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

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11 In the Matter of the Appeal of:) **HEARING SUMMARY**
12) **PERSONAL INCOME TAX APPEAL**
13 **LAVONA D. SHELLMIRE**²) Case No. 510915

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	<u>Year</u>	<u>Proposed</u>
	2004	<u>Tax Assessment</u> ³
		\$3,770 ⁴

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18 Representing the Parties:

19 For Appellant: Lavona D. Shellmire
20 For Franchise Tax Board: Nancy E. Parker, Tax Counsel III
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22 **QUESTION:** Whether appellant has demonstrated any error in respondent's assessment of tax
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24 ¹ This electronic mail address is the preferred address for any contact.

25 ² Appellant resides in Palmdale, Los Angeles County.

26 ³ The FTB should be prepared to provide the accrued interest amount at the time of the oral hearing. According to the Notice
27 of Action (NOA) dated August 27, 2009, interest in the amount of \$1,499.46 accrued through that date.

28 ⁴ Respondent abated the \$754 accuracy-related penalty in the Notice of Proposed Assessment (NPA) and NOA. See
Respondent's Opening Brief, page 1, footnote 1.

1 based on a federal adjustment.

2 HEARING SUMMARY

3 Background

4 Appellant apparently timely filed a California tax return for 2004. On her federal and
5 California 2004 returns, appellant used the Head of Household (HOH) status; reported a “negative
6 \$31,306” in federal taxable income; and reported a “negative \$21,555” in California taxable income.⁵
7 On November 7, 2007, the Franchise Tax Board (FTB or respondent) received from the Internal
8 Revenue Service (IRS) information that, as summarized by respondent in its “FEDSTAR IRS Data
9 Sheet” dated November 4, 2009⁶, states the IRS audited appellant’s federal 2004 return and assessed
10 additional federal tax based on a \$101,726 upward adjustment of appellant’s taxable income, from
11 negative \$31,306 to a positive \$70,420. The IRS upward adjustment was based on disallowed \$39,280
12 in itemized deductions for home mortgage interest, points, and real estate taxes; disallowance of two
13 claimed Schedule C interest deductions totaling \$31,700; and disallowance of a claimed \$43,186
14 Schedule C-2 other expenses deduction.⁷ The IRS assessed appellant \$25,938 in tax, a federal Internal
15 Revenue Code (IRC) section 6662 accuracy-related penalty, plus interest.

16 Appellant did not inform the FTB regarding the federal changes. The IRS Account
17 Transcript for appellant’s 2004 tax year shows that the federal adjustments became a final federal
18 determination on October 26, 2007. (See Respondent’s Opening Brief, Exhibit D; see also *id.* page 3,
19 paragraph 2.) On May 27, 2008, appellant requested an IRS “collections due process” hearing, but
20 withdrew or abandoned this request on March 17, 2009. On or about June 27, 2008, appellant filed for
21 bankruptcy; the bankruptcy was dismissed on or about March 17, 2009. Also on March 17, 2009, the
22 IRS entered the notation “[b]alance due amount currently not collectable.” On or about May 1, 2009,
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24 ⁵ Neither party has provided appellant’s 2004 California Tax Return or federal 1040 return for the appeal record.

25 ⁶ Respondent’s Opening Brief, Exhibit A.

26 ⁷ The deductions denied by the IRS total \$114,166 (\$12,440 more than the income adjustment amount), but the IRS
27 examination also credited appellant with \$7,150 in “itemized deductions or standard deduction” and \$5,290 in “[o]ne-half of
28 self-employment tax.” See respondent’s Opening Brief, Exhibit A, page 2 (“Federal Adjustments (E Record).” These
credited amounts reduced the income adjustment to \$101,726. The IRS examination also denied appellant’s claimed federal
Earned Income Tax Credit, but there is no California equivalent of this credit.

1 the IRS entered the notation “[l]ien placed on assets due to balance owed.” On or about May 25, 2009,
2 the IRS entered the notation “[f]ees and other expenses for collection” together with an entry for
3 “\$20.00.” (See Respondent’s Opening Brief, Exhibit D (IRS Account Transcript), page 2.)

4 After reviewing the IRS information, respondent determined that the disallowed itemized
5 deductions increased appellant’s California taxable income from “negative \$21,555” to a positive
6 \$80,540. After subtracting the HOH standard deduction amount, respondent determined that appellant’s
7 pre-credits tax was \$4,385; respondent then subtracted an \$85 personal exemption credit and \$530 in
8 dependent exemption credits for a tax amount of \$3,770. Respondent on October 20, 2008, issued a
9 Notice of Proposed Assessment (NPA) for \$3,770 in tax, interest, and the now-abated accuracy-related
10 penalty. (See Respondent’s Opening Brief, Exhibit B, pages 3-4.)

11 Appellant timely protested respondent’s NPA. In her Protest Letter appellant claimed the
12 IRS was reviewing the federal changes, and attached IRS “collection due process” documents. (See *id.*
13 pages 1-2 and 5-9.) On June 4, 2009, respondent sent appellant a letter asking her to substantiate (on or
14 before July 6, 2009) that the IRS modified or withdrew the federal assessment. (See *id.* Exhibit C.)
15 Appellant did not respond. Therefore, on August 27, 2009, respondent issued a Notice of Action (NOA)
16 affirming the NPA. Appellant then timely appealed the NOA to this Board.

17 Contentions

18 In her Appeal Letter, dated September 25, 2009, appellant states as follows:

- 19 • that “the final federal audit dispute will be reopened”;
- 20 • that “until a determination is made on that, the audit is considered still ‘pending’” that the
21 “[FTB]’s present assessment balance and the collectability of it must be placed on hold
22 until the audit reconsideration is completed by the [IRS]. . . .”;
- 23 • that appellant “has not exhausted [her] federal options and have exercised my right to an
24 Audit Reconsideration”;
- 25 • that “by law [the FTB] must wait until the [IRS] issues a determination on the Audit
26 Reconsideration and all available options afforded to me to oppose an adverse decision
27 have been exhausted . . . before the [FTB] can make a true and more accurate
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1 determination in the assessment on the referenced matter at hand.” (Emphasis included in
2 original.)

- 3 • That respondent’s requested information regarding any IRS changes to the federal
4 assessment “would not have properly assisted [the FTB] . . . because [the FTB] made [its]
5 adjustments based on the adjustments and figures provided to [FTB] by the [IRS], not
6 specific things that were directly challenged by the [FTB].”
- 7 • “The proper information needed to support my claim and determination on my federal
8 return has been submitted to the [IRS] in the Audit Reconsideration and will be used by
9 the [IRS] in their consideration for determining the amount of tax I owe . . .”
- 10 • “Upon the [IRS]’s . . . Audit Reconsideration, the [FTB] will then be provided with any
11 adjustments made to the final federal audit report as amended by the [IRS]. The [FTB]
12 can then make an assessment of my 2004 state taxes based on the reconsidered
13 information provided by the [IRS] from the most recent federal audit report compiled
14 after the Audit Reconsideration.”

15 Respondent argues that appellant’s IRS Account Transcript shows the federal
16 adjustments became final on October 26, 2007. Respondent further contends that appellant has neither
17 established error in the federal return adjustment determination, which is presumptively correct, nor has
18 she submitted any evidence that the IRS revised or cancelled the adjustment. Respondent argues that
19 there is a rebuttable presumption of correctness attached to a Franchise Tax Board NPA based on a
20 federal adjustment. (Citing *Appeal of Sheldon I and Helen E. Brockett*, 86-SBE-109, June 18, 1986;
21 *Todd v. McColgan*, (1949) 89 Cal.App.2d 509.) Respondent argues that because appellant has not
22 submitted any relevant, competent, credible and uncontradicted evidence showing error in the federal
23 assessments, she has not met her burden (citing *Appeal of Oscar D. and Agatha Seltzer*, 80-SBE-154,
24 Nov. 18, 1980), but rather has merely made unsupported assertions that do not satisfy her burden
25 (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982).

26 Appellant does not request interest abatement, and respondent does not address the issue.

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1 Applicable Law

2 Federal Determination

3 R&TC section 18622, subdivision (a), requires a taxpayer to either concede the accuracy
4 of a federal determination, or state where the federal determination is erroneous. The Board has long
5 held that a Franchise Tax Board deficiency assessment based on a federal audit report is presumptively
6 correct, and appellant/taxpayer bears the burden of proving error. (*Appeal of Sheldon I. and Helen E.*
7 *Brockett, supra; Appeal of Der Wienerschnitzel International, Inc.*, 79-SBE-063, April 10, 1979; *Todd v.*
8 *McColgan, supra.*) In R&TC section 17201, California expressly incorporates IRC provisions relating
9 to itemized deductions, including IRC sections 162 (business expenses), 163(h)(3)(home mortgage
10 interest), 164 (property taxes); in R&TC section 17551, California conforms to IRC section 461 on the
11 deductibility of real estate points. Thus, California law on the areas covered by the federal assessment is
12 identical to the IRC.

13 Once respondent has met its initial burden, the assessment is presumed correct and
14 appellant has the burden of proving it to be wrong. (*Todd v. McColgan, supra; Appeal of Michael E.*
15 *Myers*, 2001-SBE-001, May 31, 2001.) Unsupported assertions are not sufficient to satisfy appellant's
16 burden of proof. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence
17 of uncontradicted, credible, competent, and relevant evidence showing error in respondent's
18 determinations, they must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154,
19 Nov. 18, 1980.) An appellant's failure to produce evidence that is within her control gives rise to a
20 presumption that such evidence is unfavorable to her case. (*Appeal of Don A. Cookston*, 83-SBE-048,
21 Jan. 3, 1983.)

22 STAFF COMMENTS

23 At the hearing, appellant should be prepared to present documentation demonstrating
24 either: (1) that the IRS cancelled or revised the federal assessment; or (2) that the federal assessment
25 disallowing claimed itemized deductions is in error. Appellant may also want to address the fact that the
26 record indicates that on May 27, 2008, she requested an IRS "collections due process" hearing, but
27 withdrew or abandoned this request on March 17, 2009 (so that it does not appear there is any present
28 IRS review of her 2004 tax year). Appellant's IRS Account Transcript shows that for the 2004 tax year,

1 appellant has an IRS “account balance”, eighty percent of which is unpaid federal tax (\$32,867.15, plus
2 \$3,887.34 in interest and \$4,116.37 in penalty). (See Respondent’s Opening Brief, Exhibit D, page 1.)
3 The IRS Account Transcript also shows her 2004 tax year has moved to an involuntary collections
4 status: “[a]dditional tax assessed by examination” on “11-19-2007”, “[b]alance due account currently
5 not collectible” dated “03-17-2009”, “[l]ien placed on assets due to balance owed” on “05-01-2009” and
6 “[f]ees and other expenses for collection” dated “05-25-2009.” (*Id.* page 2, entries 300, 530, 582 and
7 360.) Staff notes that all of the above-referenced entry dates on the IRS Account Transcript are prior to
8 the September 25, 2009, date of appellant’s Appeal Letter in which appellant claims that the federal
9 determination is not final.

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