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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 **DIANE GREEN**¹) Case No. 539627²

	<u>Year</u>	<u>Proposed</u>
	2004	Assessment
		\$49,059

17 Representing the Parties:

19 For Appellant: Joyce Rebhun, JD, MBA, PhD

20 For Franchise Tax Board: Susanne E. Coakley, Tax Counsel

22 **QUESTION:** Whether appellant was a shareholder of Zack's Incorporated (Zack's), a subchapter

24 ¹ Appellant resides in San Francisco, California.

25 ² This appeal was scheduled for the September 20, 2011 oral hearing in Sacramento. Appellant provided amended returns on
26 September 19, 2011, causing the appeal to be removed from the September oral hearing calendar for additional briefing. This
27 appeal was then scheduled for the May 30, 2012 oral hearing calendar in Sacramento. During the scheduling process, this
28 appeal and the Appeal of Eben Gossage (Case ID No. 546541) were scheduled together based on their linked factual history.
For this purpose, the appeal was moved from the May calendar to the July 24, 2012 oral hearing calendar in Culver City,
where Mr. Gossage's appeal was scheduled. Based on appellant's request to keep this appeal in Sacramento, both appeals
were rescheduled to the August 21, 2012 oral hearing calendar in Sacramento.

1 S corporation, for the 2004 tax year and was therefore properly assessed additional
2 tax on her proportionate share of the income from the S corporation.

3 HEARING SUMMARY

4 Background

5 Procedural Background

6 Zack's Incorporated (Zack's), doing business as Sausalito Marine with Mr. Eben Gossage
7 as president, engaged in property transactions that it characterized as Internal Revenue Code (IRC)
8 section 1031 like-kind exchanges to defer tax on the gain in tax years 2003 and 2004. Franchise Tax
9 Board (FTB or respondent) audited Zack's 2003 and 2004 tax years and determined it did not qualify for
10 the IRC section 1031 treatment, which resulted in income to the shareholders of Zack's. (Resp. Op. Br.,
11 p. 1.) Since appellant was listed as a shareholder of Zack's for 2004 (with Mr. Gossage as the majority
12 and only other shareholder) respondent issued a Notice of Proposed Assessment (NPA) to appellant for
13 the 2004 tax year. (*Id.* at exhibit G.)

14 The NPA explained that the proposed assessment of additional tax was based on the audit
15 of Zack's and appellant's interest as a 23.428869 percent shareholder of Zack's. The NPA added
16 \$508,702 as appellant's pro rata share of Zack's income, and allowed a proportionate loss of \$1,019
17 representing built-in-gains tax paid by Zack's. Due to the increase in income, appellant's itemized
18 deductions were reduced by \$26,403, and her exemption credits were reduced to zero. (Resp. Op. Br.,
19 exhibit G.) The effect of the adjustments was to increase appellant's reported \$17,490 taxable income to
20 a revised taxable income of \$551,576. The NPA calculated a total tax of \$49,321, which was reduced
21 by \$262 for original tax reported, resulting in a proposed additional tax of \$49,059, plus interest. (*Id.* at
22 p. 1.)

23 Appellant protested the NPA, asserting she was not a shareholder of Zack's for the 2004
24 tax year. (Resp. Op. Br., exhibit H.) Appellant indicated she made loans to Zack's and was offered
25 shares of stock by Mr. Gossage as part of her loan to the company, but never elected to purchase the
26 shares. Appellant asserted she was never a shareholder of Zack's and never held herself out as a
27 shareholder of Zack's. (*Id.* at exhibits H & I.) Respondent reviewed appellant's and Zack's tax returns,
28 which show appellant was a shareholder and reported her proportionate share of income and loss from

1 Zack's for both state and federal returns.³ (Resp. Op. Br., p. 4.) Respondent also reviewed an account
2 transactions journal provided by Zack's for the 2003 and 2004 year audit, and located several entries for
3 appellant, including a check to appellant from Zack's for \$15,000 in 2003 and a transfer from Zack's to
4 appellant for \$5,000 in 2004. (*Id.* at p. 3 & exhibit F.) Respondent affirmed the NPA with a Notice of
5 Action (NOA). (Appeal Letter, attachments.) This timely appeal followed.

6 Tax Returns

7 Appellant's 2004 state and federal returns were prepared by Susan M. McGuire. (Resp.
8 Op. Br., exhibit B & C.) On appellant's 2004 federal return, she reported gain of \$24,404 and losses of
9 \$17,864 from Zack's, consistent with her being a shareholder. (*Id.* at exhibit B, pp. 6-8.) Appellant's
10 2004 state return likewise reported net passive gain of \$24,184 and net passive loss of \$17,677 from
11 Zack's. (*Id.* at exhibit C, p. 8.)⁴ Respondent indicates appellant signed these returns under penalty of
12 perjury, and that appellant's 2005, 2006, and 2007 personal income tax returns, also signed by appellant,
13 also show she was a shareholder of Zack's for those tax years. (*Id.* at p. 7.)

14 Zack's 2004 California S corporation return (form 100S) was filed by the same preparer
15 as appellant's 2004 returns.⁵ (Resp. Op. Br., exhibit A, p. 2.) Zack's 2004 form 100S included a
16 Schedule K-1 showing appellant as a 23.428869 percent shareholder of Zack's. (*Id.* at exhibit A,
17 pp. 15 & 16.) Respondent reports that Schedules K-1 issued by Zack's for tax years 2005, 2006, and
18 2007 also reported appellant as a shareholder in Zack's for those years. (Resp. Op. Br., p. 2, fn. 5.)

19 Appellant stated in her reply brief that she will file amended returns for the tax years
20 2004 through 2008 to properly reflect her assertion that she was never a shareholder of Zack's, and that
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22 _____
23 ³ California generally adopts the rules regarding S corporation shareholders, including the taxability of S corporation income,
24 contained in the Internal Revenue Code (IRC). (Rev. & Tax. Code, §§ 17087.5 & 23800 [incorporating Int.Rev. Code
§ 1366(a)(1)(A)].) Because Zack's is an S corporation, the capital gains on the sales of property is assigned to its reported
shareholders based on their pro rata share of ownership.

25 ⁴ The actual worksheets for appellant's returns are not provided, and while Zack's is reported as the source of appellant's
26 losses on appellant's federal return, there is an assumption that the long-term and capital gain and net passive gains and
27 losses listed on appellant's returns are from Zack's. (See Resp. Op. Br., p. 2.) If this assumption is in error, appellant should
provide the relevant return information to show otherwise.

28 ⁵ The tax return preparer for appellant's 2004 federal and state returns is listed as Susan M. McGuire, with Chiao Smith and
Associates. (Resp. Op. Br., exhibits B, p. 2, and C, p. 2.) The return preparer for Zack's 2004 California S corporation return
is listed as Susan M. Stevens, also with Chiao Smith and Associates, and bearing the same Preparer Tax Identification
Number. (*Id.* at exhibit A, p. 2.)

1 Zack's will issue corrected Schedules K-1 and file an amended return showing Mr. Gossage as 100
2 percent shareholder in Zack's for the 2004 tax year. (App. Reply Br., pp. 3-4.) As of the submission of
3 respondent's reply brief, respondent stated that no amended returns or Schedules K-1 had been filed for
4 the 2004 tax year.⁶ (See Resp. Reply Br., p. 2.)

5 Purported Amended Returns

6 On September 19, 2011, appellant's representative delivered purported amended returns
7 for appellant's federal and state personal tax liabilities, and an amended income tax return for Zack's,
8 including a Schedule K-1 reflecting Mr. Gossage as 100 percent owner in 2004. (Resp. Add'l Exhibits.)
9 Due to the late nature of this submission, the appeal was pulled from the September 20, 2011 oral
10 hearing calendar to allow the parties to provide briefing on the purported amended returns.

11 These documents were prepared and signed by appellant's representative on appeal, Ms.
12 Rebhun, dated September 18, 2011, on behalf of both appellant and Mr. Gossage (as president of
13 Zack's). Appellant's 540X and 1040X amended her federal adjusted gross income from \$71,264 to
14 \$64,944, and increased itemized deductions by \$474.⁷ The 540X provides in its explanation section that
15 appellant was issued a Schedule K-1 without her permission or knowledge, and is removing any tax
16 benefit from her return because the Schedule K-1 was issued in error. The 1040X similarly claims
17 appellant's accountant erroneously attributed to appellant ownership in Zack's, that appellant had no
18 interest whatsoever in Zack's, and states the president of Zack's (i.e., Mr. Gossage) has filed an
19 amended return for the 2004 tax year to claim 100 percent ownership of Zack's.⁸

20 Contentions

21 Appellant's Contentions

22 Appellant asserts her original representative, who represented her from at least as early as
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24 ⁶ Upon respondent's request, Appeals Division staff deferred this appeal for 90 days to allow appellant time to file an
25 amended return.

26 ⁷ Appellant's 540X also removed a \$187 California adjustment, apparently for passive activity related to Zack's operations.
27 (Resp. Add'l Exhibits, 540X, p. 1, ln. 2e.)

28 ⁸ No copy of any amended personal income tax return by Mr. Gossage has been received on appeal, and there is no indication
that such an amended return has been created or filed with either the Internal Revenue Service (IRS) or respondent other than
statements from appellant's representative, including the notes on appellant's federal amended return.

1 the filing of her 2004 tax returns and up through the filing of her appeal letter with the Board, had a
2 conflict of interest by representing appellant, Mr. Gossage, and Zack's. Appellant therefore contends
3 any representation prior to her reply brief was tainted by this conflict of interest.⁹ (App. Reply Br., 4.)

4 Appellant contends that she is not and has never been a shareholder in Zack's. Appellant
5 asserts errors were made on tax documents including Schedules K-1 reporting her as a shareholder in
6 2004, possibly based on misinformation from Zack's president, Mr. Gossage, indicating appellant was
7 offered shares in Zack's and would be purchasing them.¹⁰ (Appeal Letter, p. 1; App. Reply Br., p. 1.)
8 Appellant asserts she never purchased any stock from Zack's, and rejects respondent's contention that
9 appellant is a shareholder merely because she was reported as such. Appellant distinguishes *Denemark*
10 *v. Commissioner* (1976) 35 T.C.M. (CCH) 1170 ("*Denemark*"), which is cited by respondent in the
11 NOA, by noting that in that case even though the taxpayer did not purchase stock and may have been
12 confused about the tax consequences of owning S corporation stock, he still signed an election form and
13 wrote a check for stock with borrowed funds, exhibiting an understanding that he was a shareholder.
14 (Appeal Letter, pp. 1-2.) Appellant contends being a shareholder requires an affirmative action, such as
15 signing corporate documents or undertaking corporate duties, but she did none of these things.
16 (*Id.* at p. 2.)

17 Appellant states that she loaned money to Mr. Gossage personally which merely makes
18 her a personal creditor to Mr. Gossage and not a stock owner.¹¹ Appellant denies that she received a
19 shareholder loan or "was given a payment of \$15,000 as a shareholder/investor in Zack's." (App. Reply
20 Br., p. 2.) Appellant asserts there was no executed shareholder agreement between herself and
21 Mr. Gossage, and that she played no part in the corporate governance of Zack's, nor had any desire for
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23 ⁹ We note that the briefing and evidence provided by appellant's prior representative are part of this appeal record. Appellant
24 should indicate with specificity at the hearing whether she desires the Board to disregard any such documents, assertions, or
25 other product of that representation.

26 ¹⁰ Appellant's appeal letter suggests that the accounting firm preparing returns for Zack's, Mr. Gossage, and appellant
27 experienced difficulties in obtaining documentation from Mr. Gossage due to his personal troubles. (Appeal Letter, p. 1.)
Appellant also alleges that Mr. Gossage has subsequently stated he is unable to explain why he decided to report her as a
shareholder on the tax filings. (App. Reply Br., p. 4.)

28 ¹¹ Appellant's former representative stated in her appeal letter that appellant did loan money to Zack's. (Appeal Letter, p. 2.)
Appellant appears to retract this statement in her reply brief.

1 involvement in the company. (*Ibid.*)

2 Appellant asserts she has no interest whatsoever in tax matters and signed the tax returns
3 prepared for her by Ms. McGuire without examining or understanding the contents of the returns.
4 (App. Reply Br., p. 2.) Appellant asserts she was “basically clueless” until she received the NPA for
5 2004. (*Id.* at p. 4.) Appellant stated in her reply brief that she has requested and received amended
6 Schedules K-1 from Zack’s, and intends to file amended personal state income tax returns for tax years
7 2004 through 2008 to show she was not a shareholder in Zack’s, and indicated Zack’s would file
8 amended returns for the same years to show Mr. Gossage was the sole owner.¹² (*Ibid.*) As detailed in
9 the Background section above, appellant provided documents to respondent on the day prior to the
10 September 20, 2011 Board meeting. Appellant asserts these amended returns “delete any false
11 information reflecting any ownership in Zack’s or any flow thru [sic] tax benefit(s).” (App. Add’l Br.,
12 p. 3.)¹³ Appellant’s representative asserts she had “Power of Attorney to sign and file any and all tax
13 returns to correct this unintended and unfortunate tax situation.” (App. Add’l Reply Br.)

14 Respondent’s Contentions

15 Respondent asserts appellant has not provided sufficient evidence to show error in
16 respondent’s determination, and the proposed assessment based on shareholder pro rata income from
17 Zack’s must be upheld. (Resp. Op. Br., p. 8.) Respondent asserts appellant was free to organize her
18 affairs as she saw fit and she chose to hold herself out as a shareholder in Zack’s for the 2004 and
19 subsequent tax years. (*Id.* at p. 5.) Respondent notes that appellant signed her returns, confirming she
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21 ¹² Appellant indicates in her reply brief that her previous representative never counseled her to amend her income tax returns,
22 or request Zack’s amend its returns and issue new Schedule K-1s. (App. Reply Br., p. 4.) Appellant states in her reply brief,
23 dated January 16, 2011, that amended returns and Schedule K-1s will be filed for the 2004 tax year. As of the writing of this
24 appeal, appellant’s representative has submitted to respondent amended state and federal personal income tax returns for
25 herself and corporate return information including a Schedule K-1 for Zack’s. (Resp. Add’l Exhibits.) No amended return
has been provided for Mr. Gossage, and it is unclear whether appellant, Zack’s, or Mr. Gossage have filed amended returns
with the IRS. Although appellant asserts the amended returns have been filed with the IRS, respondent asserts there is no
record of appellant’s amended return being filed with the IRS. (App. Add’l Br., p. 3; Resp. Add’l Br., p. 3.)

26 ¹³ After receiving a copy of appellant’s purported amended returns, the matter was postponed from the September 20, 2011
27 oral hearing calendar for further development. Appeals Division staff requested additional briefing from the parties,
28 specifically asking appellant to provide briefing on the new returns and how they support or otherwise affect her position on
appeal. Other than one paragraph stating the amended returns were filed with respondent and the IRS to reflect the fact that
she had no ownership in Zack’s, appellant’s additional brief is a resubmission of her reply brief submitted on January 16,
2011. (App. Add’l Br.)

1 was a shareholder of Zack's, and that Zack's returns confirm that appellant was a shareholder for the
2 year at issue. Respondent contends that appellant only sought to deny her shareholder status when she
3 was assessed for her share of the S corporation income, but asserts appellant is bound by the reported
4 status and cannot change it now to avoid recognition of income. (*Id.* at pp. 5-6.)

5 Respondent rejects appellant's assertion that she cannot be a shareholder because she did
6 not purchase stock. Respondent contends that no capital contribution or receipt of stock certificates is
7 required to become a shareholder, and merely holding oneself out as a shareholder by reporting
8 shareholder income and loss on her personal income tax returns and accepting Schedules K-1 is
9 sufficient. (Resp. Op. Br., pp. 6-7 [citing *Denemark*].) Likewise, respondent disagrees with appellant's
10 argument that if she were a shareholder she would have been required to sign corporate loan documents
11 and checks. Respondent also contends there is no law requiring appellant to be an active participant in
12 the corporation to be a shareholder. (*Id.* at p. 7.) Respondent contends the issue of whether appellant
13 was a creditor of Mr. Gossage is irrelevant, and regardless, the shareholder loan journal and transactions
14 between appellant and Zack's do not support appellant's contention that she was a creditor of
15 Mr. Gossage. In addition, respondent argues that appellant's written statement that she was never a
16 shareholder of Zack's conflicts with the Schedules K-1 and appellant's personal income tax returns for
17 tax years 2004, 2005, 2006 and 2007. (*Ibid.*) Respondent indicates appellant has alleged there were
18 errors made in the preparation of her personal income tax returns and Zack's returns for the 2004 tax
19 year, but had not submitted amended returns to support her theory prior to this appeal. (Resp. Op. Br., p.
20 5.)

21 After completion of the briefing and prior to the scheduled hearing of September 20,
22 2011, appellant provided purported amended returns, as described in the Background section above.
23 Respondent provided additional briefing at Appeals Division staff's request addressing these
24 submissions. (Resp. Add'l Br.) Respondent asserts that if appellant was not a shareholder of Zack's for
25 the year at issue, then the issue should have been raised when the Schedule K-1 was received in early
26 2005, or when similar Schedule K-1s were received in subsequent years. (*Id.* at p. 1.) Respondent
27 contends the purported amended 540X and 100X returns must be treated as correspondence, and cannot
28 be accepted as valid amended returns. (*Id.* at pp. 2-4.) Respondent asserts appellant has not established

1 the correctness of the grounds of the returns. Respondent contends appellant had a duty to examine her
2 tax return before signing under penalty of perjury, and therefore rejects her argument that she signed
3 without having a clear understanding of what she was signing. (*Id.* at p. 2, fn. 2.) Respondent states the
4 returns were prepared and signed by appellant's representative, but no power of attorney has been
5 provided specifically authorizing Ms. Rebhun to prepare and sign tax returns for appellant or Mr.
6 Gossage as president of Zack's, and no explanation was provided for why the returns should be accepted
7 beyond the normal four-year statute of limitations for proposing assessments. (*Id.* at p. 7, fn. 16.)
8 Respondent asserts appellant's Internal Revenue Service (IRS) account transcript does not show that she
9 has filed an amended federal personal income tax return for the 2004 tax year, contrary to her statements
10 on appeal. (*Id.* at p. 3.)

11 Respondent contends that if it were to accept appellant's amended return, the pro rata
12 income that was allocated to appellant as a shareholder of Zack's would not be taxed, because the statute
13 of limitations for assessing additional tax on Mr. Gossage has expired. (Resp. Add'l Br., p. 3.)
14 Respondent states that Zack's returns were signed by its president, Mr. Gossage, and Zack's did not
15 dispute the NPA or information provided in its returns during the audit of Zack's. (*Id.* at p. 4.)
16 Respondent indicates Mr. Gossage did not file an amended personal income tax return for 2004 to
17 reflect the changes made on appellant's amended return and the amended Schedule K-1 provided on
18 appeal. Respondent asserts the duty of consistency applies here to prevent appellant from now taking a
19 contrary position than originally reported in an effort to escape taxes. (*Ibid.* [citing *Estate of Hilda*
20 *Ashman v. Comm'r of Internal Revenue* (9th Cir. 2000) 231 F.3d 541; *LeFever v. Comm'r Internal*
21 *Revenue* (10th Cir. 1996) 100 F.3d 778, 786-88].) Respondent contends appellant and Zack's made
22 representations on their returns that she was a shareholder, respondent relied upon information provided
23 in those returns, and appellant is now attempting to change her status as a shareholder of Zack's after the
24 expiration of the statute of limitations for assessing additional tax for 2004. Respondent asserts
25 appellant's failure to amend her personal income tax return in a timely manner harms respondent's
26 ability to properly tax shareholder income from Zack's. (*Id.* at pp. 5-6.)

27 Respondent asserts the alleged conflict of interest issue between appellant and her former
28 representative does not involve respondent or the assessment in issue. (Resp. Reply Br., pp. 1-2; Resp.

1 Add'l Br., p. 7.) Respondent also states that it does not advise taxpayers as to their choice of
2 representation, and it is solely the decision of the taxpayer. (Resp. Add'l Br., p. 7.) Respondent asserts
3 that any conflict of interest that existed at the time of the tax return preparation and filing, on audit, or on
4 protest based on the claimed diametrically-opposed interests of appellant and Mr. Gossage and their
5 representation by Ms. McGuire still exists because Ms. Rebhun now represents both individuals in their
6 separate appeals. (*Ibid.*) Respondent asserts that any conflict of issue that appellant may have with her
7 former or current representative is solely between appellant and her representatives, and is not an
8 influence on this appeal. (*Id.* at p. 8.)

9 Applicable Law

10 Respondent has the initial burden of showing that its proposed assessment is reasonable
11 and rational. Once this burden is met, respondent's determination is presumed correct and appellant has
12 the burden of proving it to be wrong. (*Todd v McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Richard*
13 *Byrd*, 84-SBE-167, Dec. 13, 1984.) An appellant's unsupported statements are insufficient to carry this
14 burden of proof. (*Appeal of Ismael R. Manriquez*, 79-SBE-077, Apr. 10, 1979.) In the absence of
15 uncontradicted, credible, competent, and relevant evidence showing error in respondent's
16 determinations, they must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18,
17 1980.) An appellant's failure to produce evidence that is within her control gives rise to a presumption
18 that such evidence is unfavorable to her case. (*Appeal of Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.)

19 The duty of consistency was discussed by the Ninth Circuit Court of Appeals in *Ashman*
20 *v. Commissioner, supra*, as follows:

21 While it is true that income taxes are intended to be settled and paid annually each year standing
22 to itself, and that omissions, mistakes and frauds are generally to be rectified as of the year they
23 occurred, this and other courts have recognized that a taxpayer may not, after taking a position in
24 one year to his advantage and after correction for that year is barred, shift to a contrary position
25 touching the same fact or transaction. When such a fact or transaction is projected in its tax
26 consequences into another year there is a duty of consistency on both the taxpayer and the
27 Commissioner with regard to it, whether or not there be present all the technical elements of an
28 estoppel.

In *Ashman, supra*, 231 F.3d at 546, the Ninth Circuit articulated the following three
elements for finding that a taxpayer breached the duty of consistency:

- (1) A representation or report by the taxpayer;
- (2) on which the Commissioner has relied;
- and (3) an attempt by the taxpayer after the statute of limitations has run to change the
previous representation or to recharacterize the situation in such a way as to harm the
Commissioner. If this test is met, the Commissioner may act as if the previous representation,

1 on which he relied, continued to be true, even if it is not. The taxpayer is estopped to assert
2 the contrary.

3 In *Denemark, supra*, the tax court decided the issue of whether the petitioner was a
4 shareholder in an S corporation. The facts in that case showed that two companies were formed, “Mills”
5 and “Textile,” and the petitioner had a desire for a proprietary share of Mills. In exchange for his
6 expertise, services, and cash, the petitioner received a salary and twenty percent interest in the company.
7 Although he never received a stock certificate evidencing his shareholder status, the petitioner did not
8 contest his status as a Mills shareholder. Petitioner asserted, however, that he was not a shareholder of
9 Textile despite the fact that: (1) the petitioner filed origination forms for Textile with the other
10 shareholders showing that he owned 20 shares; (2) the petitioner included on his personal income tax
11 returns undistributed S corporation profits and investment credit; and (3) the petitioner signed
12 documents for the sale of Mills and Textile, indicating he was a 20 percent shareholder in both
13 companies.

14 Contrary to his actions and filings during the years at issue, the petitioner in *Denemark*
15 disavowed that he was a shareholder in Textile based on the fact that he never made a capital
16 contribution to the company. The court found that the failure to make a capital contribution did not
17 negate his explicit acceptance of shareholder status, and stated, “...it is not essential that a certificate of
18 stock be issued in order to create shareholder status.” The court found that petitioner was indeed a
19 shareholder, and as such properly included as taxable income his allocable share of undistributed
20 S corporation profits. The court reached this conclusion despite finding that the petitioner did not
21 understand all the ramifications of the subchapter S election.

22 STAFF COMMENTS

23 Respondent’s proposed assessment is based on appellant’s 2004 personal income tax
24 return in which she reported herself as a shareholder in Zack’s, and respondent’s audit of Zack’s which
25 revealed unreported company income that was taxable to appellant as a shareholder. In addition to
26 discussing the purported amended returns, discussed below, appellant should explain why this Board
27 should give greater weight to the purported return signed by appellant’s representative and provided in
28 this appeal, which does not show her as a shareholder, than to her original return, signed by her under

1 penalty of perjury and filed with the FTB, which shows her as a shareholder of Zack's. Staff notes that
2 related tax filings, including Zack's and Mr. Gossage's original returns for the 2004 tax year, and her
3 returns for 2005, 2006, and 2007, consistently report her as a shareholder of Zack's.

4 Appellant should be prepared to explain why the duty of consistency should not apply in
5 this appeal. As noted above, appellant reported herself as a shareholder of Zack's for 2004. It also
6 appears to staff that respondent relied upon this representation when collecting tax and proposing
7 additional assessments for the 2004 tax year, and appellant is now attempting to change her previous
8 representation after the expiration of the statute of limitations to the detriment of respondent. If the duty
9 of consistency applies, appellant is estopped from arguing at this time that she was not a shareholder of
10 Zack's in 2004.

11 Appellant should also be prepared to explain the surrounding financial arrangements
12 between appellant, Mr. Gossage, and Zack's, including the amounts loaned from appellant to either
13 Zack's (see Appeal Letter, p. 2; Resp. Op. Br., exhibits H & I) or Mr. Gossage (App. Reply Br., p. 2)
14 and the transfers to or from appellant reported in Zack's transaction journal (see, e.g., Resp. Op. Br.,
15 exhibit E, p. 2, transfers dated June 14, 2004, and June 24, 2004).

16 As described in the Background section, appellant has provided purported amended
17 returns. These returns purport to amend appellant and Zack's original filings by removing appellant's
18 status as a shareholder of Zack's and making Mr. Gossage 100 percent shareholder of Zack's. These
19 amended returns correspond to appellant's assertions on appeal, but come with concerns regarding their
20 validity and whether they should be accepted. Respondent states it has not accepted the returns as
21 amended returns. The returns are filed beyond the four-year statute of limitations for tax assessment.¹⁴
22 All the returns are signed solely by Ms. Rebhun, the representative on appeal for both appellant and Mr.
23 Gossage. Respondent states that it has not been provided with a power of attorney allowing Ms. Rebhun
24 to file returns for either party. As noted above, respondent contends the duty of consistency prevents
25 appellant from disavowing her previously asserted shareholder status at a time when respondent is now
26 barred from assessing tax on the income that would be attributed to Mr. Gossage instead of appellant.
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28 ¹⁴ In the closely related Appeal of Eben Gossage, respondent also notes that the amended return for Zack's and
accompanying Schedule K-1 is filed well after Zack's has already consented to an assessment of tax on audit.

1 Mr. Gossage did not file amended returns to report 100 percent ownership in Zack's, consistent with
2 appellant and Zack's amended returns, and it appears appellant has not filed corresponding federal
3 amended returns or amended returns for other years (i.e., 2005, 2006, and 2007) in which she asserted
4 she was a shareholder of Zack's. Appellant should be prepared to address all these concerns with the
5 amended returns, and the parties should be prepared to discuss whether the purported amended returns
6 can and should be accepted as valid.

7 Staff notes that the president of Zack's, Eben Gossage, has an appeal pending (Appeal
8 No. 546541) for 2003 and 2004 (the year at issue here) in which he argues that the FTB erred in
9 determining that Zack's failed to satisfy like-kind exchange requirements. Since the appeals involve
10 related facts, the Board may wish to hear arguments in both appeals prior to making a motion in favor of
11 either party in this appeal.

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