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

10 In the Matter of the Appeal of:) **HEARING SUMMARY²**
 11) **PERSONAL INCOME TAX APPEAL**
 12 **JIMMY A. PRINCE¹**) Case No. 535124
 13)

	<u>Years</u>	<u>Proposed Assessments</u>	
		<u>Tax</u>	<u>Penalties³</u>
	1997	\$1,854.00	\$2,156.76
	1998	\$20,539.00	\$15,215.20
	1999	\$13,986.00	\$9,307.51

18 Representing the Parties:

19
 20 For Appellant: Jimmy A. Prince
 21 For Franchise Tax Board: Cynthia D. Kent. Tax Counsel
 22
 23

24 ¹ Appellant resides in Los Angeles, California.

25 ² According to respondent, the time involved between the tax years at issue and the filing of this appeal is due to a federal
 26 audit, a federal administrative appeal, as well as federal litigation. (Resp. Opening Br., p. 1, fn. 1.)

27 ³ The penalty amounts listed above include estimated amnesty, accuracy-related, and late filing penalties for 1997, estimated
 28 amnesty and accuracy-related penalties for 1998, and estimated amnesty and accuracy-related penalties for 1999.
 Respondent states that it has withdrawn the 1997 accuracy-related and late filing penalties and the 1998 and 1999 accuracy-
 related penalties, which will reduce the estimated amnesty penalty amount and interest for each of the tax years at issue.
 (Resp. Opening Br., p. 1, fns. 2-4, pp. 4-5, fns. 12-14.)

- 1 QUESTIONS: (1) Whether the proposed assessments are barred by the statute of limitations.
2 (2) Whether appellant has established error in the proposed assessments, which are
3 based on federal determinations.
4 (3) Whether the Board has jurisdiction to determine whether appellant's tax
5 liabilities for 1997, 1998, or 1999 have been discharged in bankruptcy.
6 (4) Whether the Board has jurisdiction to abate the amnesty penalties.

7 HEARING SUMMARY

8 Background

9 This appeal arises from respondent's action affirming its proposed assessment of tax,
10 penalties, and interest for tax years 1997, 1998 and 1999. Respondent has abated the applicable
11 accuracy-related and late filing penalties for each of the tax years at issue. Accordingly, staff has not
12 included a discussion of the contentions and law regarding the imposition of these penalties.

13 On March 29, 1999, appellant filed a California return for tax year 1997 on which he
14 reported head of household (HOH) filing status and claimed a personal exemption credit of \$68 and
15 dependent exemption credits of \$136. On the return, he reported a loss of \$10,119 for California
16 adjusted gross income (AGI), claimed total deductions in the amount of \$5,166 resulting in a loss of
17 \$15,285 and reported a self-assessed tax liability of zero. (Resp. Opening Br., p. 2, exhibits A, B.)

18 Appellant filed a timely California return for tax year 1998 on which he reported HOH
19 filing status and claimed a personal exemption credit of \$70 and dependent exemption credits of \$506.
20 On the return, he reported a loss of \$20,816 for California AGI, claimed total deductions in the
21 amount of \$5,284 resulting in a loss of \$26,100, and reported a self-assessed tax liability of zero.
22 (Resp. Opening Br., p. 2, exhibits D.)

23 Appellant filed a timely California return for tax year 1999 on which he reported HOH
24 filing status and claimed a personal exemption credit of \$72 and dependent exemption credits of \$454.
25 On the return, he reported California AGI of \$1 and claimed total deductions in the amount of \$5,422
26 resulting in a loss of \$5,421, and reported a self-assessed tax liability of zero. (Resp. Opening Br.,
27 p. 2, exhibits F.)

28 Respondent subsequently received information from the Internal Revenue Service

1 (IRS) indicating that the IRS audited appellant's 1997, 1998, and 1999 federal returns and made
2 adjustments to his reported income and itemized deductions, which increased his 1997, 1998, and
3 1999 taxable income. (Resp. Opening Br., p. 2.) Appellant did not notify respondent of the federal
4 adjustments for any of the tax years at issue. (*Ibid.*) On March 16, 2009, respondent received a
5 federal Revenue Agent Report (RAR) Form 5278, Statement – Income Tax Changes, which indicates
6 that the income tax changes for tax years 1997, 1998 and 1999 are based on a tax court opinion, and a
7 copy of a United States Tax Court Order and Decision dated September 30, 2003. (*Id.*, exhibit G.)
8 The Form 5278 shows that for tax year 1997 the IRS increased appellant's federal taxable income by
9 \$57,914 from a loss of \$23,614 to \$34,300 by including Schedule C gross receipts of \$5,261,
10 disallowing expense deductions of \$48,578, adjusting the standard deduction by \$1,900, adjusting the
11 exemptions by \$5,300 and allowing a deduction of \$3,125 for the self employment tax. (*Ibid.*) The
12 IRS increased appellant's federal tax liability from zero to \$12,656 and imposed a late filing penalty in
13 the amount of \$3,164.00 and an accuracy-related penalty in the amount of \$2,531.20. (*Ibid.*)

14 Respondent issued a Notice of Proposed Assessment (NPA) dated August 28, 2009, for
15 tax year 1997 based on the federal information. (Resp. Opening Br., p. 2, exhibit H.) The NPA
16 increased appellant's taxable income by \$53,297 from a loss of \$15,285 to \$38,012 by including
17 unreported gross receipts of \$5,261, disallowing expense deductions of \$48,578, adjusting the standard
18 deduction by \$2,583, and allowing a deduction of \$3,125 for one-half of the self employment tax. (*Id.*,
19 p. 2, fn. 5) Pursuant to the federal audit, respondent also changed appellant's filing status from HOH
20 to single and disallowed his two claimed dependent exemption credits. (*Id.*, p. 3, fn. 6.) The NPA
21 proposes additional tax of \$1,854.00 and imposes a late filing penalty of \$463.50, an accuracy related
22 penalty of \$741.60 and an estimated amnesty penalty of \$951.66, plus accrued interest. (*Id.*, pp. 2-3)

23 The Form 5278 shows that for tax year 1998 the IRS increased appellant's federal
24 taxable income by \$271,975 from a loss of \$35,166 to \$236,809 by including Schedule C gross
25 receipts of \$26,631, disallowing expense deductions of \$205,156 and net operating loss (NOL)
26 carryover of \$37,181, adjusting the standard deduction by \$2,000 and the exemptions by \$7,938 and
27 allowing a deduction of \$6,337 for the self employment tax and a deduction of \$594 for the self-
28 employment health insurance. (Resp. Opening Br., p. 2, exhibit G.) The IRS increased appellant's

1 federal tax liability from zero to \$87,796.00 and imposed an accuracy related filing penalty in the
2 amount of \$17,559.20. (*Ibid.*)

3 Respondent issued an NPA dated August 28, 2009, for tax year 1998 based on the
4 federal information. (Resp. Opening Br., p. 3, exhibit I.) The NPA increased appellant's taxable
5 income by \$264,679 from a loss of \$26,100 to \$238,579 by including unreported gross receipts of
6 \$26,631, disallowing expense deductions of \$205,156 and NOL carryover of \$37,181, adjusting the
7 standard deduction by \$2,642, and allowing a deduction of \$6,337 for one-half of the self employment
8 tax and a deduction of \$594 for the self-employment health insurance. (*Id.*, p. 3, fn. 7.) Pursuant to
9 the federal audit, respondent also changed appellant's filing status from HOH to single, disallowed his
10 two claimed dependent exemption credits and his personal exemption credit. (*Id.*, p. 3, fn. 8.) The
11 NPA proposes additional tax of \$20,539.00 and imposes an accuracy related penalty of \$8,215.60 and
12 an estimated amnesty penalty of \$6,999.60, plus accrued interest. (*Id.*, p. 3, exhibit I.)

13 The Form 5278 shows that for tax year 1999 the IRS increased appellant's federal
14 taxable income by \$179,833 from a loss of \$14,600 to \$165,233 by disallowing expense deductions of
15 \$178,124 adjusting the standard deduction by \$2,050 and the exemptions by \$6,490 and allowing a
16 deduction of \$6,831 for the self employment tax. (Resp. Opening Br., p. 2, exhibit G.) The IRS
17 increased appellant's federal tax liability from zero to \$61,711.00 and imposed an accuracy related
18 penalty in the amount of \$12,342.20. (*Ibid.*)

19 Respondent issued an NPA dated August 28, 2009, for tax year 1999 based on the
20 federal information. (Resp. Opening Br., p. 3, exhibit J.) The NPA increased appellant's taxable
21 income by \$174,004 from a loss of \$5,421 to \$168,583 by disallowing expense deductions of
22 \$178,124, adjusting the standard deduction by \$2,711, and allowing a deduction of \$6,831 for one-half
23 of the self employment tax. (*Id.*, p. 3, fn. 9, exhibit J.) Pursuant to the federal audit, respondent also
24 changed appellant's filing status from HOH to single, disallowed his two claimed dependent
25 exemption credits and his personal exemption credit. (*Id.*, p. 3, fn. 10, exhibit J.) The NPA proposes
26 additional tax of \$13,986.00 and imposes an accuracy related penalty of \$5,594.40 and an estimated
27 amnesty penalty of \$3,713.11, plus accrued interest. (*Id.*, p. 3, exhibit J.)

28 In a letter dated October 21, 2009, appellant protested the NPAs for each of the tax

1 years at issue, stating that all unpaid taxes for the time periods were discharged by the United States
2 Bankruptcy Court in a Chapter 7 bankruptcy case (LA 05-22759-AA) filed on June 2, 2005 and
3 discharged on January 27, 2006, the statute of limitations expired on April 15, 2003, and the
4 “assessment based on IRS’s incorrect projections is in dispute.” (Resp. Opening Br., p. 4, exhibit N.)⁴
5 Respondent sent appellant a letter dated January 20, 2010, which states that there were no balances for
6 tax years 1997 through 1999 at the time the bankruptcy case was filed and therefore the NPA
7 assessments were not discharged in bankruptcy, the statute of limitations did not expire, and appellant
8 must provide evidence that his federal case is not yet settled or, if a final determination has been made,
9 a copy of the court decision or revised audit report that details the changes to income and tax liability.
10 (*Id.*, exhibit O.) In a letter dated February 19, 2010, appellant repeated the contentions contained in
11 his October 21, 2009 letter and provided the docket number CV09-06436RGK-PJWX for the “said
12 case.” (*Id.*, exhibit P.) Respondent sent appellant another letter dated March 30, 2010, in which it
13 offered to keep the matter in pending status if appellant’s dispute with the IRS was still unresolved but
14 that appellant must provide supporting documentation by no later than April 14, 2010. (*Id.*, exhibit
15 Q.) In a letter dated April 12, 2010, appellant asserted the same contentions contained in his prior
16 protest letters and stated that he was insolvent since the filing of his bankruptcy, was not gainfully
17 employed, and owned no property. He also asserted that the correct tax liabilities for “those years” is
18 \$5,100. (*Id.*, exhibit R.)

19 Respondent issued Notices of Action (NOAs) dated May 14, 2010, for tax year 1997,
20 1998, and 1999 affirming the NPAs. (Appeal Letter, Attachment.) This timely appeal followed.

21 Contentions

22 Appellant’s Contentions

23 Appellant contends there is evidence to prove that the 1997, 1998, and 1999
24 assessments were based on inaccurate records. (Appeal Letter, p. 1.) He further contends that the IRS
25 conducted an audit in 2003 based solely on bank statements and sales without considering 1997, 1998,
26 and 1999 business expenses. (*Ibid.*) He also contends, “The business expense documents, invoices,
27

28 ⁴ Staff notes that the protest letter regarding the NPAs for tax years 1997, 1998, and 1999 is dated October 21, 2009, but date stamped as received by respondent on October 15, 2009. (Resp. Opening Br., p. 3, exhibit N.)

1 purchase and transaction documents were seized by Los Angeles Police Department via a Search
2 Warrant served on the business during the audit and was not available at the time. (See Attachment
3 A)” (*Ibid.*) According to appellant, a certified public accountant conducted a proper income tax
4 preparation using supporting documents and his aggregate tax liability for the three tax years at issue
5 is approximately \$5,100. (*Ibid.*) Specifically, appellant asserts the following: 1) for tax year 1997,
6 his net income was a loss of \$2,686 and his tax liability was zero; 2) for tax year 1998, his net income
7 was a loss \$6,219, which consists of a net profit of \$30,962 less \$37,181 net loss carry over for tax
8 years 1994-1997, and his tax liability was \$4,718; and for 1999, his net income was a loss of \$5,271
9 and his tax liability was \$745. (*Ibid.*) Appellant argues that California “has a duty to conduct an
10 independent and thorough Tax Audit for the years using back up documents in order to ascertain the
11 accurate tax assessment.” (*Id.*, p. 2.) Appellant contends the documents are preserved and he is
12 available for such an audit. (*Ibid.*) Appellant argues that the statute of limitations expired on April 15,
13 2003, and the unpaid tax liabilities for tax years 1997, 1998 and 1999 were discharged on January 27,
14 2006, as a result of a chapter 7 bankruptcy action (case number LA 05-22757-AA) he filed in the
15 United States bankruptcy court on June 2, 2005. (*Ibid.*) Lastly, appellant argues that even if the
16 assessments are deemed to be correct, he has no ability to pay for the following reasons: 1) he is
17 insolvent since he filed for bankruptcy; 2) he is not gainfully employed; 3) he owns no valuable
18 property; and 4) the correct federal tax liabilities for the tax years at issue is \$5,100. (*Ibid.*) Attached
19 to the Appeal Letter are the 1997, 1998, and 1999 NOAs, a letter dated September 13, 2003 from
20 appellant to Judge David Laro of the United States Tax Court, and income adjustment item
21 spreadsheets for tax year 1997, 1998, and 1999. (*Id.*, Attachments)

22 Respondent’s Contentions

23 Statute of Limitations

24 Respondent argues that the assessments at issue are not barred by the statute of
25 limitations for the following reasons: 1) the federal transcripts for each of the tax years at issue
26 indicate the final federal determination date is January 28, 2004; 2) appellant did not notify respondent
27 of the federal determinations; 3) on March 16, 2009, respondent received notice from the IRS of the
28 federal determination for each of the tax years at issue; and 4) respondent timely issued the NPAs for

1 the tax years at issue on August 28, 2009, which is within four years of March 16, 2009. (Resp.
2 Opening Br., pp. 7-8, exhibit K, p. 2, transaction code 300, exhibit L, p. 2, transaction code 300,
3 exhibit M, p. 2, transaction code 300.)

4 Deficiency Assessment

5 Respondent contends that appellant failed to establish error in the proposed assessments
6 for tax years 1997, 1998 and 1999, which are all based on a federal audit. (Resp. Opening Br., p. 5.)
7 According to respondent, the adjustments made to appellant's California taxable income and tax
8 liabilities for the tax years at issue follow the federal adjustments. (*Id.*, p. 6.) Respondent asserts that,
9 other than a letter he drafted and submitted to the tax court judge objecting to its ruling, which is
10 attached to the Appeal Letter, appellant has failed to provide any supporting documentation that shows
11 the federal determination is in error and his accumulated federal tax liabilities amount to
12 approximately \$5,100. (*Ibid.*) Although appellant argues that the Los Angeles Police Department
13 possessed his business records at the time of the federal audit, respondent contends the federal audit
14 was completed and appellant filed his petition with the tax court on May 28, 2002, which was almost
15 10 months prior to the execution of the search warrant in March 2003. (*Id.*, fn. 16, exhibit T, p. 1,
16 No. 0001 citing *Prince II, supra*, at p. 2.)

17 Respondent contends that public records indicate the IRS's efforts at collecting the
18 federal assessments remain at issue, but the merits of the federal assessments are not the subject of any
19 ongoing litigation. (Resp. Opening Br., p. 6.) Respondent asserts that appellant filed a federal tax
20 court petition regarding the federal notices of deficiencies. (*Id.*, exhibit T, p. 1, No. 0001.) Citing
21 *Prince v. Commissioner* (2009) 133 T.C. No. 12, 2 (*Prince II*), respondent contends that the Los
22 Angeles Police Department confiscated appellant's funds on the grounds they were related to alleged
23 criminal activity during the time when appellant's petition was pending in tax court. (*Id.*) Citing
24 *Prince v. Commissioner* (2003) 86 T.C.M. (CCH) 283 (*Prince I*), respondent also contends that on
25 September 30, 2003, the tax court issued an order and decision in favor of the IRS. (*Id.*, exhibit G,
26 p. 2, exhibit T, p. 2, No. 0019.) Respondent further contends that appellant filed a notice of appeal,
27 which was dismissed for failure to comply with Appellate Court Rules. (*Id.*, exhibit T, p. 2, No.
28 0022.) Respondent asserts that the IRS assessed the deficiencies on January 28, 2004, pursuant to the

1 tax court decision and it filed a notice of federal tax lien with the Los Angeles County Recorder on
2 April 7, 2005. (*Id.*, exhibits K, L, M citing *Prince II, supra*, at p. 3.)

3 Respondent contends that, even though \$212,237.89 remained in the possession of the
4 Los Angeles Police Department, appellant failed to list the confiscated funds as assets when he filed
5 his June 2, 2005 Chapter 7 bankruptcy petition. (*Id.* citing *Prince II, supra*, at p. 3.) Respondent
6 further contends that the bankruptcy petition was treated as a voluntary no-asset case and on
7 January 27, 2006, appellant was granted a discharge of debts. (*Id.*, exhibit U, pp. 1, 4, No. 38.)
8 According to respondent, the IRS was notified in early December 2007 that appellant's previously
9 seized funds were about to be returned to him, and on December 7, 2007, the IRS served a notice of
10 jeopardy levy, which appellant appealed. (*Id.*, exhibit V citing *Prince II, supra*, at p. 4.)

11 Respondent asserts that there are currently two pending actions concerning the seized
12 funds: 1) on September 3, 2009, appellant filed a complaint in the United States District Court against
13 the United States for wrongful levy (Respondent's Opening Br., p. 7, exhibit W); and 2) on October 5,
14 2009, the IRS filed a motion to reopen appellant's bankruptcy case regarding the undisclosed funds
15 and the bankruptcy court granted the motion on December 7, 2009 (*id.*, exhibit U, p. 4, Nos. 41-43.).
16 Respondent further asserts that these two pending actions are not relevant to the present appeal before
17 the Board because they concern only the issue of collection of the federal deficiencies and have no
18 bearing on the accuracy of the federal determinations. (Resp. Opening Br., p. 7.) Respondent also
19 asserts that it recently obtained federal transcripts of appellant's 1997, 1998, and 1999 federal
20 accounts, which indicate there has been no change regarding the accuracy of the federal assessments.
21 (*Ibid.*) Respondent notes, however, that following the bankruptcy discharge the federal deficiencies
22 were discharged and then reinstated. (*Id.*, fn. 17.) As discussed below, respondent argues that the
23 additional tax and amnesty penalties that are the subject of the present appeal could not have been
24 discharged in bankruptcy because they were not final and were not assessed 240 days prior to
25 appellant's filing of the bankruptcy petition. (*Ibid.*) Respondent thus argues that appellant should
26 produce any documentation that supports his contention that the additions to income reflected on the
27 federal RAR and used in adjusting his California tax liabilities for the tax years at issue are erroneous
28 and he is entitled to the disallowed deductions. (*Id.*, p. 7.)

1 Bankruptcy and Amnesty Penalties

2 Citing *Appeal of Robert G. and Jean C. Smith*, 81-SBE-145, Oct. 27, 1981, respondent
3 contends that the Board has repeatedly held that it lacks subject matter jurisdiction to determine
4 whether an amount was or should have been discharged in bankruptcy. (Resp. Opening Br., p. 8.)
5 Furthermore, respondent argues that its assessments of additional tax due and the amnesty penalties for
6 each of the tax years at issue were not discharged in bankruptcy because appellant received a
7 discharge under 11 U.S.C. section 727, which does not discharge appellant from any debts described
8 in 11 U.S.C. section 523. Citing *Franchise Tax Board v. Bracey* (9th Cir. 1996) 77 F.3d 294, 295,
9 respondent argues that under 11 U.S.C. sections 523(a)(1)(A) and 507(a)(8)(A)(iii), the tax portions of
10 the proposed assessments are not discharged because the assessments were not final at the time
11 appellant filed his bankruptcy petition on June 2, 2005. (*Ibid.*) Respondent asserts that the NPAs for
12 the tax years at issue were not issued until August 28, 2009 and thus were not final on June 2, 2005.
13 (*Ibid.*) Accordingly, respondent contends that the tax portions of the assessments were not discharged
14 in bankruptcy. (*Ibid.*) Citing *McKay v. United States* (9th Cir. 1992) 957 F.2d 689, 693-94,
15 respondent also argues that under 11 U.S.C. section 523(a)(7), the amnesty penalties were also not
16 discharged in bankruptcy because they relate to taxes that were not discharged under 11 U.S.C. section
17 523(a)(1). (*Ibid.*) Respondent also argues that the amnesty penalties relate to a transaction or event
18 that occurred on or after June 2, 2002, because appellant could have avoided the amnesty penalties by
19 taking action by no later than March 31, 2005, the last day of the amnesty program. (*Ibid.*)

20 Although appellant does not expressly request abatement of the amnesty penalties for
21 the tax years at issue, respondent presumes that the appeal contests the entire proposed assessments
22 affirmed by the NOAs, including the amnesty penalties. (Resp. Opening Br, p. 9.) Citing *Appeal of*
23 *Schillace*, 95-SBE-005, Aug. 2, 1995, respondent contends that the Board does not have jurisdiction to
24 consider abatement of the amnesty penalties until they have been assessed as final liabilities and have
25 been paid. (*Ibid.*)

26 Financial Hardship

27 Respondent contends there is no provision under the law for a withdrawal of a proposed
28 assessment or abatement of tax because a taxpayer is experiencing a financial hardship. (Resp.

1 Opening Br, p. 9.) Respondent also contends that in the case of extreme financial hardship caused by
2 significant disability or other catastrophic circumstance it has discretion to abate interest under
3 Revenue and Taxation Code (R&TC) section 19112. (*Ibid.*) Respondent further contends that there is
4 no provision in R&TC section 19112 or other law that gives the Board jurisdiction to determine
5 whether R&TC section 19112 applies in this instance. (*Ibid.*) According to respondent, appellant has
6 not shown that he has suffered extreme financial hardship caused by a significant disability or other
7 catastrophic circumstances. (*Ibid.*)

8 Respondent asserts that it has three collection programs that address a taxpayer's
9 financial hardship, but each of them is a collection program that can only be availed upon the closure
10 of this appeal. (Resp. Opening Br., p. 10.) Respondent lists the following programs: 1) appellant may
11 request an abatement of interest due to extreme financial hardship by sending his request and
12 documentation of the extreme financial hardship to respondent at the address provided; 2) appellant
13 may apply for an Offer in Compromise; and 3) appellant may enter into an installment agreement.
14 (*Ibid.*)

15 Applicable Law

16 Statute of Limitations

17 In general, respondent must issue an NPA within four years of the date the taxpayer
18 filed his California return. (Rev. & Tax. Code, § 19057.) However, there are special statutes of
19 limitations when federal adjustments are involved. A taxpayer is required to report federal changes to
20 income or deductions to respondent within six months of the date the federal changes become final.
21 (Rev. & Tax. Code, § 18622.) If the taxpayer complies with that requirement, respondent may issue
22 the NPA within two years of the date of notification. (Rev. & Tax. Code, § 19059.) If the taxpayer or
23 the IRS notify respondent more than six months after the date the federal changes become final, then
24 respondent may issue the NPA within four years of the date of notification. (Rev. & Tax. Code,
25 § 19060, subd. (b).) If the taxpayer fails to notify respondent of the federal change, respondent may
26 issue the NPA at any time. (Rev. & Tax. Code, § 19060, subd. (a).) The California Supreme Court
27 clarified that the specific statute of limitations found in under R&TC section 19060 controls over the
28 general statute of limitations in section 19057. (*Ordlock v. Franchise Tax Board* (2006) 38 Cal.4th

1 897.)⁵

2 Accuracy of Assessments

3 R&TC section 18622 provides that a taxpayer shall either concede the accuracy of a
4 federal determination or state wherein it is erroneous. It is well-settled that a deficiency assessment
5 based on a federal audit report is presumptively correct and the taxpayer bears the burden of proving
6 that the determination is erroneous. (*Appeal of Sheldon I. and Helen E. Brockett*, 86-SBE-109,
7 June 18, 1986; *Todd v. McColgan* (1949) 89 Cal.App.2d 509.) Unsupported assertions are not
8 sufficient to satisfy appellants' burden of proof with respect to an assessment based on federal action.
9 (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence of
10 uncontradicted, credible, competent, and relevant evidence showing that respondent's determinations
11 are incorrect, they must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18,
12 1980.) An appellant's failure to produce evidence that is within his control gives rise to a presumption
13 that such evidence is unfavorable to his case. (*Appeal of Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.)

14 Deductions

15 It is well established that deductions from gross income are a matter of legislative grace
16 and the burden is on appellant to show by competent evidence that he is entitled to deductions
17 claimed. (*Appeal of James C. and Monablance A. Walshe*, 75-SBE-073, Oct. 20, 1975; *New*
18 *Colonial Ice Co. v. Helvering* (1934) 292 U.S. 435.) Appellant's burden of proof is not met by
19 unsupported allegations. (*Appeal of Gilbert W. Janke*, 80-SBE-059, May 21, 1980.) To carry his
20 burden of proof, appellant must point to an applicable statute and show by credible evidence that the
21 deductions he claims come within its terms. (*Appeal of Robert R. Telles*, 86-SBE-061, Mar. 4, 1986.)

22 Discharge in Bankruptcy

23 The Bankruptcy Code enumerates certain classes of debts that are not dischargeable.
24 (11 U.S.C. § 523(a)(1)-(12).) Bankruptcy Code sections 523(a)(1) and 507(a)(8) provide that taxes are
25 not dischargeable if, at the time the bankruptcy is filed, the taxes are "assessable," but not finally
26

27
28 ⁵ The Court of Appeal had held that R&TC section 19060 does not apply when the federal action becomes final after the
general four-year statute of limitations in R&TC section 19057 expires. (*Ordlock v. Franchise Tax Board* (2004) 120
Cal.App.4th 1366 [depublished at 21 Cal.Rptr.3d 610].) The Supreme Court reversed and held that the specific language of
R&TC section 19060 applies notwithstanding R&TC section 19057. (*Ordlock, supra*, 38 Cal.4th at pp. 909-912.)

1 assessed. Decisions as to whether a particular debt has been discharged by the bankruptcy court are
2 within the exclusive jurisdiction of the bankruptcy court as to debts within classes provided for under
3 section 523(a)(2), (a)(4), and (a)(6). The federal and state courts have concurrent jurisdiction to pass
4 on dischargeability of debts in the remaining classes, which includes tax debts. (*In re Aldrich* (9th Cir.
5 BAP, 1983) 34 B.R. 776.) The concurrent jurisdiction of the state courts relates only to those courts of
6 general jurisdiction. However, the Board's jurisdiction is of a limited nature and bankruptcy discharge
7 issues are specifically proscribed. (Cal. Code Regs., tit. 18 § 5412, subd. (b)(3).)

8 In addition, the Board previously held that it lacks jurisdiction to determine whether a
9 discharge in bankruptcy applies to respondent's assessment of tax, penalties, and interest. (*Appeal of*
10 *Robert G. and Jean C. Smith, supra; Appeals of Fred R. Dauberger, et al.*, 82-SBE-082, Mar. 31,
11 1982.) The determination of dischargeability must therefore be raised in a different forum, such as a
12 bankruptcy court. It thus appears that the Board lacks jurisdiction to determine whether appellant's
13 tax liabilities for tax years 1997, 1998, and 1999 have been discharged in bankruptcy.

14 Moreover, it appears that appellant's tax liabilities would not have been discharged in
15 bankruptcy because Bankruptcy Code section 523(a)(1)(A) specifically excludes from discharge all
16 taxes that are entitled to priority under Bankruptcy Code section 507(a). Thus, appellant's discharge
17 in bankruptcy does not necessarily mean he is freed from all of his obligations. Bankruptcy Code
18 section 507(a) provides a priority for "unsecured claims of governmental units to the extent that such
19 claims are for a tax ... not assessed before, but assessable, under applicable law or by agreement, after
20 the commencement of the case." (11 U.S.C. § 507(a)(8)(A)(iii).) Therefore, a tax liability needs to be
21 assessed prior to appellant's filing of his petition in bankruptcy in order for it to be discharged.

22 An NPA becomes final after 60 days if it is not protested. (Rev. & Tax. Code,
23 § 19042.) The NPAs for the tax years at issue did not become final because appellant timely protested
24 the NPAs for tax years 1997, 1998, and 1999 on October 15, 2009. (Rev. & Tax. Code, § 19041.) If
25 an NPA is protested and an NOA is issued, then the assessment becomes final after 30 days if the
26 NOA is not appealed. (Rev. & Tax. Code, § 19045.) Appellant filed a timely appeal to the Board
27 from respondent's action upon the protest on June 14, 2010 (the post-mark date). (Rev. & Tax. Code,
28 §§ 19041, 19045; Cal. Code Regs., tit. 18, § 5422, subd. (c).) If the Board sustains respondent's action

1 on appeal, the assessments at issue will not become final until 30 days after the Board's decision on
2 this appeal assuming that appellant does not file a petition for rehearing. (Rev. & Tax. Code,
3 § 19048.) Therefore, respondent's tax assessments were not final before appellant's bankruptcy
4 petition was filed, and thus were exempt from discharge under Bankruptcy Code section 523(a)(1)(A).

5 Amnesty Penalties

6 In 2004, the Legislature enacted Senate Bill 1100 (Stats. 2004. Ch. 226) adding R&TC
7 sections 19730 through 19738, which set forth the provisions for the income tax amnesty program;
8 taxpayers who paid outstanding tax and interest liabilities were granted relief from most penalties.
9 R&TC section 19733, subdivision (a), paragraph (3), specifies that within 60 days of the conclusion of
10 the program period (February 1 through March 31, 2005) the taxpayer must file a return and pay the
11 tax and interest or enter into an installment agreement to pay the tax and interest. R&TC section
12 19777.5 generally provides that, for each tax year for which amnesty could have been requested by the
13 taxpayer, the amnesty penalty will be imposed in an amount equal to 50 percent of interest accrued on
14 unpaid tax as of the last day of the amnesty period, March 31, 2005. The amnesty penalty is imposed
15 in addition to any other applicable penalties.

16 The amnesty provisions give respondent no discretion to determine whether the
17 amnesty penalty should be imposed. In addition, the amnesty provisions strictly limit the Board's
18 ability to review respondent's imposition of the amnesty penalty. Among other things, subdivision (d)
19 of R&TC section 19777.5 states, "Article 3 (commencing with Section 19031), (relating to deficiency
20 assessments) shall not apply with respect to the assessment or collection of [the amnesty penalty]."
21 Article 3 sets forth the procedure for a taxpayer to protest a proposed assessment. Thus, subdivision
22 (d) of R&TC section 19777.5 provides that a taxpayer may not contest the assessment of the amnesty
23 penalty by respondent under the protest procedures that are applicable to deficiency assessments.
24 Because the protest provisions are not applicable to the amnesty penalty, there is no action by
25 respondent for the Board to review under R&TC section 19045 when a taxpayer challenges the
26 assessment of the amnesty penalty in a deficiency proceeding. Even if the Board did have the
27 jurisdiction to review respondent's imposition of an amnesty penalty in a deficiency appeal, the
28 amnesty provisions do not provide a reasonable cause exception or any similar exception to the

1 imposition of the amnesty penalty.

2 Subdivision (e)(2) of R&TC 19777.5 only grants the Board jurisdiction to review
3 respondent's imposition of the amnesty penalty where a taxpayer paid the amnesty penalty, filed a
4 refund claim asserting that respondent failed to "properly compute" the amount of the penalty and
5 respondent denied this refund claim.

6 STAFF COMMENTS

7 The NPAs are not barred by any statute of limitations period because appellant failed to
8 notify respondent of the federal changes and respondent issued the NPAs less than six months after
9 receiving notification of the federal changes. Appellant should be prepared to argue and provide
10 supporting evidence establishing error in the proposed assessment or error, revision or revocation of
11 the federal changes or evidence that the federal changes are still pending. Appellant should also be
12 prepared to argue and show supporting evidence that his accumulated federal tax liabilities amount to
13 approximately \$5,100. Pursuant to California Code of Regulations, title 18, section 5523.6, if
14 appellant is able to locate any additional evidence supporting his appeal, it should be submitted if
15 possible to the Board and respondent at least 14 days prior to the hearing date.⁶

16 Appellant should also be prepared to discuss whether the Board has the requisite
17 subject matter jurisdiction to decide if his personal income tax liabilities were discharged in
18 bankruptcy. (See *Appeal of Robert G. and Jean C. Smith, supra.*) Respondent should be prepared to
19 confirm the amount of appellant's current outstanding liability for each tax in view of the fact that it is
20 withdrawing the late filing penalty and the accuracy related penalty for tax year 1997, the accuracy
21 related penalty for tax year 1998, and the accuracy related penalty for tax year 1999.

22 The Board does not have jurisdiction in this appeal to review the imposition of the
23 amnesty penalties and there is no statutory mechanism for the Board to review respondent's proposed
24 assessment of the amnesty penalties at this time. If the amnesty penalties become final liabilities and
25 are paid, then appellant will be entitled to file claims for refund if he asserts that the penalties were not
26 properly computed by respondent. (Rev. & Tax. Code, § 19777.5, subs. (e)(1) & (2).) Lastly, the

27 _____
28 ⁶ Exhibits should be submitted to: Claudia Madrigal, Board Proceedings Division, Board of Equalization. P. O. Box
942879 MIC: 80, Sacramento, CA 94279-0080

1 amnesty penalties are proper because it is undisputed that appellant failed to participate in the amnesty
2 program with respect to the additional taxes respondent assessed based on the federal audit for tax
3 years 1997, 1998 and 1999.

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