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

10 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
11 ) **PERSONAL INCOME TAX APPEAL**  
12 **KEVIN SHEY** ) Case No. 607386  
13 )

14 Year Proposed  
15 2008 Assessment  
16 \$5,972<sup>1</sup>

17 Representing the Parties:

18 For Appellant: Kevin Shey

19 For Franchise Tax Board: Joanne A. Garcia, Senior Legal Analyst

21 QUESTION: Whether appellant has established that respondent erroneously disallowed a portion  
22 of appellant's claimed capital loss.

23 HEARING SUMMARY

24 Background

25 Appellant filed a timely 2008 income tax return, claiming the head of household filing  
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27 <sup>1</sup> The Notice of Proposed Assessment indicated the assessment was \$5,978. After further review, respondent discovered a  
28 math error relating to appellant's California adjusted gross income on appellant's original return. Based on the corrected California AGI, respondent will revise the propose assessment to \$5,972, plus applicable interest. (Resp. Op. Br., p. 3.)

1 status. On the return, appellant reported federal adjusted gross income (AGI) of \$146,431, California  
2 adjustments (subtractions) of \$36,786,<sup>2</sup> California adjustments (additions) of \$ - 33,099, and itemized  
3 deductions of \$23,920, for taxable income of \$52,686. Appellant reported tax of \$1,462, less  
4 appellant's exemption credit of \$99, for a total tax of \$1,363. After applying appellant's California  
5 state tax withholding of \$9,024, appellant reported an overpayment of \$7,661. Respondent states that  
6 its records indicate the overpayment was refunded to appellant on August 4, 2009. (Resp. Op. Br.,  
7 p. 1, Ex. A.)

8 Respondent subsequently reviewed appellant's return and determined that appellant's  
9 return did not substantiate the amount of capital gains or losses subtracted on his return. Based on this  
10 review, respondent issued a Notice of Proposed Assessment (NPA) on July 29, 2011, reducing  
11 appellant's capital loss to the maximum allowed amount of \$3,000. The NPA informed appellant that,  
12 if he claimed the maximum allowable capital loss on his federal return, respondent reduced the amount  
13 of the capital loss adjustment claimed on appellant's Schedule CA to zero. The NPA made a capital  
14 loss adjustment of \$66,198 and reflected a revised taxable income of \$118,884 (i.e., \$52,686 reported  
15 taxable income + \$66,198 increase) and additional tax of \$5,978, plus applicable interest.<sup>3</sup> (Resp. Op.  
16 Br., pp. 1-2, Ex. B.)

17 Appellant protested the NPA, stating that appellant had a capital loss of \$71,648 from  
18 tax year 2007, which was carried forward to 2008. In response to the protest, respondent contacted  
19 appellant by telephone. Respondent informed appellant that, because he did not have a capital gain to  
20 offset his capital loss carryover, the maximum amount appellant could claim for a capital loss was  
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22 \_\_\_\_\_  
23 <sup>2</sup> See the explanation in footnote 3 below.

24 <sup>3</sup> The \$66,198 increase in appellant's taxable income reflects the following: (1) a \$33,099 adjustment to appellant's \$36,786 in  
25 California adjustments (subtractions) and (2) a \$33,099 adjustment to appellant's negative \$33,099 in California adjustments  
(additions).

26 Respondent's first adjustment reflects that, on the Form CA (540), appellant reported a subtraction adjustment of \$3,687  
27 (relating to taxable state tax refunds). However, on the front page of appellant's Form 540, appellant reported subtraction  
adjustments of \$36,786, a difference (and an increase in the subtracted amount) of \$33,099 (i.e., \$36,786 - \$3,687 = \$33,099).

28 Respondent's second adjustment reflects that respondent eliminated the \$33,099 increase in appellant's claimed capital losses  
deduction, an adjustment that appellant made on the Form CA (540).

1 \$3,000. On March 2, 2012, respondent issued a Notice of Action, in which respondent affirmed the  
2 NPA. This timely appeal then followed. (Resp. Op. Br., p. 2, Exs. C & D; Appeal Letter, Attch.)

### 3 Contentions

#### 4 Appellant

5 Appellant maintains that he is entitled to claim a capital loss of \$66,198 on his 2008 tax  
6 return. Appellant explains that he had a capital loss of \$71,648 from the 2007 tax year, which was  
7 carried forward to 2008. Appellant further states that the capital loss claimed on his 2008 return was  
8 reduced by \$3,000, as required by California state tax law. Appellant contends that California tax law  
9 permits taxpayers to deduct a capital loss amount equivalent to the capital gains plus \$3,000.

10 Appellant further claims that, in instances where a taxpayer has no capital gain in the current tax year,  
11 the taxpayer may carry forward to the subsequent year, the total amount of capital loss from the  
12 previous year minus \$3,000. As such, appellant states that, according to state law, he is allowed a total  
13 carry forward capital loss of \$68,648. Appellant further notes that the capital loss amount claimed on  
14 his 2008 state return (\$66,198) is less than what he is entitled to claim (\$68,648). Appellant further  
15 contends that, for the 2008 tax year, California's tax law governing capital loss is identical to federal  
16 tax law. Appellant claims that the federal government accepted the capital loss of \$66,198 on his  
17 federal return and California should allow that same amount. (Appeal Letter.)

#### 18 Respondent

19 Respondent contends that appellant's claim of a capital gain subtraction of \$66,198  
20 resulted in its proposed assessment. Respondent further contends that appellant has not provided any  
21 evidence showing error in the assessment. While respondent agrees that appellant had a capital loss  
22 carryover of \$68,648 from the 2007 tax year, respondent argues that appellant is limited to claiming a  
23 capital loss of \$3,000 for the 2008 tax year because appellant did not have any capital gains to offset  
24 the full amount of the capital loss carryover, citing R&TC section 18151 and Internal Revenue Code  
25 (IRC) section 1211(b). With regard to appellant's contention that California's 2008 tax laws  
26 governing capital losses is identical to federal tax laws and that the Internal Revenue Service accepted  
27 the capital loss appellant claimed for 2008, respondent notes that a review of appellant's federal return  
28 indicates appellant claimed a federal capital loss of \$3,000. Respondent contends that appellant is

1 entitled to the same capital loss amount of \$3,000 on his state return. (Resp. Op. Br., pp. 2-5.)

2 Applicable Law

3 Capital Loss Limitation

4 R&TC section 18151 incorporates the provisions of the IRC relating to capital gains  
5 and losses. IRC section 1211(b) provides that capital losses are allowed only to the extent of the gain  
6 from such sales or exchanges, plus, if such losses exceed such gain, the lower of \$3,000 or the excess  
7 of such losses over such gains.

8 Burden of Proof

9 Respondent's determinations are generally presumed to be correct and an appellant  
10 generally bears the burden of proving error. (*Appeal of Sheldon I. and Helen E. Brockett*,  
11 86-SBE-109, June 18, 1986; *Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514.) Unsupported  
12 assertions are not sufficient to satisfy an appellant's burden of proof. (*Appeal of Aaron and Eloise*  
13 *Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence of uncontradicted, credible, competent, and  
14 relevant evidence showing that respondent's determinations are incorrect, such determinations must be  
15 upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.) An appellant's  
16 failure to produce evidence that is within his or her control gives rise to a presumption that such  
17 evidence is unfavorable to his or her case. (*Appeal of Don Cookston*, 83-SBE-048, Jan. 3, 1983.)

18 STAFF COMMENTS

19 Appellant appears to misread the law. IRC section 1211(b) provides that capital losses  
20 are allowed only to the extent of the gain from such sales or exchanges, plus, if such losses exceed  
21 such gain, the lower of \$3,000 or the excess of such losses over such gains. Appellant has not alleged  
22 or demonstrated that he had capital gains for the 2008 tax year. As such, IRC section 1211(b) limits  
23 appellant's ability to claim a capital loss amount to \$3,000 for the 2008 tax year. Staff notes that  
24 appellant claimed a capital loss of \$3,000 on his 2008 federal return, which was accepted by the IRS.  
25 Appellant has not demonstrated why the treatment of capital losses should be different on his  
26 California return. If either party has any additional evidence to present, such evidence should be  
27 submitted to the Board Proceedings Division at least 14 days prior to the oral hearing pursuant to

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1 California Code of Regulations, title 18, section 5523.6.<sup>4</sup>

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28 <sup>4</sup> Evidence exhibits should be sent to: Claudia Madrigal, Appeals Analyst, Board Proceedings Division, State Board of Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.