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10 **BOARD OF EQUALIZATION**
 11 **STATE OF CALIFORNIA**

12 In the Matter of the Appeal of:) **HEARING SUMMARY²**
 13) **PERSONAL INCOME TAX APPEAL³**
 14 **MICHAEL ZAPARA AND GINA ZAPARA¹**) Case No. 252128

	<u>Years</u>	<u>Proposed Assessments</u>
	1993	\$32,027
	1994	\$1,048
	1995	\$4,416

15 Representing the Parties:

16 For Appellants: Michael and Gina Zapara
 17 For Franchise Tax Board: Diane L. Ewing, Tax Counsel III

18 ¹ Appellants reside in Palm Desert, Riverside County, California.

19 ² The years on appeal are more than ten years from the date of the appeal for multiple reasons: respondent received audit information from the Internal Revenue Service (IRS) on November 7, 2000, the Board deferred action on the appeal pending the result of *Ordlock v. Franchise Tax Board* (2006) 38 Cal.4th 897, and appellants requested and were granted multiple deferrals of further action on the appeal pending the conclusion of their petition to the United States Tax Court. Although this appeal was initially received January 14, 2004, this appeal was deferred for the above reasons until June of 2007. After briefing was completed and the appeal was set for an oral hearing, it was further deferred for the reasons listed in footnote 3 below.

20 ³ This appeal was originally calendared for an October 28, 2008 oral hearing in Culver City, but was postponed to the February 25, 2009 calendar due to appellants' medical condition. The appeal was further deferred pending appellants' 9th Circuit U.S. Court of Appeals case. The decision in that case was filed July 18, 2011. This appeal was then put back into active status and was rescheduled for the next available Culver City calendar.

1 QUESTIONS: (1) Whether appellants have demonstrated error in the proposed assessment which is
2 based on a federal assessment.

3 (2) Whether there are court decisions or proceedings precluding the assessment of
4 additional taxes for the tax years at issue.

5 HEARING SUMMARY

6 Background

7 On November 7, 2000, the Franchise Tax Board (FTB or respondent) received a copy of
8 an Internal Revenue Service (IRS) Form 4549-CG titled Income Tax Examination Changes (RAR)⁴
9 concerning appellants' 1993, 1994, and 1995 income tax years. The RAR listed unreported income for
10 each year and was signed by both appellants on February 29, 2000. The IRS identified additional
11 income of \$361,559⁵ for 1993, \$23,894⁶ for 1994, and \$80,489⁷ for 1995. (Resp. Reply Br., exhibit C.)

12 Due to the length of time between the filing deadlines for the years at issue and the date
13 of the RAR, respondent no longer had appellants' original state income tax returns. Respondent
14 requested copies from appellants and was informed they were no longer available. (Resp. Reply Br.,
15 p. 2 & exhibit D.) Using its electronically-stored data, respondent compared the original return
16 information and the IRS RAR to calculate the increase in appellants' state income tax liability. (*Id.* at
17 p. 2.) Notices of Proposed Assessment (NPAs) were mailed on March 12, 2001. The NPAs proposed
18 additional taxes of \$32,027 for 1993, \$1,048⁸ for 1994, and \$4,416⁹ for 1995. (*Id.* at exhibit E, F, & G.)

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21 ⁴ RAR stands for Revenue Agent Report.

22 ⁵ The sources of the amounts for 1993 were AAA Insurance Company (\$63,650), Auto Rentals, Inc (\$49,634), Rock Island
23 Bank (\$62,776), and defrauded income (\$185,499). The IRS also disallowed a \$14,100 personal exemption credit that does
24 not apply to California tax law.

25 ⁶ The sources of the amounts for 1994 were Bank of America (\$8,424) and National Bank of California (\$15,470).

26 ⁷ The sources of the amounts for 1995 were Pagenet (\$4,200), Republic Check (\$1,289), and defrauded income (Booz Check,
27 \$75,000).

28 ⁸ This amount includes reductions of the tax amount for a \$130 personal exemption, \$195 in dependent exemptions, and \$100
in previously assessed tax.

⁹ This amount includes reductions of the tax amount for a \$132 personal exemption, \$198 in dependent exemptions, and \$33
in previously assessed tax.

1 Appellants protested all three NPAs by letter dated April 30, 2001.¹⁰ (Resp. Reply Br.,
2 p. 3 & exhibit H.) In their protest letter, appellants argued that respondent had the burden of proving
3 that appellants received the additional income reported by the IRS. Respondent notes that further action
4 was suspended pending appellants' federal petition. At appellants' request, a protest hearing was held
5 on September 10, 2002. Appellants contended that the federal determinations were erroneous. (*Id.* at
6 p. 3.) Upon consideration of available information, respondent affirmed the NPAs by issuing Notices of
7 Action (NOA) on December 15, 2003. (*Id.* at exhibits I, J, & K.) This timely appeal followed.¹¹

8 Related Court Action

9 Appellants pled guilty to various tax-related offenses in a district court criminal
10 proceeding. Appellants signed a Form 4549-CG (RAR)¹² consenting to income tax examination
11 changes and waiving their right to contest the tax liabilities for the 1993 through 1995 tax years. After
12 sentencing, appellants filed a motion alleging they were denied effective assistance of counsel and that
13 the plea agreement overstated government tax losses. The Government conceded there was a
14 mathematical or typographical error in the plea agreement, causing the tax loss to be overstated. The
15 District Court found that appellants' representation provided ineffective assistance of counsel in
16 allowing appellant-husband to sign a plea agreement containing a computational error, and failing to
17 catch the error prior to sentencing. The District Court corrected appellants' sentencing using the proper
18 calculation and denied the other parts of appellants' motion. (See *Zapara v. Commissioner* (2005) 124
19 T.C. 223, 224-225 [*Zapara I*].)

20 Appellants subsequently brought action in the United States Tax Court (USTC)
21 challenging their tax liabilities for 1993 through 1995 and a determination not to withdraw the IRS's
22 jeopardy levy. (*Zapara I, supra.*) Although appellants signed a Form 4549-CG waiving their right to
23 appeal their tax liability determinations for the years at issue, appellants alleged they signed the form
24 under duress. The USTC found, however, that appellants failed to show they were under any duress
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26 ¹⁰ The letter mistakenly contains an April 30, 2000 date on the first page, but subsequent pages contain the proper April 30,
27 2001 date.

28 ¹¹ The lengthy deferral and postponement process that followed is detailed in footnotes 2 and 3 above.

¹² RAR stands for Revenue Agent Report, and is used generally to refer to an IRS report of income tax examination changes.

1 from either the IRS or their own representatives when signing the form, and therefore determined
2 appellants are precluded from challenging their underlying tax liabilities for the years at issue. (*Id.* at
3 pp. 228-233.) The USTC decided in appellants' favor on a separate and seemingly unrelated issue
4 regarding the failure of the IRS to properly respond to appellants' request to sell stock seized under a
5 jeopardy levy.¹³ (*Id.* at pp. 242-243.) The IRS appealed the jeopardy levy determination with a motion
6 for reconsideration, which was denied by the USTC in a supplemental opinion, and the USTC's decision
7 was thereafter affirmed by the 9th Circuit Court of Appeals. (*Zapara v. Commissioner* (2006) 126 T.C.
8 215 [*Zapara II*], *affd.* (9th Cir. 2011) 652 F.3d 1042.)

9 Contentions

10 Appellants contend the following:

- 11 • The United States Tax Court appeal, Docket No. 9480-02L (i.e., *Zapara I, supra*),
12 is not yet final and its decision bears upon this appeal;¹⁴
- 13 • The federal determinations for the years at issue are otherwise not final;
- 14 • The RAR is incorrect because it was signed under duress and appellants were
15 represented by incompetent counsel;
- 16 • The RAR is inaccurate because it failed to include exemptions for their children
17 or for business and personal exemptions; and
- 18 • The proposed assessment of additional state income tax is barred by the statute of
19 limitations.

20 Respondent contends that appellants have failed to establish error, revision, or revocation
21 for the federal actions for any of the subject years, and thus have failed to establish error in respondent's
22 proposed assessments in this appeal. Respondent asserts that their proposed assessments are timely and
23 properly based on federal findings.

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26 ¹³ The USTC decision held that the IRS violated its statutory mandate under Internal Revenue Code (IRC) section 6335(f).
27 This IRC statute gives owners of property seized by the IRS under a jeopardy assessment the right to request the property be
28 sold within 60 days. The result of the decision in this case is that the IRS assumed the risk of devaluation on appellants' levied property (stock) when it failed to follow the taxpayers' request to sell under IRC section 6335(f).

¹⁴ Subsequent to the filing of briefs and contentions, this appeal was decided, as explained in the background section above.

1 Applicable Law

2 Burden of Proof

3 Revenue and Taxation Code (R&TC) section 18622 provides that a taxpayer shall either
4 concede the accuracy of a federal determination or state wherein it is erroneous. It is well-settled that a
5 deficiency assessment based on a federal audit report is presumptively correct, and the taxpayer bears
6 the burden of proving that the determination is erroneous. (*Appeal of Sheldon I. and Helen E. Brockett*,
7 86-SBE-109, June 18, 1986; *Todd v. McColgan* (1949) 89 Cal.App.2d 509.) Likewise, a deficiency
8 assessment based on a final federal determination resulting from a settlement agreement between the
9 taxpayer and the IRS is presumed to be correct.¹⁵ (*Appeal of David Chow*, 86-SBE-130, July 29, 1986.)
10 Unsupported assertions are not sufficient to satisfy appellant's burden of proof. (*Appeal of Aaron and*
11 *Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence of uncontradicted, credible, competent,
12 and relevant evidence showing error in respondent's determinations, they must be upheld. (*Appeal of*
13 *Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.) An appellant's failure to produce
14 evidence that is within his control gives rise to a presumption that such evidence is unfavorable to his
15 case. (*Appeal of Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.)

16 The tax laws regarding exemptions for children differ between state and federal law, and
17 while respondent may rely on the findings of the IRS, it is not necessarily bound to follow a federal
18 action. (*Appeal of Der Weinerschnitzel International, Inc.*, 79-SBE-063, Apr. 10, 1979; *Appeal of*
19 *Raymond and Rosemarie J. Pryke*, 83-SBE-212, Sept. 15, 1983.) Furthermore, income tax deductions
20 are a matter of legislative grace, and the burden is on taxpayers to show by competent evidence that they
21 are entitled to the deductions they have claimed. (*Appeal of James C. and Monablance A. Walshe*,
22 75-SBE-073, Oct. 20, 1975.) Respondent's denials of deductions are presumed correct. (*Appeal of*
23 *Gilbert W. Janke*, 80-SBE-059, May 21, 1980.)

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27 ¹⁵ IRC section 6213(a) limits the ability of the IRS to assess a deficiency until the decision of the USTC becomes final if a
28 taxpayer appeals the assessment. However, a taxpayer can waive his right to appeal a federal assessment. The USTC held in
Zapara I, supra, that appellants did not sign the RAR under duress, and therefore the waiver clause on the form is in effect.
(*Zapara I, supra*; contra, *Shireman v. Commissioner* (2004) 87 T.C.M. (CCH) 1448.)

1 Statute of Limitations

2 The statute of limitations applicable to personal income tax deficiency assessments are in
3 Division 2, Part 10.2 of the Revenue and Taxation Code. The general statute of limitations allows an
4 NPA to be mailed to the taxpayer within four years after the return is filed. (Rev. & Tax. Code,
5 § 19057.) However, when the proposed assessment results from federal adjustments, as in this instance,
6 exceptions to the four-year statute are expressly provided. R&TC section 18622 provides that a
7 taxpayer must report these adjustments within six months.¹⁶ If the taxpayer or the IRS reports these
8 changes, R&TC sections 19059 and 19060 provide for two and four year statute of limitations,
9 respectively, depending on whether reporting was timely. If a taxpayer fails to report federal
10 adjustments that result in additional state tax, then respondent may mail notice of a deficiency
11 assessment at any time. (Rev. & Tax. Code, § 19060, subd. (a).) The California Supreme Court decided
12 the specific language of R&TC section 19060 applies notwithstanding R&TC section 19057. (*Ordlock*
13 *v. Franchise Tax Board* (2006) 38 Cal.4th 897, at pp. 909-912.)

14 STAFF COMMENTS

15 In this instance, the federal RAR was signed by appellants on February 29, 2000.
16 Respondent was notified of the federal changes when it received the RAR on November 7, 2000.
17 Respondent issued the NPAs on March 12, 2001, less than five months after notification. It appears the
18 NPAs were therefore timely. Appellants contend the RAR is incorrect as it was signed under duress.
19 The parties should address the finding in the USTC opinion determining appellants did not sign the RAR
20 under duress from either the IRS or their own representatives, and therefore petitioners were precluded
21 from challenging the underlying tax liabilities for the years at issue here. (*Zapara I, supra.*)

22 At the hearing, appellants should provide evidence to substantiate their contentions and
23 rebut the assessment made by respondent. For example, appellants should discuss the USTC decision in
24 *Zapara I, supra*, and be prepared to provide evidence and arguments showing that the merits of the
25 *Zapara II, supra*, affirmed by the United States 9th Circuit Court of Appeals, are central to the proposed
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28 ¹⁶ Reporting deadlines are based on the date of federal determinations. This date is the date of federal assessment, or the
recording of the liability in the taxpayer's IRS Individual Master File (IMF). (Rev. & Tax. Code, § 18622, subd. (d); Int.Rev.
Code, § 6203.)

1 assessment in this appeal. Respondent should also be prepared to discuss the findings of the USTC and
2 appellate court decisions and their relevance to this appeal.

3 The period for briefing is closed, but if either party wishes to provide any additional
4 documentation as evidence, we request that any additional documentation be provided to the other party
5 and Board staff no later than fourteen days prior to the hearing date.¹⁷

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28 ¹⁷ Exhibits should be submitted to: Claudia Madrigal, Board Proceedings Division, Board of Equalization. P. O. Box 942879
MIC: 80, Sacramento, CA 94279-0080