Inquiry

22 This matter was deferred from the October 2011 Culver City Board meeting due to a
23 Board member inquiry concerning efforts appellant made to obtain check copies or other evidence of
24 the payment of alimony during 2006 from his account at Washington Mutual, as reflected in a letter
25 to appellant from the Appeals Division staff dated October 12, 2011. Appellant subsequently
26 produced copies of checks he wrote from his Washington Mutual account. Respondent's response to
27 appellant's additional documentation is incorporated into its contentions set forth below.

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1 Appellant's Contentions

2 In his appeal letter, appellant asserts that he does not agree with the proposed assessment,
3 any "proposal" should be zero, and he does not have any money. (Appeal Letter.) In his opening brief,
4 appellant contends that the proposed assessment is incorrect and he asserts that he already submitted
5 copies of his 2006 returns. He also contends that the attached IRS transcript shows that the amount for
6 wages, tips and other compensation is \$65,630, rather than the \$45,870 respondent is claiming. (App.
7 Opening Br.) Appellant attached to his opening brief a copy of the IRS transcript dated April 29, 2010
8 for the 2006 tax year, which shows, among other things, that the IRS assessed additional tax of \$2,212
9 plus interest. (App. Opening Br., Attachment.)

10 In his reply brief, appellant asserts that he would like to proceed with his appeal
11 referring to the enclosed copies of a court order of alimony payment and an IRS correspondence.
12 Attached to appellant's reply brief are the following: 1) a divorce decree dated April 11, 2006, stating
13 that appellant was required to pay his former spouse \$500 per month beginning on April 1, 2006; 2)
14 A Notice of an Order to Withhold Income issued to appellant's employer for monthly child support
15 (\$800) and spousal support (\$500); and 3) an IRS letter dated October 31, 2008, informing appellant
16 that it determined there is a deficiency (increase) in appellant's 2006 income tax in the amount of
17 \$2,212 and explaining the procedure for filing a petition with the tax court if appellant wished to
18 contest the determination. (App. Reply Br., Attachments.)

19 Respondent's Contentions

20 Respondent argues that appellant failed to show that the federal adjustments and the
21 proposed assessment are erroneous. Respondent asserts that it and the IRS made the same disallowances
22 of appellant's claimed alimony paid (\$8,112), medical expenses (\$609), and employee business
23 expenses (\$163) and it increased appellant's 2006 taxable income by \$8,884, which is the same amount
24 as the IRS adjusted appellant's 2006 federal taxable income. Respondent thus asserts that it properly
25 assessed \$628 of additional tax. To the extent appellant argues the federal adjustments are incorrect,
26 respondent contends that appellant has failed to submit any evidence establishing the IRS revised or
27 revoked the adjustments that are the basis of the proposed assessment. Respondent asserts the IRS
28 transcript shows that the federal actions are final and have not been revised or revoked. In its opening

1 brief, respondent states that it will consider any submitted correspondence from the IRS showing
2 otherwise. Respondent attached to its opening brief corrected federal and California 2006 returns
3 reflecting the federal and state adjustments. Respondent asserts that, notwithstanding appellant's
4 assertion to the contrary, it did not change the amount of appellant's reported wages. (Resp. Opening
5 Br., pp. 3-4.)

6 In its reply brief, respondent contends that the submitted documentation merely shows
7 that appellant was ordered to pay a total of \$4,500 in spousal support (\$500 x 9 months) during 2006.
8 Respondent also contends that there is no evidence indicating appellant paid the amount of alimony
9 (\$8,112) he reported on his 2006 return. (Resp. Reply Br., pp. 1-2.) According to respondent,
10 appellant's former spouse did not report on her 2006 return that she received alimony payments.
11 (*Id.*, fn. 1.) Respondent asserts that appellant's former spouse signed her 2006 return under penalty of
12 perjury and she would have been required to report any alimony received pursuant to Internal Revenue
13 Code (IRC) section 71(a) and Treasury Regulations section 1.215-1. Attached to respondent's reply
14 brief is appellant's former spouse's 2006 federal return. (*Id.*, exhibit M.) Respondent contends that in a
15 telephone conversation on March 16, 2011, appellant stated that he was unable to provide evidence of
16 payment because his employer never complied with the court order to withhold income for spousal
17 support and he directly paid alimony to his former spouse with checks drawn from Washington Mutual
18 bank, which is no longer in business. (*Id.*, p. 2.)

19 Respondent sent appellant a letter dated December 14, 2011, addressing the additional
20 documentation appellant produced in response to the Board member inquiry, which is described
21 above. In its December 14, 2011 letter, respondent conceded that appellant is entitled to a deduction
22 for alimony paid in the amount of \$4,348 and therefore reduced the additional tax assessment from
23 \$628 to \$276.⁶ Respondent attached copies of revised 2006 federal and California returns to its
24 December 14, 2011 letter. The attached revised federal return reflects the alimony deduction of
25 \$4,348 on line 31a and the attached revised California return reflects the additional state tax of \$276
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27 ⁶ In the letter, respondent requested that appellant to sign the agreement page if he was in agreement with respondent's
28 conceded position. Respondent stated that no response was required if appellant disagreed with its conceded position. As of
December 21, 2011, appellant had not responded to respondent's letter.

1 on line 48.

2 Respondent sent appellant a second letter on January 5, 2012, entitled "Explanation of
3 Revised Proposed Assessment." (Resp. Jan. 5, 2012 Letter.) In this letter, respondent explains in
4 more detail its revised proposed assessment provided in the December 14, 2011 letter. Respondent
5 explains that the court documents provided show appellant was obligated to make monthly spousal
6 maintenance payments of \$450 and monthly child support payments of \$800, both beginning on
7 April 1, 2006. The copies of checks provided by appellant in response to the Board Member Inquiry
8 show that for the period between April 1, 2006, and December 31, 2006, appellant made \$11,280 in
9 payments to his former spouse. Respondent asserts payments of this nature are first applied to the
10 child support obligation, and then to the alimony obligation. (Citing *Bacon v. Commissioner*, T.C.
11 Memo. 1989-90.) Accordingly, respondent applied \$7,200 of the total payment amount to satisfy the
12 child support obligation, which is not deductible,⁷ and the remaining \$4,080 (i.e., \$11,280 - \$7,200)
13 as deductible alimony payments. Respondent indicates appellant's checks show that for the period
14 between January 1, 2006, through March 31, 2006, he paid \$2,833 to his spouse. Respondent asserts
15 \$2,565 of this amount satisfies his child support obligation (i.e., \$855 times 3 months, the court-
16 ordered rate for this period), and the remaining \$268 (i.e., \$2,833 - \$2,565) was accepted as
17 deductible alimony payments. Respondent asserts the \$4,348 (i.e., \$4,080 + \$268) of alimony
18 payments for 2006 were accepted as deductible amounts, resulting in the revised proposed assessment
19 of \$276, down from \$628. Respondent concludes the letter by stating appellant indicated in a
20 telephone conversation that additional documentation to support the remaining claimed deductions
21 was unavailable.

22 Applicable Law

23 Assessment Based on Federal Determination

24 Revenue and Taxation Code (R&TC) section 18622, subdivision (a), provides that when
25 the IRS makes a change or correction to a taxpayer's federal account that results in an increase in the
26

27 ⁷ Respondent notes that, "Payments fixed by the terms of a decree, instrument, or agreement, as payable for the support of the
28 payor's children, are not alimony but rather non-deductible child support." (Resp. Jan. 5, 2012 Letter; citing Int.Rev. Code,
§ 71(b); Rev. & Tax. Code, § 17081; Treas. Reg. § 1.71-1T.)

1 amount of state tax payable, the taxpayer must either concede the accuracy of the federal determination
2 or state wherein the federal change is erroneous. A state deficiency assessment that is based on a federal
3 report is presumptively correct and the taxpayer bears the burden of proving error. (*Appeal of Sheldon I.*
4 *and Helen E. Brockett*, 86-SBE-109, June 18, 1986.) Absent uncontradicted, credible, competent and
5 relevant evidence showing that respondent's determinations are incorrect, respondent's proposed
6 assessment must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.)
7 An appellant's failure to produce evidence that is within his or her control gives rise to a presumption
8 that such evidence is unfavorable to his or her case. (*Appeal of Don A. Cookston*, 83-SBE-048,
9 Jan. 3, 1983.)

10 Deductions in General

11 Income tax deductions are a matter of legislative grace and the burden is on the appellant
12 to show by competent evidence that he is entitled to deductions claimed. (*Appeal of James C. and*
13 *Monablanch A. Walshe*, 75-SBE-073, Oct. 20, 1975; *New Colonial Ice Co. v. Helvering* (1934) 292
14 U.S. 435.) To carry his burden of proof, appellant must point to an applicable statute and show by
15 credible evidence that the deductions he claims come within its terms. (*Appeal of Robert R. Telles*,
16 86-SBE-061, Mar. 4, 1986.) Respondent's denials of claimed deductions are presumed correct. (*Appeal*
17 *of Gilbert W. Janke*, 80-SBE-059, May 21, 1980.)

18 Alimony Deduction

19 In general, alimony received by a taxpayer's former spouse is taxable to him or her as
20 ordinary income. (Int. Rev. Code, § 71(a); Rev. & Tax. Code, § 17081.) Conversely, alimony payments
21 made by a taxpayer are deductible by him or her. (Int. Rev. Code, § 215; Rev. & Tax. Code, § 17201.)⁸
22 IRC section 71, subsection (b)(1), defines alimony payments under a four-part test:

- 23 (A) Such payment is received by a spouse under a divorce or separation instrument,
- 24 (B) The divorce or separation instrument does not designate such payment as a payment
25 which is not includible in gross income under this section and not allowable as a
26 deduction under IRC section 215,
- 27 (C) In the case of an individual legally separated from his spouse under a decree of
28 divorce or of separate maintenance, the payee spouse and the payor spouse are not
members of the same household at the time such payment is made, and

⁸ IRC sections 71 and 215 are incorporated into California tax law by R&TC sections 17081 and 17201, respectively.

1 (D) There is no liability to make any such payment for any period after the death of the
2 payee spouse and there is no liability to make any payment (in cash or property) as
a substitute for such payments after the death of the payee spouse.

3 IRC section 71, subsections (b)(2)(A) and (C), includes in its definition of a divorce or separation
4 instrument, “a decree of divorce or separate maintenance or a written instrument incident to such a
5 decree,” and “a decree (not described in subparagraph (A)) requiring a spouse to make payments for the
6 support or maintenance of the other spouse.”

7 When a taxpayer is obligated to make payment for both child support and alimony,
8 payments made to the former spouse will be allocated to the child support obligation until that obligation
9 is met. (*Bacon v. Commissioner, supra*; Int.Rev. Code, § 71(c)(3).) Unlike payments for alimony,
10 payments for child support are not deductible by the payor spouse. (Treas. Reg., § 1.71-1T(c).)

11 Unreimbursed Employee Expenses Deductions

12 IRC section 62 provides that AGI is computed by reducing a taxpayer’s gross income by
13 any available deductions listed under that section. R&TC section 17076 incorporates IRC section 67
14 and requires that all miscellaneous deductions, such as unreimbursed employee expenses, exceed two
15 percent of AGI. (See also 2006 Schedule A, 2006 IRS Publication 529, pp. 2-3.) The IRS requires
16 itemized deductions claimed as unreimbursed employee expenses on Schedule A to be identified on IRS
17 Form 2106 or 2106-EZ, “Employee Business Expense.” IRS Form 2106 is used by employees to report
18 ordinary and necessary business expenses relating to their job. (See 2006 IRS Form 2106 Instructions.)

19 Medical Deductions

20 R&TC section 17201 incorporates IRC section 213, which allows as a deduction any
21 expenses paid during the taxable year for the “medical care” of the taxpayer, his/her spouse, and
22 dependents that are not compensated for by insurance or otherwise, but only to the extent that such
23 medical expenses exceed seven and one-half percent of federal AGI. The term “medical care” is defined
24 to include the diagnosis, cure, mitigation, treatment, or prevention of disease. (Treas. Reg. § 1.213-
25 1(e)(1)(i).) For a taxpayer to substantiate medical expenses under IRC section 213, the taxpayer must
26 furnish the name and address of each person to whom payment was made and the amount and date of
27 each payment. (Treas. Regs. § 1.213-1(h); see also *Davis v. Commissioner*, T.C. Memo 2006-272.)
28 When a taxpayer fails to provide documentation to support claimed deductions for medical expenses, a

1 court is not required to accept the taxpayer's self-serving and uncorroborated testimony in this regard
2 and may sustain the IRS's determination denying a claimed medical expense deduction. (See *Davis v.*
3 *Commissioner, supra; Hunter v. Commissioner*, T.C. Memo 2000-249; *Nwachukwu v. Commissioner*,
4 T.C. Memo. 2000-27.)

5 Financial Inability to Pay Assessment

6 In his appeal letter, appellant asserts that he does not have any money to pay the proposed
7 assessment. In the *Appeal of Estate of Richard Luebbert, Deceased, et al.* (71-SBE-028), decided on
8 September 13, 1971, the Board held, "This board lacks the authority to strike down a valid assessment of
9 tax on the ground that payment will be difficult."

10 STAFF COMMENTS

11 Staff notes that appellant did not provide any written response to the Board regarding
12 respondent's December 14, 2011, and January 5, 2012 letters. In respondent's letters, respondent
13 revised the additional amount of tax from \$628 to \$276 due to appellant's entitlement to a deduction for
14 alimony. Appellant should be prepared to discuss any contentions he has regarding respondent's
15 concession and the allocation of payment amounts to child support versus alimony. If appellant has
16 additional evidence supporting his position, he should submit it to the Board at least 14 days prior to the
17 hearing date.⁹

18 Respondent based its proposed assessment on information showing that the IRS
19 disallowed claimed deductions totaling \$8,884 on appellant's 2006 federal return. Respondent has since
20 allowed \$4,348 of this disallowed amount. Appellant should be prepared to discuss the facts and
21 circumstances surrounding the remaining disallowed deduction of \$3,764 for claimed alimony paid (the
22 original \$8,112 in claimed alimony deductions minus the allowed \$4,348), \$609 of claimed medical
23 expenses deduction, and \$163 of claimed unreimbursed employee expenses. He should also be prepared
24 to discuss whether he still contends that the IRS erroneously disallowed these deduction amounts and, if
25 so, to present additional documentary evidence to support his entitlement to these deduction amounts.
26 In addition, the parties should be prepared to present any evidence that the IRS cancelled or reduced its
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28 ⁹ Appellant should submit any additional evidence to: Claudia Madrigal, Board Proceedings Division, Board of Equalization.
P. O. Box 942879 MIC: 80, Sacramento, CA 94279-0080.

1 assessment. Appellant may wish to discuss whether he protested the federal disallowance of the claimed
2 deduction amounts and the outcome of any such protest.

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