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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 **MARK R. TRINDER¹**) Case No. 514344
13)

14
15 Year Claim
16 2004 \$1,223.16³

17 Representing the Parties:

19 For Appellant: Megan Robin, Taxpayer Appeals Assistance Program⁴
20

21 ¹ Appellant resides in Bakersfield in Kern County, California. In a letter dated December 8, 2009, Board staff noted that the
22 Franchise Tax Board issued the assessment at issue to more than one person and, pursuant to California Code of Regulations,
23 title 18, section 5420, subdivision (a)(9), each appellant who is filing the appeal must sign the appeal letter. Mr. Trinder is
24 the only individual who signed the appeal. We thus must treat this matter as an appeal by him alone. "Appellant" will
25 therefore refer only to Mr. Trinder.

26 ² This appeal was postponed from the February 28, 2012, hearing calendar due to a scheduling conflict and rescheduled to the
27 May 30, 2012, hearing calendar.

28 ³ According to the Notice of Action dated October 9, 2009, appellant and his wife made an advance payment of the balance
due and the remaining balance was paid by a credit transfer from their 2006 tax year account. (Appeal Letter, Attachment.)

⁴ Appellant submitted his own appeal letter. Gerald Cho from the Tax Appeals Assistance Program (TAAP) submitted
appellant's opening brief. Christian Kelsey from TAAP submitted appellant's reply brief. Sandy Liu submitted appellant's
supplemental reply brief and Megan Robin is listed as the TAAP representative at the time of this hearing summary.

1 For Franchise Tax Board: Janet Butler, Legal Analyst
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3 QUESTION: Whether appellant has established error in the Franchise Tax Board's (FTB or
4 respondent) assessment, which is based on a federal audit adjustment.

5 HEARING SUMMARY

6 Background

7 Appellant and his wife timely filed a 2004 joint California nonresident or part-year
8 resident income tax return (540NR return). On this return, the couple reported California wages of
9 \$61,340, federal adjusted gross income (AGI) of \$61,103, California adjustments (subtractions) of
10 \$4,590, a standard deduction of \$6,330, and a tax of \$1,386. After prorating the tax and exemption
11 credits, the couple reported a tax of \$1,000. The couple subtracted California withholding credits of
12 \$1,216 and the child and dependent care expenses (CDC) credit of \$162, resulting in a claimed
13 overpayment of \$378. Respondent reportedly refunded the overpayment to the couple. (Resp. Opening
14 Br., p. 1, exhibit A.).

15 Subsequently, respondent received audit information concerning the couple's 2004
16 federal tax return from the Internal Revenue Service (IRS). The audit information shows that the IRS
17 made a miscellaneous adjustment (an increase) of \$17,969 to the couple's federal joint return. Based on
18 this information, respondent issued a Notice of Proposed Assessment (NPA) for 2004, which applied the
19 federal miscellaneous adjustment of \$17,969 to the couple's 2004 California return. Due to AGI
20 limitations, the NPA disallowed \$34.16 of the CDC credit and proposed an assessment of additional tax
21 in the amount of \$1,223.16, plus applicable interest. Pursuant to Revenue & Taxation Code (R&TC)
22 section 19116, the interest was suspended for a period of time. (Resp. Opening Br., p. 2, fn. 1, exhibit
23 C.).

24 Appellant filed a timely protest letter in which he requested an explanation of the
25 proposed assessment. Respondent sent appellant a letter stating that the proposed assessment was based
26 on the fact that the IRS adjusted appellant's federal AGI from the reported amount of \$61,103 to
27 \$79,072. Respondent attached a copy of the CP2000 audit report reflecting the federal adjustments,
28 which it received from the IRS. Appellant sent respondent a letter in which he stated that he did not

1 receive any information from the IRS about a federal adjustment of the 2004 federal return and that the
2 CP2000 audit report was not apparently generated by the IRS. Appellant also stated that an adjustment
3 of \$17,969 is not possible because the return reflects only simple income and standard deductions. He
4 requested that respondent review its file to ascertain whether the assessment was incorrect. Appellant
5 attached a copy of the first page of his 2004 federal joint return. (Resp. Opening Br., p. 2, exhibits D-F.)

6 Respondent issued a Notice of Action (NOA) that affirmed the NPA. The NOA indicates
7 that appellant made an advance payment of \$200 and the remaining balance of the assessment in the
8 amount of \$593.62 was paid via a credit transfer from appellant's and his wife's 2006 tax year account.
9 This timely appeal followed. (Resp. Opening Br., p. 2, Appeal letter, attachment.)

10 Contentions

11 Appellant's Contentions

12 Appellant contends that he and his wife timely filed their federal and state tax returns for
13 2004. He also contends that after the IRS contacted them, they filed a revised 2004 Schedule D with the
14 IRS because their tax preparer failed to separate long-term and short-term capital gains in the original
15 2004 Schedule D. He further contends that the IRS accepted the revised 2004 Schedule D and decreased
16 their federal tax liability from the reported amount of \$8,019 to \$699, which they paid in full. Appellant
17 asserts that he has been unemployed for approximately one year and he has been trying to support a
18 family of three with his unemployment compensation. (Appeal Letter; App. Opening Br., p. 1.)

19 Appellant contends that the proposed assessment of \$1,223.16, which is based on the
20 federal adjustment, is erroneous because respondent's assessment should not result in a tax liability that
21 is almost double the federal assessment for the following reasons: (1) for tax year 2004, the federal
22 marginal rate for long-term capital gains was 15 percent and the federal marginal rate for short-term
23 capital gains was 25 percent; (2) under federal tax law, short-term capital gains are treated as ordinary
24 income; and (3) California has an eight percent tax rate for an individual filing a California return using
25 the joint filing status with taxable income between \$63,850 and \$80,692. According to appellant, the
26 proposed assessment "should be between approximately one-quarter and one-half of the increased
27 federal liability." (App. Reply Br., p. 2; App. Suppl. Br., p. 2.)

28 In addition, appellant contends that the assessment is erroneous because appellant was

1 not a California resident until March 3, 2004, and any gain he realized from the sale of stocks prior to
2 the date when he became a California resident would not be subject to California income tax. Appellant
3 contends that, prior to March 3, 2004, he lived in Washington State and collected unemployment.
4 Appellant asserts that he provided a copy of an Ameritrade 2004 consolidated form that lists the gross
5 proceeds less commissions and options premiums reported to the IRS, which reflects \$17,721.86 of
6 proceeds from stock sales he executed prior to moving to California. Appellant also asserts that the
7 Ameritrade form shows that he only sold \$18,888.56 of stock on December 7, 2004. Appellant further
8 asserts that the 2004 revised Schedule D does not list all of the dates when he sold stocks during 2004; it
9 fails to identify the dates of the stock sales because the sales all involved stocks of the same company,
10 Xybernaut. According to appellant, the IRS relied on the Ameritrade form when it adjusted his federal
11 tax liability. At the request of respondent, appellant provided with his supplemental brief a handwritten
12 stock basis document reflecting detailed information concerning the stocks he sold and bought during
13 2004, including the transaction dates, number of shares, selling price, and cost basis of stock shares he
14 sold during 2004. Appellant argues that the Ameritrade form and the stock basis document are
15 sufficient documentary evidence to establish that he and his wife realized capital gains in the amount of
16 \$17,721.86 before he became a California resident, and these capital gains are not subject to California
17 income tax. Appellant thus argues that he has met his burden of showing that the proposed assessment
18 is erroneous. (App. Reply Br., p. 1, exhibit B; App. Supp. Br., p. 2, exhibit A.)

19 Respondent's Contentions

20 Respondent contends that California tax law makes no distinction between long-term and
21 short-term capital gains but rather treats all capital gains as ordinary income, regardless of the holding
22 period. Respondent asserts that this may be the reason why the IRS increased appellant's and his wife's
23 federal tax by only \$699.00 whereas respondent increased the couple's California tax by \$1,223.16.
24 Respondent asserts that it received a copy of the couple's federal audit file, which confirms the IRS
25 made a miscellaneous adjustment of \$17,969 to their 2004 federal return resulting in a federal tax
26 increase of \$699. Respondent prepared a corrected 540NR return that reflects the federal adjustment as
27 it applies to appellant's 540NR return. The corrected 540NR return shows additional tax due in the
28 amount of \$1,223, which is the amount of additional tax reflected on the NPA. (Resp. Reply Br., pp. 1-

1 2, exhibits J-K.)

2 Respondent agrees with appellant that any capital gains appellant realized prior to the
3 date when appellant became a California resident would not be subject to California income tax.
4 Respondent contends, however, that appellant has not provided the documents it requested to verify
5 what amounts of capital gains or losses are associated with stock sales he made prior to March 3, 2004.
6 Respondent asserts that the couple's revised 2004 Schedule D shows that appellant and his wife had
7 short-term and long-term capital gains from sales that occurred after March 3, 2004, but it does not
8 identify any stock sales made prior to March 3, 2004. Respondent further asserts that the revised 2004
9 Schedule D lists short-term capital gains of \$6,925 from the sale of stocks on May 19, 2004, and long-
10 term capital gains of \$27,808 from the sale of stocks on December 7, 2004. Respondent contends that
11 the produced Ameritrade document does not list the cost basis or the resulting gain or loss with respect
12 to the stock shares appellant purportedly sold prior to March 3, 2004. Respondent also contends that,
13 despite requests made in its opening brief and in phone conversations with appellant's representatives,
14 appellant has not provided the documents that reflect the sales, dates, cost basis and gain or loss amounts
15 of the stock shares appellant purportedly sold prior to March 3, 2004. Respondent further contends that
16 without any additional documents, it "is unable to determine what amounts of the IRS income
17 adjustment of \$17,969.00 is attributable to stock sales prior to March 3, 2004 and whether appellant's
18 California source income should be revised." (Resp. Reply Br., pp. 2-3.)

19 Applicable Law

20 Burden of Proof

21 R&TC section 18622 provides that a taxpayer shall either concede the accuracy of a
22 federal determination or state wherein it is erroneous. It is well-settled that a deficiency assessment
23 based on a federal audit report is presumptively correct and the taxpayer bears the burden of proving
24 that the determination is erroneous. (*Appeal of Sheldon I. and Helen E. Brockett*, 86-SBE-109, June 18,
25 1986; *Todd v. McColgan* (1949) 89 Cal.App.2d 509.) Unsupported assertions are not sufficient to
26 satisfy an appellant's burden of proof with respect to an assessment based on federal action. (*Appeal of*
27 *Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence of uncontradicted, credible,
28 competent, and relevant evidence showing that respondent's determinations are incorrect, such

1 assessments must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.)

2 Tax Liability for Part-Year Residents (the “California Method”)

3 R&TC section 17041, subdivision (b), imposes a tax upon California-source income of
4 part-year residents for periods when they are nonresidents and upon income from all sources for periods
5 when they are California residents. Through a nine-step process, known as the “California Method,” the
6 taxpayer’s total income is used to compute the appropriate California tax rate, then that California tax
7 rate is applied to only the California-source income. In addition, the taxpayer’s exemption credits and
8 deductions are pro-rated as part of this process. This method does not tax out-of-state income; it merely
9 takes out-of-state income into consideration in determining the tax rate that should apply to the
10 California-source income. (*Appeal of Dennis L. Boone*, 93-SBE-015, Oct. 28, 1993, *Appeal of Louis N.*
11 *Million*, 87-SBE-036, May 7, 1987). The purpose of the “California Method” is to preserve the
12 progressive nature of the income tax system for all persons, not just for those who live in California for
13 the full year. By applying graduated tax rates on the basis of income, this method apportions the tax
14 burden according to the ability to pay. The fundamental fairness and constitutionality of this method has
15 been upheld by New York’s highest court, and the United States Supreme Court refused to hear an
16 appeal from the New York decision. (*Brady v. New York* (1992) 80 N.Y.2d 596, *cert. den.* (1993) 509
17 U.S. 905.) The federal courts have determined that such methods do not violate federal law or
18 constitutional rights. (See, e.g., *United States v. State of Kansas* (10th Cir. 1987) 810 F.2d 935).

19 STAFF COMMENTS

20 Staff notes there is no dispute that appellant became a California resident on March 3,
21 2004. Appellant should be prepared to discuss if, and when, his spouse became a California resident and
22 whether the stock shares at issue were community property or his separate property. Staff notes that, if
23 appellant’s spouse became a California resident before appellant became a California resident, this could
24 cause some or all of the capital gains to be subject to California income tax. Appellant bears the burden
25 of proving that the proposed assessment, which is based on a federal miscellaneous adjustment of
26 \$17,969, is erroneous. At the oral hearing, the parties should be prepared to discuss whether the revised
27 2004 Schedule D, the Ameritrade document, and the handwritten stock basis document provided with
28 appellant’s supplemental brief, can be reconciled, and whether these documents establish that appellant

1 realized capital gains of \$17,721.86 between January 1, 2004 and March 2, 2004, the period during 2004
2 prior to the date when appellant became a California resident. Appellant should be prepared to discuss
3 how he acquired the information contained on the handwritten stock basis document. In the event that
4 appellant has additional evidence supporting his position, he should submit it to the Board and
5 respondent at least 14 days prior to the hearing date.⁵ The parties should also be prepared to discuss at
6 the oral hearing what effect, if any, these documents have on the proposed assessment.

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