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7 **BOARD OF EQUALIZATION**  
8 **STATE OF CALIFORNIA**  
9

10 In the Matter of the Appeals of: ) **HEARING SUMMARY**  
11 ) **PERSONAL INCOME TAX APPEAL**  
12 **WILSON MONTEVILLA**<sup>1</sup> ) Case No. 550849  
13 )  
14 )

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

17 Representing the Parties:

19 For Appellant: Wilson Montevilla  
20 For Franchise Tax Board: Anjali Balasingham, Tax Counsel  
21

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

24 HEARING SUMMARY

25 Background

26 Appellant filed a timely 2006 California return. On the return, appellant claimed head of  
27

28 <sup>1</sup> Appellant resides in Pacoima, Los Angeles County.

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

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

21 Respondent subsequently received information from the Internal Revenue Service (IRS) indicating the  
22 IRS disallowed appellant's claimed payment of \$8,112 of alimony, which increased appellant's 2006  
23 federal AGI from \$55,270 to \$63,382. (Resp. Opening Br., p. 2, exhibit E.) The IRS also disallowed  
24 \$609 of claimed medical expenses deduction, and \$163 of employee business expenses deduction.

25  
26  
27 <sup>2</sup> 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.)

<sup>3</sup> For purposes of brevity, staff refers to medical expenses as inclusive of both medical and dental expenses. (See Int. Rev.  
Code, § 213(a).)

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

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

#### 18 Appellant's Contentions

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

27 In his reply brief, appellant asserts that he would like to proceed with his appeal  
28 referring to the enclosed copies of a court order of alimony payment and an IRS correspondence.

1 Attached to appellant's reply brief are the following: 1) a divorce decree dated April 11, 2006, stating  
2 that appellant was required to pay his former spouse \$500 per month beginning on April 1, 2006; 2)  
3 A Notice of an Order to Withhold Income issued to appellant's employer for monthly child support  
4 (\$800) and spousal support (\$500); and 3) an IRS letter dated October 31, 2008, informing appellant  
5 that it determined there is a deficiency (increase) in appellant's 2006 income tax in the amount of  
6 \$2,212 and explaining the procedure for filing a petition with the tax court if appellant wished to  
7 contest the determination. (App. Reply Br., Attachments.)

### 8 Respondent's Contentions

9 Respondent argues that appellant failed to show that the federal adjustments and the  
10 proposed assessment are erroneous. Respondent asserts that it and the IRS made the same disallowances  
11 of appellant's claimed alimony paid (\$8,112), medical expenses (\$609), and employee business  
12 expenses (\$163) and it increased appellant's 2006 taxable income by \$8,884, which is the same amount  
13 as the IRS adjusted appellant's 2006 federal taxable income. Respondent thus asserts that it properly  
14 assessed \$628 of additional tax. To the extent appellant argues the federal adjustments are incorrect,  
15 respondent contends that appellant has failed to submit any evidence establishing the IRS revised or  
16 revoked the adjustments that are the basis of the proposed assessment. Respondent asserts the IRS  
17 transcript shows that the federal actions are final and have not been revised or revoked. In its opening  
18 brief, respondent states that it will consider any submitted correspondence from the IRS showing  
19 otherwise. Respondent attached to its opening brief corrected federal and California 2006 returns  
20 reflecting the federal and state adjustments. Respondent asserts that, notwithstanding appellant's  
21 assertion to the contrary, it did not change the amount of appellant's reported wages. (Resp. Opening  
22 Br., pp. 3-4.)

23 In its reply brief, respondent contends that the submitted documentation merely shows  
24 that appellant was ordered to pay a total of \$4,500 in spousal support (\$500 x 9 months) during 2006.  
25 Respondent also contends that there is no evidence indicating appellant paid the amount of alimony  
26 (\$8,112) he reported on his 2006 return. (Resp. Reply Br., pp. 1-2.) According to respondent,  
27 appellant's former spouse did not report on her 2006 return that she received alimony payments.  
28 (*Id.*, fn. 1.) Respondent asserts that appellant's former spouse signed her 2006 return under penalty of

1 perjury and she would have been required to report any alimony received pursuant to Internal Revenue  
2 Code (IRC) section 71(a) and Treasury Regulations section 1.215-1. Attached to respondent's reply  
3 brief is appellant's former spouse's 2006 federal return. (*Id.*, exhibit M.) Respondent contends that in a  
4 telephone conversation on March 16, 2011, appellant stated that he was unable to provide evidence of  
5 payment because his employer never complied with the court order to withhold income for spousal  
6 support and he directly paid alimony to his former spouse with checks drawn from Washington Mutual  
7 bank, which is no longer in business. (*Id.*, p. 2.)

### 8 Applicable Law

#### 9 Assessment Based on Federal Determination

10 Revenue and Taxation Code (R&TC) section 18622, subdivision (a), provides that when  
11 the IRS makes a change or correction to a taxpayer's federal account that results in an increase in the  
12 amount of state tax payable, the taxpayer must either concede the accuracy of the federal determination  
13 or state wherein the federal change is erroneous. A state deficiency assessment that is based on a federal  
14 report is presumptively correct and the taxpayer bears the burden of proving error. (*Appeal of Sheldon I.*  
15 *and Helen E. Brockett*, 86-SBE-109, June 18, 1986.) Absent uncontradicted, credible, competent and  
16 relevant evidence showing that respondent's determinations are incorrect, respondent's proposed  
17 assessment must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.)  
18 An appellant's failure to produce evidence that is within his or her control gives rise to a presumption  
19 that such evidence is unfavorable to his or her case. (*Appeal of Don A. Cookston*, 83-SBE-048,  
20 Jan. 3, 1983.)

#### 21 Deductions in General

22 Income tax deductions are a matter of legislative grace and the burden is on the appellant  
23 to show by competent evidence that he is entitled to deductions claimed. (*Appeal of James C. and*  
24 *Monablance A. Walshe*, 75-SBE-073, Oct. 20, 1975; *New Colonial Ice Co. v. Helvering* (1934) 292  
25 U.S. 435.) To carry his burden of proof, appellant must point to an applicable statute and show by  
26 credible evidence that the deductions he claims come within its terms. (*Appeal of Robert R. Telles*,  
27 86-SBE-061, Mar. 4, 1986.) Respondent's denials of claimed deductions are presumed correct. (*Appeal*  
28 *of Gilbert W. Janke*, 80-SBE-059, May 21, 1980.)

### Alimony Deduction

In general, alimony received by a taxpayer's former spouse is taxable to him or her as ordinary income. (Int. Rev. Code, § 71(a); Rev. & Tax. Code, § 17081.) Conversely, alimony payments made by a taxpayer are deductible by him or her. (Int. Rev. Code, § 215; Rev. & Tax. Code, § 17201.)<sup>4</sup> IRC section 71, subsection (b)(1), defines alimony payments under a four-part test:

- (A) Such payment is received by a spouse under a divorce or separation instrument,
- (B) The divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under IRC section 215,
- (C) In the case of an individual legally separated from his spouse under a decree of 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
- (D) There is no liability to make any such payment for any period after the death of the 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.

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

### Unreimbursed Employee Expenses Deductions

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

### Medical Deductions

R&TC section 17201 incorporates IRC section 213, which allows as a deduction any expenses paid during the taxable year for the "medical care" of the taxpayer, his/her spouse, and

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<sup>4</sup> IRC sections 71 and 215 are incorporated into California tax law by R&TC sections 17081 and 17201, respectively.

1 dependents that are not compensated for by insurance or otherwise, but only to the extent that such  
2 medical expenses exceed seven and one-half percent of federal AGI. The term “medical care” is defined  
3 to include the diagnosis, cure, mitigation, treatment, or prevention of disease. (Treas. Reg. § 1.213-  
4 1(e)(1)(i).) For a taxpayer to substantiate medical expenses under IRC section 213, the taxpayer must  
5 furnish the name and address of each person to whom payment was made and the amount and date of  
6 each payment. (Treas. Regs. § 1.213-1(h); see also *Davis v. Commissioner*, T.C. Memo 2006-272.)  
7 When a taxpayer fails to provide documentation to support claimed deductions for medical expenses, a  
8 court is not required to accept the taxpayer’s self-serving and uncorroborated testimony in this regard  
9 and may sustain the IRS’s determination denying a claimed medical expense deduction. (See *Davis v.*  
10 *Commissioner, supra; Hunter v. Commissioner*, T.C. Memo 2000-249; *Nwachukwu v. Commissioner*,  
11 T.C. Memo. 2000-27.)

#### 12 Financial Inability to Pay Assessment

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

#### 17 STAFF COMMENTS

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. Appellant should be  
20 prepared to discuss the facts and circumstances surrounding the disallowed deduction of \$8,112 for  
21 claimed alimony paid, \$609 of claimed medical expenses deduction, and \$163 of claimed unreimbursed  
22 employee expenses. He should also be prepared to discuss whether he still contends that the IRS  
23 erroneously disallowed these deduction amounts and, if so, to present documentary evidence to support  
24 his entitlement to these deduction amounts, such as cancelled checks made payable to his former spouse.  
25 In addition, the parties should be prepared to present any evidence that the IRS cancelled or reduced its  
26 assessment. Appellant may wish to discuss whether he protested the federal disallowance of the claimed  
27 deduction amounts and the outcome of any such protest.

28 Pursuant to California Code of Regulations, title 18, section 5523.6, if appellant is able to

1 locate any additional evidence supporting his appeal, it should be submitted if possible to the Board and  
2 respondent at least 14 days prior to the hearing date.<sup>5</sup>

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28 <sup>5</sup> Exhibits should be submitted to: Claudia Madrigal, Board Proceedings Division, Board of Equalization. P. O. Box 942879  
MIC: 80, Sacramento, CA 94279-0080