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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 APPEAL³**
 12 **MICHAEL ZAPARA AND GINA ZAPARA¹**) Case No. 252128

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

16 Representing the Parties:

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

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

22 ² The years on appeal are more than ten years from the date of the decision on this 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 for 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.

26 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, February 2, 2012. This appeal was postponed due to the health of appellant-husband and rescheduled to the April 24-26, 2012 Culver City Board meeting. The appeal was once more postponed to the July 24-26, 2012 Culver City Board meeting due to the health of appellant-husband. The appeal was postponed again to the April 24-25, 2013 Culver City Board meeting due to the health of appellant-husband.

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 that the returns were no longer available. (Resp.
15 Reply Br., p. 2 & exhibit D.) Using its electronically-stored data, respondent compared the original
16 return information and the IRS RAR to calculate the increase in appellants' state income tax liability.
17 (*Id.* at p. 2.) Notices of Proposed Assessment (NPAs) were mailed to appellants on March 12, 2001.

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23 ⁴ RAR stands for Revenue Agent Report. This acronym is used generally to refer to an IRS report of income tax examination
24 changes.

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

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

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

1 The NPAs proposed additional taxes of \$32,027 for 1993, \$1,048⁸ for 1994, and \$4,416⁹ for 1995. (*Id.*
2 at exhibit E, F, & G.)

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

10 Related Court Action

11 Appellants pled guilty to various tax-related offenses in a district court criminal
12 proceeding. Appellants signed a Form 4549-CG (RAR) consenting to income tax examination changes
13 and waiving their right to contest the tax liabilities for the 1993 through 1995 tax years. After
14 sentencing, appellants filed a motion alleging they were denied effective assistance of counsel and that
15 the plea agreement overstated the Government tax loss for purposes of sentencing. The Government
16 conceded there was a mathematical or typographical error in the plea agreement. The District Court
17 found that appellants' representation provided ineffective assistance of counsel in allowing appellant-
18 husband to sign a plea agreement containing a computational error, and failing to catch the error prior to
19 sentencing. The District Court corrected appellants' sentencing using the proper calculation and denied
20 the other parts of appellants' motion.¹²

21 Appellants subsequently brought action in the United States Tax Court (1) challenging
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23 ⁸ This amount includes reductions of the tax amount for a \$130 personal exemption, \$195 in dependent exemptions, and \$100
24 in previously-assessed tax.

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

27 ¹⁰ The letter mistakenly contains an April 30, 2000 date on the first page, but subsequent pages contain the proper April 30,
28 2001 date.

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

¹² The District Court's actions are summarized in *Zapara v. Commissioner* (2005) 124 T.C. 223, 224-225.

1 their tax liabilities for 1993 through 1995 and (2) seeking a review of the IRS's jeopardy levy. (*Zapara*
2 *v. Commissioner* (2005) 124 T.C. 223 [*Zapara I*].) Although appellants signed a Form 4549-CG
3 waiving their right to appeal their tax liability determinations for the years at issue, appellants alleged
4 they signed the form under duress. The United States Tax Court found, however, that appellants failed
5 to show they were under any duress from either the IRS or their own representatives when signing the
6 form and, therefore, determined that appellants were precluded from challenging their underlying tax
7 liabilities for the years at issue. (*Id.* at pp. 228-233.) The United States Tax Court decided in
8 appellants' favor on a separate issue regarding the failure of the IRS to properly respond to appellants'
9 request to sell stock seized under a jeopardy levy.¹³ (*Id.* at pp. 242-243.) The IRS appealed the Tax
10 Court's determination relating to the stock seizure issue with a motion for reconsideration, which was
11 denied by the Tax Court in a supplemental opinion, and the Tax Court's decision was thereafter affirmed
12 by the 9th Circuit Court of Appeals. (*Zapara v. Commissioner* (2006) 126 T.C. 215 [*Zapara III*], *affd.*
13 (9th Cir. 2011) 652 F.3d 1042.)

14 Contentions

15 Appellants contend the following:

- 16 • The United States Tax Court appeal, Docket No. 9480-02L (i.e., *Zapara I, supra*),
17 is not yet final and its decision bears upon this appeal;¹⁴
- 18 • The federal determinations for the years at issue are otherwise not final;
- 19 • The RAR is incorrect because it was signed under duress and appellants were
20 represented by incompetent counsel;
- 21 • The RAR is inaccurate because it failed to include exemptions for their children
22 or for business and personal exemptions; and
- 23 • The proposed assessment of additional state income tax is barred by the statute of
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25 ¹³ The United States Tax Court decision held that the IRS violated its statutory mandate under Internal Revenue Code (IRC)
26 section 6335(f). This Internal Revenue Code statute gives owners of property seized by the IRS under a jeopardy assessment
27 the right to request that the property be sold within 60 days. The result of the decision in this case is that the IRS assumed the
28 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 limitations.

2 Respondent contends that appellants have failed to establish error, revision, or revocation
3 for the federal actions for any of the subject years and, thus, have failed to establish error in respondent's
4 proposed assessments in this appeal. Respondent asserts that its proposed assessments are timely and
5 properly based on federal findings.

6 Applicable Law

7 Burden of Proof

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

21 The tax laws regarding exemptions for children differ between state and federal law, and
22 while respondent may rely on the findings of the IRS, it is not necessarily bound to follow a federal
23 action. (*Appeal of Der Weinerschnitzel International, Inc.*, 79-SBE-063, Apr. 10, 1979; *Appeal of*
24 *Raymond and Rosemarie J. Pryke*, 83-SBE-212, Sept. 15, 1983.) Furthermore, income tax deductions

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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 United States Tax Court
28 becomes final if a taxpayer appeals the assessment. However, a taxpayer can waive his right to appeal a federal assessment.
The United States Tax Court held in *Zapara I, supra*, that appellants did not sign the RAR under duress and, therefore, the
waiver clause on the form was in effect. (*Zapara I, supra*; contra, *Shireman v. Commissioner* (2004) 87 T.C.M. (CCH)
1448.)

1 are a matter of legislative grace, and the burden is on taxpayers to show by competent evidence that they
2 are entitled to the deductions they have claimed. (*Appeal of James C. and Monablance A. Walshe*,
3 75-SBE-073, Oct. 20, 1975.) Respondent's denials of deductions are presumed correct. (*Appeal of*
4 *Gilbert W. Janke*, 80-SBE-059, May 21, 1980.)

5 Statute of Limitations

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

17 STAFF COMMENTS

18 In this instance, the federal RAR was signed by appellants on February 29, 2000.
19 Respondent was notified of the federal changes when it received the RAR on November 7, 2000.
20 Respondent issued the NPAs on March 12, 2001, less than five months after notification. It appears then
21 that the NPAs were therefore issued timely. Appellants contend that the RAR is incorrect as it was
22 signed under duress. The parties should be prepared to address the finding in the United States Tax
23 Court opinion in *Zapara I, supra*, which, among other things, concluded that appellants did not sign the
24 RAR under duress from either the IRS or their own representatives and, therefore, petitioners were
25 precluded from challenging the underlying tax liabilities for the years at issue here. The parties should
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27 ¹⁶ Reporting deadlines are based on the date of federal determinations. This date is the date of the federal assessment, or the
28 recording of the liability in the taxpayer's IRS Individual Master File (IMF). (Rev. & Tax. Code, § 18622, subd. (d); Int.Rev.
Code, § 6203.)

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also be prepared to discuss the relevance, if any, of the decision in *Zapara II, supra*.

At the hearing, appellants should substantiate their contentions by referencing supporting evidence.¹⁷ Respondent provides appellants' joint IRS account transcripts for the three years at issue. For all three years, appellants have a bankruptcy action filed on October 13, 2010, and completed in November of 2011.¹⁸ Both parties should be prepared to discuss these transcripts, which show the joint liabilities being transferred to split liability accounts in December of 2011, and explain whether these transcripts support appellants' position that the federal determinations are not final.

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¹⁷ The period for briefing is closed, but if either party wishes to provide any additional evidentiary exhibits, such exhibits should be submitted to the Board and the other party at least 14 days prior to the date of the hearing. Exhibits should be submitted to: Claudia Madrigal, Board of Equalization, Board Proceedings Division, P.O. Box 942879 MIC: 80, Sacramento, CA 94279-0080.

¹⁸ The bankruptcy action occurred after the close of briefing, and therefore has not yet been discussed by either party.