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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 **ALAN GORG AND GWYNDOLIN GORG¹**) Case No. 401348

	<u>Year</u>	<u>Tax³</u>	<u>Proposed Assessment²</u>	<u>Penalties⁴</u>
	2000	\$995.00		\$585.90

17 Representing the Parties:

18 For Appellants: Eric D. Tetrault, TAAP⁵
 19 For Franchise Tax Board: Diane L. Ewing, Tax Counsel III

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22 ¹ Appellants reside in Venice, Los Angeles County, California.

23 ² Respondent should be prepared to provide the amount of accrued interest as of the date of the oral hearing.

24 ³ On account of a clerical or mathematical error on the Notice of Proposed Assessment, respondent has adjusted the total tax
 25 due to \$983. (Resp. Reply Br., p. 2, fn. 4.)

26 ⁴ This amount represents a 40 percent accuracy-related penalty in the amount of \$398.00 and a post-amnesty penalty in the
 27 amount of \$187.90. Respondent agreed to abate the 40 percent accuracy-related penalty. (Resp. Reply Br., p. 1, fn. 1.)

28 ⁵ Appellants provided their own opening brief. Subsequent representation and briefing was completed by the Tax Appeals
 Assistance Program (TAAP). Darren Pluth submitted appellants' supplemental brief, and Sun Chung submitted appellants'
 additional brief. Subsequently, Harpaul Nahal represented appellants. Eric D. Tetrault is the listed TAAP representative at
 the time of this hearing summary.

- 1 QUESTIONS: (1) Whether appellants have shown error in respondent's proposed assessment.
2 (2) Whether the IRS is still reviewing appellants' 2000 federal tax account, or
3 whether the federal determination is final.
4 (4) Whether this Board has jurisdiction to determine if the assessment was discharged
5 in bankruptcy.
6 (3) Whether this Board has jurisdiction to consider the post-amnesty penalty.

7 HEARING SUMMARY

8 Background

9 The records of the Franchise Tax Board (FTB or respondent) show that appellants
10 electronically filed their 2000 state income tax returns timely, on April 14, 2001. (Resp. Reply Br.,
11 exhibit A, p. 1, line 8.) Appellants reported wages of \$14,596, adjusted gross income (AGI) of \$5,475,
12 and a negative taxable income of (\$147). (Resp. Reply Br., exhibit B.)⁶ With zero tax liability,
13 respondents reported an overpayment equal to their withholding credits of \$165.⁷ (Resp. Reply Br.,
14 exhibit B.) On April 16, 2004, respondent received a revenue agent's report (RAR) from the Internal
15 Revenue Service (IRS) indicating that changes were made to appellants' 2000 federal taxable income.
16 (Resp. Reply Br., exhibit D.) Respondent notes that these changes were not reported by appellants.
17 (Resp. Reply Br., p. 2.)

18 According to the RAR, appellants underreported their 2000 taxable income by \$56,077.
19 (Resp. Reply Br., exhibit D.) The RAR lists the report type as: "Corrected Agreed."⁸ (*Id.*) After
20 reviewing the RAR and its own records, respondent revised appellants' taxable income to \$44,352, and
21 issued a Notice of Proposed Assessment (NPA) to appellants on December 9, 2005, proposing an
22 additional tax of \$995. (App. Op. Br., exhibits.) The NPA requested a response by February 7, 2006.
23 (*Id.*) The revised taxable income was calculated using the federal changes from the RAR that were
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26 ⁶ Respondent indicates that, in accordance with R&TC section 19530 and its own document retention policy, it no longer has
a physical copy of appellants' original return. (Resp. Reply Br., p. 2, fn. 2.)

27 ⁷ Respondent notes that the overpayment was applied toward appellants' 1996 tax obligation. (Resp. Reply Br., p. 2, fn. 3 &
exhibit C, line 3.)

28 ⁸ Respondent contends that this means appellants agreed to the adjusted amounts. (Resp. Reply Br., p. 2.)

1 applicable to state law.⁹ (Resp. Reply Br., p. 2.) Respondent indicated that there appears to be a clerical
2 or mathematical error on the NPA and subsequently reduced the proposed tax amount from \$995 to
3 \$983.¹⁰ (Resp. Reply Br., p. 2, fn. 4.) Respondent provided a corrected computation of tax. (Resp.
4 Reply Br., exhibit E.) The NPA also included a 40 percent accuracy-related penalty of \$398.00 and a
5 post amnesty penalty of \$187.90, plus interest. (App. Op. Br., exhibits.) Respondent subsequently
6 agreed to abate the 40 percent accuracy-related penalty. (Resp. Reply Br., p. 1, fn. 1.)

7 Appellants protested the NPA, but the date seems to be in dispute. Appellants assert that
8 they protested the NPA on March 15, 2006. (App. Supp. Br., p. 3.) Respondent's records indicate that
9 appellants protested the NPA in the form of an amended return received on February 9, 2006.¹¹ (Resp.
10 Add'l. Br., p. 2 & exhibit K.) Respondent issued a Notice of State Income Tax Due on March 6, 2006,
11 stating that the proposed assessment for tax year 2000 was final and due.¹² (App. Op. Br., exhibits.)
12 Appellants filed for bankruptcy on November 6, 2006, and were awarded a discharge on February 22,
13 2007. (Resp. Reply Br., exhibit H.) Respondent affirmed the NPA by issuing a Notice of Action
14 (NOA) on March 9, 2007, informing appellants that they failed to reply to its request for information
15 concerning the final federal determination.¹³ (App. Op. Br., exhibits.) This timely appeal followed.
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17 ⁹ Respondent indicates that it calculated appellants' revised taxable income by following the RAR's adjustments to
18 appellants' Schedule C expenses (disallowing \$4,210 for cost of goods sold and \$21,500 for other expenses) and gross
19 income (\$13,780 in IRA distributions, \$19 in interest, and \$6,554 disallowed net operating loss carryforward less a \$1,764
20 self employment AGI adjustment), resulting in a total adjustment of \$44,299. (Resp. Reply Br., p. 2 & exhibit E.) The
21 adjustment was then applied to appellants' self reported negative taxable income of (\$147) to reach \$44,152 in taxable
22 income. Changes made by the RAR that are not applicable to California tax law include adjustments to federal withholding
23 credits, social security benefits, state tax refunds, credits or offsets, and unemployment compensation. (Resp. Reply Br., p.
24 2.)

25 ¹⁰ Respondent recorded the appellants' revised taxable income as \$44,352 on the NPA, but notes that the correct amount is
26 \$44,152, as shown in footnote 9 of this hearing summary. (Resp. Reply Br., p. 2, fn. 4.)

27 ¹¹ Staff notes that this amended return is not found in the record. The record contains an amended federal return (Form
28 1040X) dated February 4, 2006 (Resp. Add'l. Br., exhibit L, p. 3), an undated and unsigned amended state return (Form
540X) (App. Supp. Br., exhibits), and a copy of the same 540X signed and dated December 4, 2006 (Resp. Add'l. Br., exhibit
L, p. 2).

¹² This notice is only mentioned by appellants, alleging that this acknowledges that the assessment in the NPA was final more
than 240 days prior to when they filed for bankruptcy. (App. Supp. Br., p. 3.) Respondent does not mention this notice.
Whether the notice is proper and valid or not, both parties continued with the protest and appeal processes.

¹³ It appears from the language of the NOA that respondent was extending the protest period on the belief that appellants had
evidence of a federal correction or adjustment to the information contained in the RAR, hence the thirteen month period
between appellants' protest of the NPA and the issuance of the NOA.

1 Contentions

2 Appellants' Contentions

3 Appellants contend that their tax return was prepared by an unknown and unauthorized
4 preparer and was not reviewed or signed by them. (App. Opening Br.) Appellants state that they took
5 their tax information to the Care Financial Group, but their forms were completed and submitted by the
6 E.W. Holding Company without their review or signature. Appellants contend that they did not see
7 these returns until the IRS audited their tax year, and that the state is unjust to ignore these facts. (*Id.*)

8 Appellants contend that they have filed an amended federal return on which the IRS has
9 not made a decision. (App. Add'l. Br., p. 5 & exhibit F.) Therefore, they claim that the federal
10 determination is not final and respondent's proposed assessment, based on a federal determination, is not
11 proper at this time. (App. Add'l. Br., p. 5.) Appellants provided letters from the IRS stating that their
12 amended federal return has been received and is being processed. The last such letter is dated December
13 5, 2007, and states that a decision regarding their amended return would be made within 45 days. (App.
14 Add'l. Br., exhibit F.)

15 Appellants contend that they are entitled to a refund for tax year 2000. (App. Supp. Br.,
16 p. 2.) Appellants provided an amended state income tax return (540X) that was submitted to respondent,
17 an amended federal income tax return (1040X) that was submitted to the IRS, as well as several receipts
18 and other financial documents to validate this claim. (See App. Supp. Br., exhibits; App. Add'l. Br.,
19 exhibits.) Respondent originally had problems with several of the documents submitted by appellants,
20 ranging from issues of readability to lack of proof of payment. (Resp. Add'l. Br., attachment 1.)
21 Appellants contend that they remedied respondent's problems with the documents through the
22 submission of clearer copies and explanations validating the claimed deductions. (App. Add'l. Br., pp.
23 7-10 & exhibits.) Respondent has not addressed this new evidence yet. Appellants assert that since they
24 are entitled to a refund, the interest and penalties should be abated. (App. Supp. Br., p. 3.)

25 In the alternative, appellants contend that their tax obligation was discharged in
26 bankruptcy. Appellants claim that the assessment was final on March 6, 2006, when the Notice of State

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1 Income Tax Due was issued.¹⁴ (App. Supp. Br., p. 3.) Appellants state that when they failed to protest
2 the NPA in a timely manner, the assessment was made final, according to Revenue & Taxation Code
3 (R&TC) section 19042 and the language reflected in the Notice of State Income Tax Due. (*Id.*) March
4 6, 2006, is more than 240 days prior to the date they filed for bankruptcy, November 6, 2006, and
5 appellants contend, therefore, that the assessment was discharged in bankruptcy on February 22, 2007.
6 (*Id.*) Appellants provided evidence showing that IRS debt was discharged in the bankruptcy proceeding
7 and that the IRS removed the lien they had on appellants. (App. Supp. Br., last exhibits.) Appellants
8 contend that the state tax obligation should likewise be discharged through bankruptcy.

9 Finally, appellants contend that the post-amnesty penalty is unconstitutional and should
10 be abated.¹⁵ (App. Supp. Br., pp. 4-7.)

11 Respondent's Contentions

12 Respondent contends that appellants have a nondelegable duty to file their taxes.
13 Respondent asserts that this duty to file cannot be delegated to a tax preparer, and that this obligation
14 includes the duty of ensuring that their taxes are filed properly by the due date. (Resp. Reply Br., p. 4.)
15 Respondent notes that appellants apparently left their tax information with Care Financial Group and did
16 not attempt to verify that their taxes were filed timely or properly until after they were audited by the
17 IRS. (Resp. Reply Br., p. 5.) Respondent contends that appellants did not act like reasonably prudent
18 business persons in filing their state income tax return for 2000. (*Id.*)

19 Respondent contends that the proposed assessment is based on a final federal
20 determination and that appellants have not shown that the IRS is reconsidering the matter. (Resp. Reply
21 Br., p. 3.) Respondent asserts that it verified that the federal determination is final by requesting an
22 Individual Master File transcript (IMF), which satisfies the requirements of Treasury Regulation section
23 301.6203-1, from the IRS on June 29, 2007. (*Id.*) While respondent recognizes that the IRS accepted an
24 amended return from appellants in July of 2006, it notes that the IRS did not alter its determination and
25 the bankruptcy court discharged the federal tax due in April of 2007. (Resp. Reply Br., p. 3 & exhibit F,
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27 ¹⁴ Appellants also refer to this notice as a Notice of Action, but the actual NOA was issued on March 9, 2007. (App. Supp.
28 Br., p. 1; App. Add'l. Br., p. 2.)

¹⁵ Appellants note in their briefs that the post-amnesty penalty argument is advanced to preserve their future appeals rights.

1 p. 4.) Respondent subsequently requested and received a more current IMF transcript for appellants
2 dated May 12, 2008, which respondent contends shows that no adjustments have been made to
3 appellants' 2000 federal income tax assessment. (Resp. Add'l. Br., p. 1.)

4 Respondent notes that it is not obligated to follow federal determinations, but contends
5 that appellants have not shown error in the federal determination or the NPA. (Resp. Add'l. Br., p. 2.)
6 Respondent contends that the evidence appellants provided in their opening and supplemental briefs are
7 lacking or unclear and do not substantiate the expenses and deductions claimed.¹⁶ (*Id.*)

8 Respondent contends that the tax obligation was not discharged in bankruptcy, and,
9 regardless, the Board does not have jurisdiction to determine whether it was discharged in bankruptcy.
10 (Resp. Add'l. Br., p. 2.)

11 Respondent contends that the Board's jurisdiction is limited concerning the post-amnesty
12 penalty. (Resp. Add'l. Br., p. 3.) Respondent asserts that the post-amnesty penalty is merely an
13 estimate at this point and cannot be assessed until the proper amount of additional tax assessed is final.
14 (Resp. Reply Br., p. 6.) Respondent therefore contends that the Board does not have jurisdiction to
15 consider the post-amnesty penalty in this appeal.

16 Applicable Law

17 Non-delegable Duty to File

18 Each taxpayer has a personal, non-delegable obligation to file the tax return and make
19 payment by the due date. (*Appeal of Thomas K. and Gail G. Boehme*, 85-SBE-134, Nov. 6, 1985;
20 *Appeal of Philip C. and Anne Berolzheimer*, 86-SBE-172, Nov. 19, 1986; Rev. & Tax. Code, § 18501.)
21 In some circumstances, taxpayers may claim that they reasonably relied on the advice of a tax preparer.
22 (*Appeal of Thomas K. and Gail G. Boehme, supra.*) To establish reasonable reliance, taxpayers must
23 show that an ordinarily intelligent and prudent businessman would have so acted under similar
24 circumstances. (*Id.*) Reasonable reliance does not excuse taxpayers from paying taxes properly owed.

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27 ¹⁶ Respondent requested additional records from appellants to respond to the listed shortcomings. (Resp. Add'l. Br., p. 2.)
28 Appellants provided additional documents and clarifications for the problems presented by respondent. (See App. Add'l. Br.,
pp. 7-10 & exhibits.) The record does not contain a reply from respondent to this new information.

1 Federal Determination

2 A federal determination is deemed final on the date on which the adjustment resulting
3 from an IRS examination is assessed. (Rev. & Tax. Code, § 18622, subd. (d); Int.Rev. Code, § 6203.)
4 Recording the liability in accordance with federal rules and regulations constitutes an assessment.
5 (Treas. Reg., § 301.6203-1.) IMF transcripts meet the federal requirements for properly recording a
6 liability.

7 R&TC section 18622 provides that a taxpayer shall either concede the accuracy of a
8 federal determination or state wherein it is erroneous. It is well-settled that a deficiency assessment
9 based on a federal audit report is presumptively correct, and the taxpayer bears the burden of proving
10 that the determination is erroneous. (*Appeal of Sheldon I. and Helen E. Brockett*, 86-SBE-109, June 18,
11 1986; *Todd v. McColgan* (1949) 89 Cal.App.2d 509.) Unsupported assertions are not sufficient to
12 satisfy appellant's burden of proof. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17,
13 1982.) In the absence of uncontradicted, credible, competent, and relevant evidence showing error in
14 respondent's determinations, they must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-
15 154, Nov. 18, 1980.)

16 Bankruptcy

17 A tax liability cannot be discharged until the assessment has become final, after
18 appellants have exhausted all administrative appeals. (*In Re King* (9th Cir. 1992) 961 F.2d 1423; *Schatz*
19 *v. Franchise Tax Board* (1999) 69 Cal.App.4th 595.) It appears that the assessment in this appeal has not
20 become final, because the Board has not issued its decision, and therefore the tax liability could not have
21 been discharged in bankruptcy. Moreover, the Board is without jurisdiction to determine if a bankruptcy
22 discharge applies to taxes which respondent proposes to assess. (*Appeal of Robert G. and Jean C.*
23 *Smith*, 81-SBE-145, Oct. 27, 1981.)

24 Post-Amnesty Penalty

25 California imposes a post-amnesty penalty under R&TC section 19777.5, subdivision
26 (a)(2), for any underpayment of an eligible tax year beginning before January 1, 2003, that became final

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1 after the end of the amnesty period (March 31, 2005).¹⁷ The amnesty provisions give respondent no
2 discretion to determine whether the amnesty penalty should be imposed and provide no exceptions for
3 taxpayers who may have acted in good faith or had reasonable cause for failing to participate in the
4 amnesty program. In addition, the amnesty provisions strictly limit the Board's ability to review
5 respondent's imposition of the amnesty penalty.

6 Subdivision (d) of R&TC section 19777.5 provides that a taxpayer may not contest the
7 assessment of the amnesty penalty by respondent under the protest procedures that are applicable to
8 deficiency assessments. Because the standard protest provisions are not applicable to the amnesty
9 penalty, it appears as though this Board does not have any authority under R&TC section 19045 to
10 review respondent's imposition of the amnesty penalty where the penalty has not been paid.

11 STAFF COMMENTS

12 Both parties should be prepared to discuss the relevance of the Notice of State Income
13 Tax Due sent to appellants on March 6, 2006. According to R&TC section 19049, the notice, which
14 required payment at the expiration of 15 days from the date of issuance, should only have been issued if
15 the proposed assessment became final. Respondent should be prepared to discuss its validity, and
16 provide evidence to show why it is not effective. Both parties should be prepared to discuss the
17 relevance of appellants' further pursuance of the protest and appellate processes. (See *Schatz v.*
18 *Franchise Tax Bd.* (1999) 69 Cal.App.4th 595, 602.)

19 Both parties should be prepared to discuss the protest to the NPA. Namely, what form it
20 was received in (e.g., an amended return), what date it was submitted (i.e. February 9, 2006 or March
21 15, 2006), and whether it constitutes a timely protest even if it was received two days after the protest
22 deadline. Both parties should be prepared to discuss the applicability of Treasury Regulation
23 section 301.7502-1, which states, in general, that the filing date is the date of the postmark stamped on
24 the envelope in which the documents were mailed.

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28 ¹⁷ The amount of the penalty is 50 percent of the interest on the tax underpayment from the original due date of the tax to the end of the amnesty period.

1 Non-delegable Duty to File

2 Respondent has already abated the 40 percent accuracy-related penalty, to which
3 appellants may have asserted a reasonableness-based argument. (Rev. & Tax. Code, § 19164, subd.
4 (a)(1)(A); Int.Rev. Code, § 6662(b).) Staff notes that whether appellants were reasonable in their
5 reliance on their tax preparer, or even knew who their tax preparer was, has no bearing on whether the
6 proposed assessment of additional tax is correct.

7 Federal Determination

8 Both parties should be prepared to discuss the finality of the federal determination and
9 the significance of the IMF reports and appellants' letters from the IRS. Appellants should be prepared
10 to provide any evidence showing that the federal determination is not final, or that it has been adjusted,
11 and if so, for what reason. If it is found that the federal determination is not final, or that there have
12 been subsequent adjustments made, respondent should be prepared to support its findings in the NPA
13 and explain whether it can still rely on the RAR.

14 Both parties should be prepared to discuss the documents and clarifications provided with
15 appellants' additional brief. The parties should discuss whether appellants have met their burden of
16 proving error in the federal determination and NPA.

17 Bankruptcy

18 Appellants must raise their bankruptcy argument in another forum, either in a lawsuit in
19 state court, or by reopening their bankruptcy case to file an adversary proceeding to determine whether
20 these tax debts were dischargeable. While tied to the arguments on bankruptcy, the question of whether
21 the assessment became final may have its own significance in this appeal. Both parties should be
22 prepared to discuss and provide evidence as to whether the assessment is final and if so, when it became
23 final. In particular, respondent should be prepared to discuss the effectiveness of the Notice of State
24 Income Tax Due, as stated above. If the Board finds that the assessment is final, both parties should be
25 prepared to discuss the effect that finding has, if any, on this appeal.

26 Post-Amnesty Penalty

27 If the Board finds that the assessment is not final, then the post-amnesty penalty has yet
28 to be imposed. In that event, the Board may lack jurisdiction at this time to review respondent's

1 possible future assessment of the amnesty penalty. Likewise, if the assessment is final, but appellants
2 have not paid the amount and requested a refund of the penalty, the Board may still lack jurisdiction. At
3 the hearing, both parties should be prepared to discuss whether the Board has such jurisdiction.

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