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7 **BOARD OF EQUALIZATION**

8 **STATE OF CALIFORNIA**

9  
10 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
11 ) **PERSONAL INCOME TAX APPEAL**  
12 **RALPH E. SIZEMORE** ) Case No. 572401

	<u>Years</u>	<u>Proposed Assessments</u> <sup>1</sup>
	2004	\$828
	2005	\$955

16 Representing the Parties:

17 For Appellant: Basim Humeid, Taxpayer Appeals Assistance Program<sup>2</sup>  
18 For Franchise Tax Board: Sean Sullivan, Tax Counsel III

20 QUESTION: Whether appellant has established error in the Franchise Tax Board's (FTB or  
21 respondent) assessments, which are based on federal audit adjustments.

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26 <sup>1</sup> As discussed below, respondent is allowing additional Schedule A deductions for 2004 and 2005 resulting in a revised  
27 additional tax due of \$820 for 2004 and a revised additional tax due of \$781 for 2005.

28 <sup>2</sup> Appellant submitted his own appeal letter. Myshanda V. Upton from the Tax Appeals Assistance Program (TAAP)  
submitted appellant's opening brief. Keith Long from TAAP submitted appellant's reply brief and supplemental reply brief  
and Basim Humeid is listed as the TAAP representative at the time of this hearing summary.

1 HEARING SUMMARY

2 Background

3 2004

4 Appellant timely filed a 2004 California income tax return using the single filing status.  
5 On this return, appellant reported federal adjusted gross income (AGI) of \$53,697, taxable income of  
6 \$26,921 and a tax of \$801. After applying an exemption credit of \$85, and a withholding tax credit of  
7 \$2,406, he claimed a refund of \$1,690. (Resp. Opening Br., p. 1, exhibit B.)

8 Subsequently, respondent received audit information from the Internal Revenue Service  
9 (IRS) showing that the IRS made several adjustments to appellant's 2004 federal return. Based on this  
10 information, respondent issued a Notice of Proposed Assessment (NPA), which disallows a claimed  
11 business loss of \$6,575 from the sale of a truck and all claimed Schedule A itemized deductions. It  
12 allows a standard deduction of \$3,165 resulting in a revised taxable income of \$55,418. The NPA  
13 proposes an assessment of additional tax in the amount of \$2,375 plus applicable interest. (Resp.  
14 Opening Br., p. 1, exhibits A-D.)

15 Respondent received an updated 2004 federal account transcript showing that the IRS  
16 disallowed the claimed business loss of \$6,575 from the sale of the truck but allowed \$22,566 of  
17 Schedule A itemized deductions resulting in a federal adjusted gross income of \$60,272. Based on this  
18 information, respondent issued a 2004 Notice of Action (NOA), which revises the NPA. The NOA  
19 disallows the claimed loss of \$6,575 and itemized deductions of \$5,014 resulting in a revised taxable  
20 income of \$38,510. The NOA proposes additional tax of \$828 plus interest. This timely appeal  
21 followed. (Resp. Opening Br. p. 2, exhibits A, E.)

22 2005

23 Appellant and his spouse, Emilia Sizemore, timely filed a 2005 joint California income  
24 tax return. On this return, the couple reported federal AGI of \$72,966, taxable income of \$36,170 and a  
25 tax of \$722. After applying an exemption credit of \$446 and a withholding tax credit of \$3,237, they  
26 claimed a refund of \$3,165. (Resp. Opening Br., p. 2, exhibit H.)

27 Subsequently, respondent received audit information from the IRS showing the IRS made  
28 several adjustments to the couple's 2005 federal return. Based on this information, respondent issued an

1 NPA, which disallows \$54,764 of claimed expenses and deductions resulting in a revised taxable  
2 income of \$90,934. The NPA proposes an assessment of additional tax in the amount of \$3,669 plus  
3 applicable interest. (Resp. Opening Br., pp. 2-3, exhibits I-K.)

4 Respondent received an updated 2005 federal account transcript showing that the IRS  
5 allowed \$31,226 of claimed itemized deductions resulting in a federal AGI of \$86,317. Based on this  
6 information, respondent issued a 2005 NOA, which revises the NPA. The NOA makes a Schedule E  
7 income adjustment (increase) of \$10,759 and disallows claimed itemized deductions of \$8,843 resulting  
8 in a revised California taxable income of \$55,772. The NOA proposes additional tax of \$955 plus  
9 interest. This timely appeal followed. (Resp. Opening Br. pp. 2-3, exhibits L-M; Appeal Letter,  
10 Attachment.)

## 11 Contentions

### 12 Introduction

13 As discussed more fully below, each party has made several concessions during this  
14 appeal. Appellant has conceded various claimed expenses and itemized deductions. Respondent  
15 indicates that the 2004 and 2005 NOAs already allow most of the claimed itemized deductions, and it is  
16 now allowing on appeal all of the requested itemized deductions for 2004 and 2005 that appellant has  
17 not conceded.

18 It appears that the primary remaining dispute concerns whether appellant is entitled to  
19 deduct rental expenses claimed for 2005. It appears that appellant primarily contends that he is entitled  
20 to a depreciation deduction of at least \$263 as a result of \$6,900 of work done on the property's roof.  
21 Respondent argues that appellant is not entitled to deduct any rental expenses because during 2005,  
22 appellant's spouse lived in the residence more than 14 days, and the property was not rented. In the  
23 alternative, respondent argues that it appears that passive loss rules would prevent appellant from taking  
24 any deduction. (See Resp. Reply Br., p. 2; App. Supp. Br., pp. 1-3.)

### 25 Rental Expenses (Schedule E)

#### 26 General Arguments

27 In his opening brief, appellant asserted that since before the couple married in 2005, his  
28 spouse owned real estate located on Heaton Circle in Concord, California (the Heaton Circle property).

1 He also asserted that beginning in May 2005, the couple tried to rent the Heaton Circle property and  
2 spoke to prospective tenants, namely appellant's sister-in-law and nephew. Appellant further asserted  
3 that the couple made repairs and improvements to the Heaton Circle property in an effort to obtain  
4 renters but they were not able to rent the Heaton Circle property and they did not receive any rental  
5 income during 2005. In his opening brief, appellant stated that on March 6, 2006, the couple entered  
6 into a management agreement with Contra Costa's Residential Property Management, Inc., and the  
7 Heaton Circle property was subsequently rented. According to appellant, the Heaton Circle property  
8 should therefore be considered rental property during 2005. (App. Opening Br., p. 9.)

9 Respondent did not discuss the claimed rental expenses in its opening brief. In his reply  
10 brief, appellant contended that for 2005, the Heaton Circle property was rental property, he is entitled to  
11 claim a deduction for rental property repairs and a deduction for depreciation resulting from the  
12 capitalized cost of the roof repair. Attached to appellant's reply brief are two separate statements signed  
13 by appellant and his spouse under penalty of perjury, both of which state that during 2005, the couple  
14 made several improvements to the Heaton Circle property in an effort to rent it and they spoke to  
15 prospective tenants, namely, appellant's spouse's sister and nephew, but they were not able to rent it  
16 during 2005, and it remained unoccupied from May 2005 through December 2005; appellant's spouse's  
17 statement is notarized. (App. Reply Br., p. 2, exhibits A-B.)

18 In its reply brief, respondent argues, for the first time in this appeal, that the Heaton  
19 Circle property was not rental property in 2005. Citing "Directions for 1040 Schedule E, p. E-4,"  
20 respondent contends in its reply brief that appellant is not entitled to any rental deductions because in  
21 2005, appellant's spouse used the Heaton Circle property as a residence for more than 14 days and the  
22 couple rented it out for fewer than 15 days. Attached to its reply brief is a copy of the relevant 2011  
23 Instructions for Schedule E (Form 1040). In the alternative, respondent argues in its reply brief that it  
24 appears any deduction would be precluded by the operation of passive loss limitations, because the  
25 rental would have been a passive activity and there was no corresponding passive income. Respondent  
26 notes in its reply brief that appellant did not report any rental income on his 2005 Schedule E (Form  
27 1040), a copy of which is attached to its reply brief. (Resp. Reply Br., p. 2, exhibit A.)

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1 In his supplemental brief, appellant states, “Despite the fact that the Sizemore’s [sic]  
2 were not able to rent the property on their own, they should not be penalized for trying.” Appellant  
3 contends in his supplemental brief that his rental activity qualifies as active participation for purposes of  
4 the passive loss rules because it was either capital or repair expenditures. He also contends in his  
5 supplemental brief that he is entitled to deduct a casualty loss for the roof repairs. He further contends  
6 that he should be allowed a depreciation deduction of \$263 for the roof repairs because that is what the  
7 IRS allowed during its audit. (App. Supp. Br., pp. 1-3.)

8 Rental Expense for Mortgage Interest on the Heaton Circle Property for 2005

9 In his opening brief, appellant contended that for 2005, he is entitled to claim a rental  
10 expense on IRS Schedule E (Form 1040) for paid mortgage interest of \$9,071 paid to Bank of America  
11 for two mortgages (\$2,005 + \$7,066) related to the Heaton Circle property. (App. Opening Br., pp. 9-  
12 10.) In its opening brief, respondent stated that for 2005, it is fully allowing the claimed home mortgage  
13 interest in the amount of \$26,192. (Resp. Opening Br., p. 3.) In his reply brief, appellant acknowledged  
14 that for 2005, respondent is allowing him a deduction of \$26,192 for home mortgage interest and  
15 contends that he is entitled to a deduction for \$9,071 of mortgage interest paid on the Heaton Circle  
16 property. (App. Reply Br., pp. 1, 3.) In its reply brief, respondent states, “On appeal, as explained in  
17 Respondent[’]s opening brief, the \$26,192 requested by Appellants for home mortgage interest was  
18 allowed in its entirety.” Respondent also states in its reply brief that “mathematically combining  
19 Mrs. Sizemore’s interest deduction of \$9,071 with Mr. Sizemore’s interest deduction of \$17,121 equates  
20 to \$26,192” and appellant should not be entitled to claim the same \$9,071 amount twice. (Resp. Reply  
21 Br., p. 1.) In his supplemental brief, appellant does not discuss the rental expenses for mortgage interest  
22 on the Heaton Circle property for 2005. Accordingly, it appears to appeals staff that the claimed rental  
23 expense for mortgage interest on the Heaton Circle property for 2005 is no longer an issue in this appeal  
24 because respondent is allowing appellant a mortgage interest deduction of \$26,192, which includes the  
25 \$9,071 of claimed mortgage interest for the Heaton Circle property (i.e., more than the amount claimed  
26 by appellant and more than the amount respondent states appellant is actually entitled to deduct).

27 Rental Expense for Real Estate Taxes on the Heaton Circle Property for 2005

28 In his opening brief, appellant contended that for 2005, he is entitled to claim on IRS

1 Schedule E (Form 1040) a rental expense for paid real estate tax of \$2,060 paid to the Bank of America  
2 for real estate taxes related to the Heaton Circle property. (App. Opening Br., p. 11, exhibit J.) In its  
3 opening brief, respondent stated that for 2005, appellant requested a deduction of \$4,034 for real estate  
4 taxes and the 2005 NOA already allowed and respondent is allowing on appeal a deduction of \$6,042 for  
5 real estate taxes. (Resp. Opening Br., p. 3.) In his reply brief, appellant acknowledged that respondent  
6 is allowing a deduction of \$6,042 for real estate taxes and contended that he is entitled to a deduction for  
7 \$2,059.59 of real estate taxes paid on the Heaton Circle property. (App. Reply Br., pp. 1, 3.) In its reply  
8 brief, respondent asserts that it allowed a deduction of \$4,034 for paid estate taxes and appellant is not  
9 entitled to deduct a second time the \$2,059 amount related to the claimed real estate taxes paid for the  
10 Heaton Circle property. (Resp. Reply Br., pp. 1-2.) In his supplemental brief, appellant does not discuss  
11 the rental expenses for real estate taxes on the Heaton Circle property for 2005. Accordingly, it appears  
12 to appeals staff that the claimed rental expense for real estate taxes paid for the Heaton Circle property  
13 for 2005 is no longer an issue in this appeal because the 2005 NOA allowed a deduction of \$6,042 for  
14 real estate taxes.

15 Rental Expense for Painting and Other Repair-Related Expenses on the Heaton Circle  
16 Property for 2005

17 In his opening brief, appellant contended that for 2005, he is entitled to claim a rental  
18 expense on IRS Schedule E (Form 1040) for \$888 of painting and other repair-related expenses.  
19 Attached to appellant's opening brief are copies of his Bank of America statement for the period  
20 October 12 through November 8, 2005. (App. Opening Br., pp. 10-11, exhibit L.) In its opening brief,  
21 respondent did not discuss the claimed rental expense for painting and other repair-related expenses on  
22 the Heaton Circle property for 2005. In his reply brief, appellant asserted that for the paint job, he  
23 incurred labor costs of \$775.00 and material costs of \$80.64, and he also incurred related trash cleanup  
24 costs of \$32.00, all of which he claimed constitute property maintenance expenses that are deductible  
25 from rental income. (App. Reply Br., p. 2.) Respondent contends in its reply brief that for 2005,  
26 appellant is not entitled to claim any rental deduction with respect to the Heaton Circle property. (Resp.  
27 Reply Br., p. 2.) Appellant's supplemental brief only mentions the painting and other repair-related  
28 expenses in the context of arguing that the property was actively managed so that the passive loss

1 limitation rules should not apply. (App. Supp. Br., p. 2.) Based on appellant’s different contentions in  
2 his briefings, it is not clear to appeals staff whether the claimed rental expense for painting and other  
3 repair-related expenses on the Heaton Circle property for 2005 are still an issue in this appeal.

4 Rental Expense for Roof Repairs on the Heaton Circle Property for 2005

5 In his opening brief, appellant contended that for 2005, he is entitled to claim a rental  
6 expense on IRS Schedule E (Form 1040) for \$6,900 of roof repairs he incurred in September 2005 on  
7 the Heaton Circle property. According to appellant, he paid a contractor \$6,900 in September 2005 to  
8 repair the roof on the Heaton Circle property. Appellant attached to his opening brief copies of the  
9 cancelled checks he wrote payable to Rodolfo Perez for \$3,500 and \$3,400 dated September 22, 2005  
10 and September 25, 2005, respectively. In his opening brief, appellant also asserted that on his 2005  
11 return, he erroneously deducted \$6,900 for the entire cost of the roof repairs. Based on information the  
12 IRS auditor provided him, appellant stated in his opening brief that the roof repair costs of \$6,900 must  
13 be capitalized over a period of 27.5 years. (App. Opening Br., pp. 10-11, exhibit M.) In its opening  
14 brief, respondent did not discuss the claimed rental expense for roof repairs on the Heaton Circle  
15 property for 2005. In his reply brief, appellant again asserted that on his 2005 return, he “mistakenly  
16 expensed the entire cost of the repairs” based on his tax preparer’s advice. He asserted in his reply brief  
17 “that the cost of the roof repair must be capitalized over 27.5 years” and therefore he is entitled to a  
18 depreciation deduction. (App. Reply Br., pp. 2-3.) Respondent contends in its reply brief that for 2005,  
19 appellant is not entitled to claim any rental deduction with respect to the Heaton Circle property. (Resp.  
20 Reply Br., p. 2.)

21 In his supplemental brief, appellant contends that, although the directions for Form 1040  
22 Schedule E provides that a property owner may not report rental income or deduct expenses if he uses  
23 the residence and rents it for fewer than 15 days, he is entitled to deduct allowable interest, taxes and  
24 casualty losses related to the property if he itemizes deductions. Appellant asserts that the entire roof  
25 needed to be replaced because there were leaks and shingles were falling off. Appellant argues that the  
26 cost of the roof repair qualifies as a casualty loss, which he should be allowed to deduct. Appellant also  
27 argues that he should be allowed a depreciation deduction of \$263 for the roof repair cost, as was  
28 allowed by the IRS during the federal audit. In his supplemental brief, appellant states, “Because

1 Appellant’s [sic] suffered a casualty loss, they should be allowed a deduction in at least the same amount  
2 as was allowed on their Federal Taxes.” Appellant attached to his supplemental brief a copy of IRS  
3 Form 886-A, Explanation of Items, which show that during the 2005 audit, the IRS allowed a Schedule  
4 E depreciation expense deduction in the amount of \$263 ( $\$7,000 \times 3.75\%$ ) based on the claimed roof  
5 repair cost. (App. Supp. Br., pp. 1-3, exhibit B.)

6 In response to respondent’s reply brief, appellant argues in his supplemental brief that an  
7 exception to the passive activity loss rules applies to his attempt to rent the Heaton Circle property.  
8 Citing the Directions for 1040 Schedule E, page E-3 and IRS Publication 527, appellant contends that  
9 the roof replacement and repainting constitutes active participation that were either capital or repair  
10 expenditures. Appellant thus claims that his attempt to rent the Heaton Circle property was not a passive  
11 activity. (App. Suppl. Br., p. 2.) Accordingly, it appears to appeals staff that the claimed rental expense  
12 for roof repairs on the Heaton Circle property for 2005 is still in dispute.

#### 13 Business Loss on Sale of a Truck (IRS Form 4797)

14 In his opening brief, appellant asserted that on his 2004 federal return, he claimed a  
15 business loss on IRS Form 4797, related to the sale of a truck he used in 2002 for business purposes.  
16 According to appellant, the IRS disallowed this loss on audit and assessed additional tax based on this  
17 determination. In his opening brief, appellant stated that he “concedes that he will not be able to take  
18 the deduction and will accept the FTB assessment for this item.” (App. Opening Br., p. 2.) Respondent  
19 does not discuss the claimed business loss on the sale of a truck in its briefings and appellant does not  
20 discuss it in his reply and supplemental briefs. Attached to respondent’s opening brief is a copy of an  
21 IRS audit sheet for 2004 showing among other things that the IRS disallowed \$6,575 of claimed losses  
22 from Form 4797. (Resp. Opening Br., exhibit C.) Accordingly, it appears to appeals staff that the  
23 claimed business loss on the sale of a truck is no longer an issue in this appeal because appellant  
24 concedes it is not supported with the evidence.

#### 25 Itemized Deductions (Schedule A)

##### 26 Real Estate Taxes

27 In his opening brief, appellant contended that he is entitled to claim a deduction on his  
28 2004 California return for \$1,974.55 of real estate taxes he paid in 2004 on real property located on

1 Arguello Boulevard in Pacifica, California (the Arguello property), and he is entitled to claim a  
2 deduction on his 2005 California return for \$1,974.55 of real estate taxes he paid in 2005 on the  
3 Arguello Boulevard property. Referring to exhibits A and N of his opening brief, appellant contended in  
4 his opening brief that Bank of America issued 2004 and 2005 Forms 1098 that substantiate that he paid  
5 these amounts of real estate taxes.<sup>3</sup> Appellant also contended in his opening brief that he is entitled to a  
6 deduction for property tax of \$2,060 paid in 2005 for the Heaton Circle property. (App. Opening Br.,  
7 pp. 2, 11-12, exhibits A, N.) In its opening brief, respondent stated that it is allowing the claimed paid  
8 real estate tax deductions of \$1,974 for 2004. In its opening brief, respondent noted that the 2005 NOA  
9 already allowed a deduction of \$6,042 for paid real estate taxes and on appeal it is allowing the same  
10 amount (\$6,042) for this item. (Resp. Opening Br., pp. 2-3, exhibits M-N.) Appellant acknowledged in  
11 his reply brief that for 2005, respondent is allowing a deduction of \$6,042.00 for real estate taxes and  
12 contended that he is entitled to a deduction of \$2,059.59 in real estate taxes for the Heaton Circle  
13 property. (App. Reply Br., pp. 1, 3.) Respondent states in its reply brief that for 2005, it already  
14 allowed a deduction of \$4,034 for paid real estate taxes and appellant is not allowed to deduct the \$2,059  
15 of claimed real estate taxes paid on the Heaton Circle property twice. In other words, respondent  
16 indicates that for 2005, appellant is only entitled to deduct real estate taxes in the amount of \$4,034  
17 (\$2,059 + \$1,975), rather than \$6,093 (\$2,059 + \$2,059 + \$1,975). (Resp. Reply Br., pp. 1-2.) In his  
18 supplemental brief, appellant does not discuss the rental expenses for real estate taxes on the Heaton  
19 Circle property for 2005. Accordingly, it appears to appeals staff that the claimed deduction for paid  
20 real estate taxes paid for 2005 is no longer an issue in this appeal because the 2005 NOA already  
21 allowed a deduction of \$6,042 for real estate taxes (i.e., more than the amount claimed by appellant and  
22 more than the amount respondent states appellant is actually entitled to deduct).

### 23 Personal Property Taxes

24 In his opening brief, appellant asserted that he claimed personal property taxes  
25 deductions for 2004 and 2005, but he is unable to recall the sources or verify the methods of payment.  
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27 <sup>3</sup> Appeals staff notes that, while exhibit A of appellant's opening brief is a copy of a 2004 substitute Form 1098 that Bank of  
28 America issued to appellant showing property taxes of \$1,974.55, neither exhibit N of appellant's opening brief, which is  
cited by appellant as supporting evidence, nor any other document in the appeal record lists the amount of real estate taxes  
paid in 2005 for the Arguello property.

1 In his opening brief, appellant concedes to the exclusion of these claimed deductions for 2004 and 2005.  
2 (App. Opening Br., pp. 3, 13.) Respondent does not discuss the claimed personal property taxes in its  
3 briefings. Accordingly, it appears to appeals staff that the claimed personal property taxes deduction is  
4 no longer an issue in this appeal because appellant concedes it is not supported with the evidence.

5 Mortgage Interest

6 In his opening brief, appellant argued that he is entitled to claim a deduction on his 2004  
7 return for \$15,284.74 of interest he paid in 2004 on mortgages held by Bank of America and  
8 Washington Mutual on the Arguello property and \$378 of interest he paid in 2004 on a mortgage held by  
9 Worldmark by Wyndam on a timeshare located in Las Vegas, Nevada (Las Vegas timeshare property).  
10 He also argued in his opening brief that he is entitled to claim a deduction on his 2005 return for  
11 \$17,121.00 of interest he paid in 2005 on the Bank of America mortgage on the Arguello property and  
12 \$1,457.97 of interest he paid in 2005 on the Worldmark by Wyndam mortgage on the Las Vegas  
13 timeshare property. Appellant contended in his opening brief that he is allowed to deduct interest he  
14 paid on these mortgages because he continuously lived at the Arguello property as his principal  
15 residence since he purchased it in 1989 and he used the Las Vegas timeshare property as a residence for  
16 more than 14 days in both 2004 and 2005.<sup>4</sup> For purposes of Schedule E rental property expenses for  
17 2005, appellant claimed in his opening brief that he paid mortgage interest of \$9,071 on the Heaton  
18 Circle property. Appellant attached to his opening brief copies of interest paid statements from Bank of  
19 America and Worldmark by Wyndam. (App. Opening Br., pp. 3-4, 12-13.)

20 In its opening brief, respondent stated that for 2004, it is allowing on appeal all of the  
21 requested deduction amount for home mortgage interest of \$15,663. Respondent noted in its opening  
22 brief that the 2004 NOA already allowed a mortgage interest deduction of \$15,659 (that is, just \$4 less  
23 than that claimed). In its opening brief, respondent stated that for 2005, it is allowing all of the  
24 requested mortgage interest deduction of \$26,192. In its opening brief, respondent noted that the 2005  
25 NOA already allowed a mortgage interest deduction of \$18,579. (Resp. Opening Br., pp. 2-3, exhibits  
26 F, M.)

27 \_\_\_\_\_  
28 <sup>4</sup> Appellant inadvertently refers to 2004 when discussing the mortgage interest he paid on the timeshare in 2005.

1 Appellant acknowledged in his reply brief that for 2005, respondent is allowing him a  
2 deduction of \$26,192 for home mortgage interest and contends that he is entitled to a deduction for  
3 \$9,071 of mortgage interest paid on the Heaton Circle property. (App. Reply Br., pp. 1, 3.) In its reply  
4 brief, respondent states, “On appeal, as explained in Respondent[’]s opening brief, the \$26,192  
5 requested by Appellants for home mortgage interest was allowed in its entirety.” Respondent also states  
6 in its reply brief that “mathematically combining Mrs. Sizemore’s interest deduction of \$9,071 with  
7 Mr. Sizemore’s interest deduction of \$17,121 equates to \$26,192” and appellant should not be entitled to  
8 claim the same \$9,071 amount twice. (Resp. Reply Br., p. 1.) In his supplemental brief, appellant does  
9 not discuss the claimed deduction for mortgage interest for 2004 or 2005. Accordingly, it appears to  
10 appeals staff that the claimed deductions for mortgage interest for 2004 and 2005 are no longer an issue  
11 in this appeal because respondent is allowing appellant mortgage interest deductions of \$15,663 and  
12 \$26,192 for 2004 and 2005.

#### 13 Charitable Contributions

14 With respect to claimed noncash charitable donations, appellant contended in his opening  
15 brief that he is entitled to claim a deduction of \$795 on his 2004 California return for personal property  
16 with a fair market value of \$795 that he donated in 2004 to Goodwill Industries and he is entitled to  
17 claim a deduction of \$2,270 on his 2005 California return for personal property with a fair market value  
18 of \$2,270 he donated in 2005 to Goodwill Industries. Appellant contended in his opening brief that  
19 Goodwill Industries provided him with acknowledgement cover forms that substantiate his 2004 and  
20 2005 noncash charitable donations. With respect to his claimed cash charitable donations to Goodwill  
21 Industries in 2004 and 2005, appellant asserted in his opening brief that he is unable to locate the checks  
22 or acknowledgement that would substantiate these cash donations in 2004 and 2005. He therefore  
23 conceded in his opening brief that he will not be able to take a deduction for cash charitable  
24 contributions for 2004 or 2005. Attached to appellant’s opening brief are copies of acknowledgement  
25 cover forms from Goodwill Industries and handwritten lists of items and their worth. (App. Opening  
26 Br., pp. 4-6, 13-16, exhibits E, O.)

27 In its opening brief, respondent stated that for 2004, it is allowing all of the requested

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1 noncash charitable contributions of \$750.<sup>5</sup> Respondent noted that the 2004 NOA already allowed a  
2 noncash charitable contribution of \$596. For 2005, respondent stated in its opening brief that it is  
3 allowing all of the requested noncash charitable contributions of \$2,270. Respondent notes that the  
4 2005 NOA allowed a noncash charitable contribution of \$1,703. (Resp. Opening Br., pp. 2-3.)

5 In his reply brief, appellant acknowledged that respondent is allowing a deduction for  
6 noncash charitable contributions of \$2,270 for 2005; he did not discuss the claimed charitable  
7 contribution deduction for 2004. (App. Reply Br., p. 1.) In its reply brief, respondent does not discuss  
8 the claimed charitable contribution deductions for 2004 or 2005. In his supplemental brief, appellant  
9 does not discuss the claimed charitable contributions deduction for 2004 or 2005. Accordingly, it  
10 appears to appeals staff that the claimed deductions for charitable contributions for 2004 and 2005 are  
11 no longer an issue in this appeal because appellant concedes he is not entitled to take a deduction for the  
12 claimed cash contributions for 2004 or 2005, and respondent is allowing appellant all of the requested  
13 noncash charitable contribution deductions of \$750 and \$2,270 for 2004 and 2005, respectively.

#### 14 Unreimbursed Employee Expenses (IRS Form 2106)

15 In his opening brief, appellant contended that for 2004 and 2005, he is entitled to deduct  
16 miscellaneous expenses subject to the two percent floor for the payment of unreimbursed business  
17 expenses he incurred as a result of his work as an auto mechanic for Serramonte Ford. For 2004,  
18 appellant asserted in his opening brief that he claimed a business expenses deduction of \$4,031  
19 consisting of \$3,209 of vehicle expenses and \$822 of other business expenses. In his opening brief,  
20 however, appellant conceded that for 2004 he is only entitled to a deduction of \$1,775 for the vehicle  
21 depreciation, rather than the claimed amount of \$3,209 for vehicle expenses. According to appellant, his  
22 tax preparer improperly completed line 1 of IRS Form 2106 by claiming a deduction for both vehicle  
23 mileage and depreciation. Appellant also contended in his opening brief that during 2004, he paid union  
24 dues of \$783 to the International Association of Machinist and Aerospace Workers (union) and he  
25 purchased specialized tools from Snap-On to perform his job in the amount of \$200. For 2005,  
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27 <sup>5</sup> It is unclear to appeals staff why respondent states that it is allowing the full amount of appellant's claimed deduction of  
28 \$750 for noncash charitable contributions for 2004, as appellant claimed in his opening brief that he contributed personal  
property with a fair market value of \$795 to Goodwill Industries. (App. Opening Br., p. 4, exhibit O.)

1 appellant asserted in his opening brief that he claimed a business expenses deduction of \$5,694  
2 consisting of \$1,818 of vehicle expenses and \$3,876 of other business expenses.<sup>6</sup> In his opening brief,  
3 appellant conceded that for 2005 he lacks the proper documentation to establish his vehicle expenses.  
4 He stated in his opening brief that during 2005, he paid dues of \$1,116 to the union and he purchased  
5 specialized tools from Snap-On to perform his job in the amount of \$710. Appellant attached to his  
6 opening brief a copy of his 2004 and 2005 union member dues history and customer statements from  
7 Snap-On.<sup>7</sup> (App. Opening Br., pp. 7-9, 16-18, exhibits G, I, P-Q.)

8 For 2004, respondent stated in its opening brief that it is allowing all of the requested  
9 miscellaneous itemized deductions for unreimbursed employee expenses of \$2,758. Respondent noted  
10 in its opening brief that the 2004 NOA already allowed a miscellaneous itemized deduction for  
11 unreimbursed employee expenses of \$2,188. For 2005, respondent stated in its opening brief that it is  
12 allowing all of the requested miscellaneous itemized deductions for unreimbursed employee expenses of  
13 \$1,826, which consists of the union dues of \$1,116 and the tools of \$710. Respondent noted that the  
14 2005 NOA already allowed a miscellaneous itemized deduction for unreimbursed employee expenses of  
15 \$1,756. (Resp. Opening Br., pp. 2-3.) Appellant does not discuss the requested miscellaneous itemized  
16 deductions for unreimbursed employee expenses for 2004 or 2005 in his reply or supplemental brief, and  
17 respondent does not discuss them in its reply brief. Accordingly, it appears to appeals staff that the  
18 claimed deductions for miscellaneous itemized deduction for unreimbursed employee expenses for 2004  
19 and 2005 are no longer an issue in this appeal because respondent is allowing all of the requested  
20 amounts for 2004 and 2005.

### 21 Applicable Law

#### 22 Burden of Proof

23 R&TC section 18622 provides that a taxpayer shall either concede the accuracy of a  
24 federal determination or state wherein it is erroneous. It is well-settled that a deficiency assessment  
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26 <sup>6</sup> Appellant inadvertently referred to 2004, rather than 2005, when discussing his \$5,694 of claimed business expenses for  
27 2005.

28 <sup>7</sup> Appeals staff notes that the statement shows that during 2005, appellant only paid \$906.75 to the union plus a total of  
\$139.50 on January 12, 2006 and February 6, 2006, which is applied to his November 2005 and December 2005 dues, for an  
aggregate amount of \$1,046.25 (\$906.75 + \$139.50).

1 based on a federal audit report is presumptively correct and the taxpayer bears the burden of proving  
2 that the determination is erroneous. (*Appeal of Sheldon I. and Helen E. Brockett*, 86-SBE-109, June 18,  
3 1986; *Todd v. McColgan* (1949) 89 Cal.App.2d 509.) Unsupported assertions are not sufficient to  
4 satisfy an appellant's burden of proof with respect to an assessment based on federal action. (*Appeal of*  
5 *Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence of uncontradicted, credible,  
6 competent, and relevant evidence showing that respondent's determinations are incorrect, such  
7 assessments must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.)

#### 8 Deductions in General

9 IRC section 62 provides that AGI is computed by reducing a taxpayer's gross income by  
10 any available deductions listed under that section, including the deductions attributable to property held  
11 for the production of rents. Income tax deductions are a matter of legislative grace and the burden is on  
12 appellants to show by competent evidence that they are entitled to deductions claimed. (*Appeal of*  
13 *James C. and Monablance A. Walshe*, 75-SBE-073, Oct. 20, 1975; *New Colonial Ice Co. v. Helvering*  
14 (1934) 292 U.S. 435.) In order to carry his burden of proof, appellant must point to an applicable statute  
15 and show by credible evidence that the deductions he claims come within its terms. (*Appeal of Robert*  
16 *R. Telles*, 86-SBE-061, Mar. 4, 1986.) Respondent's denials of claimed deductions are presumed  
17 correct. (*Appeal of Gilbert W. Janke*, 80-SBE-059, May 21, 1980.)

#### 18 Depreciation Deductions

19 California conforms to the IRC for depreciation deductions for individual taxpayers.  
20 (Rev. & Tax. Code, § 17201; Int.Rev. Code § 167) IRC section 167 allows as a depreciation deduction  
21 a reasonable allowance for the exhaustion, and wear and tear of property used in the trade or business, or  
22 property held for the production of income. The period for depreciation of an asset begins when the  
23 asset is placed in service and ends when the asset is retired from service. (Treas. Regs., § 1.167(a)-  
24 10(b).) Property subject to depreciation is first placed in service "when first placed in a condition or  
25 state of readiness and availability for a specially assigned function." (Treas. Regs., § 1.167(a)-  
26 11(e)(1)(i).)

#### 27 Use of Residence as Rental Property

28 IRC section 280A(a) limits deductions otherwise allowable by individuals with respect to

1 a “dwelling unit” that the taxpayer uses as a “residence” during the tax year unless specifically excepted.  
2 IRC section 280A(a) does not bar non-business deductions, such as for interest, taxes and casualty  
3 losses. (Int.Rev. Code, § 280A(b).) A taxpayer uses a dwelling unit as a “residence” during the tax year  
4 if he or she uses it for personal purposes for the greater of 14 days or 10 percent of the number of days  
5 during the tax year for which it is rented at a fair rental value. (Int.Rev. Code, § 280A(d)(1).) If a  
6 taxpayer uses the dwelling unit as a “residence,” IRC section 280A(c)(5) “limits the deduction of  
7 expenses related to the property to the excess of gross income from the property over deductions  
8 allocable to the rental use that are deductible regardless of the rental use, such as interest and taxes.”  
9 (*Akers v. Commissioner*, T.C. Memo 2010-85.) If the “residence” is rented for less than 15 days during  
10 the tax year, deductions of expenses related to the property are entirely disallowed and the income  
11 derived from such use shall not be included in the taxpayer’s gross income. (Int.Rev. Code,  
12 § 280A(g).)<sup>8</sup>

### 13 Casualty Loss Deductions

14 California conforms to IRC section 165 , which allows deductions based on a personal  
15 casualty loss. (Rev. & Tax. Code, § 17201; Int.Rev. Code § 165) IRC section 165(a) permits  
16 deductions for losses not compensated for by insurance or otherwise. For individuals, IRC section  
17 165(c) generally limits the deduction to the following: 1) losses incurred in a trade or business; 2) losses  
18 incurred in any transaction entered into for profit; or 3) losses of property not connected with a trade or  
19 business or a transaction entered into for profit, if such losses arise from fire, storm, shipwreck, or other  
20 casualty, or from theft. “A casualty has been defined as the total or partial destruction of property  
21 resulting from an identifiable event of a sudden or unexpected nature.” (*Matheson v. Commissioner* (2d  
22 Cir. 1931) 54 F.2d 537, 539, affg. 18 B.T.A. 674 (1930). See also *Axelrod v. Commissioner* (1971) 56  
23 T.C. 248, 256; *Durden v. Commissioner* (1944) 3 T.C. 1, 3 (1944); *Appeal of Costa Zmay*, 87-SBE-078,  
24 decided on December 3, 1987.) In *Torre v. Commissioner*, T.C. Memo 2001-218, the Tax Court stated:

25 [I]n order for the loss to be deductible, the taxpayer must prove that the destructive event  
26 or happening was similar in nature to a fire, storm, or shipwreck. Accordingly, “other  
casualty” denotes ““an undesigned, sudden and unexpected event””, *Durden v.*

27  
28 <sup>8</sup> The relevant portions of IRC section 280A have been incorporated into the R&TC, as in effect in 2005. (See R&TC sections 17201.)

1           *Commissioner*, 3 T.C. 1, 3 (1944) or a “sudden, cataclysmic, and devastating loss”, *Popa*  
2           *v. Commissioner*, 73 T.C. 130, 132 (1979). Conversely, the term “excludes the  
3           progressive deterioration of property through a steadily operating cause.” *Fay v.*  
4           *Helvering*, 120 F.2d 253 (2d Cir. 1941), affg. 42 B.T.A. 206 (1940).

5           The amount of a casualty loss is the lesser of (1) the difference between the fair market  
6           value (FMV) of the property immediately before the casualty and its FMV immediately after; or (2) the  
7           adjusted basis of the property immediately before the casualty. (Treas. Reg. § 1.165-7(b).) The casualty  
8           loss is also reduced by any insurance or other compensation received. (Int.Rev. Code § 165(a).) For  
9           2005, the allowable casualty loss deduction is limited to each casualty that exceeds \$100 (the \$100  
10          floor). (Int.Rev. Code § 165(h), as current through October 4, 2004.) Finally, the total casualty loss  
11          must be reduced by 10 percent of the taxpayer’s AGI (after the \$100 floor is applied). (Int.Rev. Code  
12          § 165(h)(2).)

#### 13                           Passive Activity Loss

14          IRC section 469(a)(1) limits the losses that can be taken from a passive activity. The  
15          disallowed passive activity loss equals the excess of the aggregate losses from all passive activities for a  
16          taxable year over the aggregate income from all passive activities for that year. (Int.Rev. Code,  
17          § 469(d)(1); Sec. 1.469-2T(b)(1), Temporary Income Tax Regs., 53 Fed. Reg. 5711 (Feb. 25, 1988).) A  
18          passive activity is any activity which involves the conduct of any trade or business in which the taxpayer  
19          does not materially participate. (Int.Rev. Code, § 469(c)(1).) Rental real estate activity is generally  
20          treated as a per se passive activity, regardless of whether the taxpayer materially participates. (Int.Rev.  
21          Code, § 469(c)(2), (4).) Rental activity is not a per se passive activity under IRC section 469(c)(2),  
22          however, if a taxpayer rents the property for an average period of seven days or less during the tax year.  
23          (Treas. Regs. § 1.469-1T(e)(3)(ii)(A). See also *Akers v. Commissioner, supra.*) In such a case, the  
24          taxpayer can only deduct a loss from his other active income if he materially participates in the rental  
25          activity. (*Akers v. Commissioner, supra.*) IRC section 469(h)(1) defines material participation in an  
26          activity as involvement in the operations of an activity on a regular, continuous, and substantial basis. A  
27          taxpayer can establish material participation by satisfying any one of seven tests provided in the  
28          regulations. (Sec. 1.469-5T(a), Temporary Income Tax Regs., 53 Fed. Reg. 5725-5726 (Feb. 25, 1988);  
          see *Akers v. Commissioner, supra*; *Lum v. Commissioner*, T.C. Memo 2012-103; *Uyemura v.*

1 *Commissioner*, T.C. Memo 2012-102; *Wilson v. Commissioner*, T.C. Memo 2012-101.) IRC section  
2 469(i)(1) and (2) “allows the taxpayer to offset from nonpassive income up to \$25,000 of certain passive  
3 activity losses, as long as the activity is considered a ‘rental activity.’” (*Akers v. Commissioner, supra.*)  
4 The limitation on the deduction of losses imposed by IRC section 469 disappears when the taxpayer  
5 disposes of the entire interest in a passive activity in a fully taxable transaction. (Int.Rev. Code,  
6 § 469(g).)<sup>9</sup>

7 The passive activity loss rules of IRC section 469 do not apply to any rental activity in  
8 any tax year if the gross income limitation set forth in IRC section 280A(c)(5) applies. IRC section  
9 469(j)(10) provides:

10 **Coordination with section 280A.** If a passive activity involves the use of a dwelling  
11 unit to which section 280A(c)(5) applies for any taxable year, any income, deduction,  
12 gain, or loss allocable to such use shall not be taken into account for purposes of this  
13 section for such taxable year.

### 13 STAFF COMMENTS

14 Appellant bears the burden of proving that the proposed assessments, which are based on  
15 federal audit adjustments, are erroneous. At the hearing, the parties should confirm, or clarify as  
16 necessary, what items are still in dispute. It appears to appeals staff that, other than the 2005 roof repair  
17 costs, the items originally at issue were either conceded by appellant, allowed by respondent during the  
18 appeal or already allowed in the NOAs. Appeals staff sets forth below its understanding of the status of  
19 each claimed expense below, and requests that at the hearing, the parties confirm or correct appeals  
20 staff’s understanding.

#### 21 Business Loss on Sale of a Truck

22 For 2004, appellant concedes that he is not entitled to claim a business loss on the sale of  
23 a truck. (App. Opening Br., p. 2.)

#### 24 Real Estate Taxes

25 For 2004, respondent is allowing all of the claimed paid real estate deduction of \$1,974.

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27 <sup>9</sup> The relevant portions of IRC section 469 have been incorporated into the R&TC, as in effect in 2005. (See R&TC sections  
28 17551 and 17561.) R&TC section 17561(a) provides, however, that IRC section 469(c)(7) pertaining to special rules for real  
estate professionals shall not apply.

1 For 2005, the 2005 NOA already allowed a deduction of \$6,042 for paid real estate taxes, although  
2 appellant is only requesting a deduction of \$4,034 consisting of \$2,059 of real estate taxes paid on the  
3 Heaton Circle property and \$1,975 of real estate taxes paid on the Arguello property. (Resp. Opening  
4 Br., pp. 2-3; Resp. Reply Br., pp. 1-2.)

5 Personal Property Taxes

6 Appellant concedes that he is not entitled to a deduction for paid personal property taxes  
7 for 2004 or 2005. (App. Opening Br., pp. 3, 13.)

8 Mortgage Interest

9 For 2004, respondent is allowing all of the claimed mortgage interest deduction of  
10 \$15,663 for the Arguello property (\$15,284.74) and the Las Vegas timeshare property (\$378). For 2005,  
11 respondent is allowing a deduction for all of the requested mortgage interest of \$26,192.00 for the  
12 Arguello property (\$17,121.87) and the Heaton Circle property (\$9,071.00).

13 Charitable Contributions

14 Appellant concedes that he is not entitled to a deduction for cash charitable contributions  
15 for 2004 or 2005. Respondent is allowing all of the noncash charitable contributions appellant requests  
16 on appeal in the amounts of \$750 and \$2,270 for 2004 and 2005, respectively. (App. Opening Br.,  
17 pp. 4-6; Resp. Opening Br., pp. 2-3.)

18 Vehicle Expenses

19 For 2004, appellant concedes that he is only entitled to claim a miscellaneous itemized  
20 deduction for unreimbursed employee expenses of \$2,758, which consists of a claimed vehicle  
21 depreciation \$1,775, union dues of \$783, and purchased tools of \$200. Respondent is allowing all of  
22 this claimed miscellaneous itemized deduction for 2004. (App. Opening Br., pp. 7-9; Resp. Opening  
23 Br., p. 2.) For 2005, appellant concedes that he is only entitled to claim a miscellaneous itemized  
24 deduction for unreimbursed employee expenses of \$1,826, which consists of union dues of \$1,116 and  
25 purchased tools of \$710. Respondent is allowing all of this claimed miscellaneous itemized deduction  
26 for 2005. (App. Opening Br., pp. 16-18; Resp. Opening Br., p. 3.)

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1           Rental Expenses

2                   Use of Residence as Rental Property

3           In his opening brief, appellant argued that in 2005, he should be entitled to deduct the  
4 rental expenses for \$6,900 of roof repair expenses and \$888 of painting and other repair-related  
5 expenses related to the Heaton Circle property. It is undisputed that appellant's spouse lived in the  
6 dwelling unit on the Heaton Circle property until approximately May 2005 when she moved into his  
7 residence located at the Arguello property, and appellant subsequently made the claimed repairs and  
8 unsuccessfully attempted to rent the Heaton Circle property. Appellant and his spouse did not report  
9 any rental income on their 2005 joint return. At the oral hearing, appellant should clarify his position  
10 with respect to the claimed rental expenses related to the Heaton Circle property, including the \$6,900 of  
11 claimed roof repairs and the \$888 of claimed painting and other repair-related expenses, and provide  
12 supporting legal authorities and arguments. Appellant should be prepared to discuss at the oral hearing  
13 whether he concedes that under IRC section 280A(g), he is not allowed to take any deductions related to  
14 "the rental use of such dwelling unit," including a business expenses deduction under IRC section 212 or  
15 a depreciation expense deduction under IRC section 167, because the "dwelling unit" was used as a  
16 residence during 2005 by appellant's spouse, it was "actually rented for less than 15 days during the  
17 taxable year," and appellant earned no rental income. It appears that appellant argues in his  
18 supplemental brief that, even if he is not entitled to any deductions related to the rental use of the Heaton  
19 Circle property under IRC section 280A(g), he should still be allowed to claim a casualty loss deduction  
20 for the roof repairs. If appellant still contends that he is entitled to claim rental expenses related to the  
21 Heaton Circle property for 2005, including the rental painting and other repair-related expenses of \$888,  
22 he will need to explain why IRC section 280A(g) does not prevent the deduction of these expenses.

23                   Casualty Loss

24           If the Board determines that IRC section 280A prevents appellant from deducting any  
25 rental expenses related to the Heaton Circle property for 2005, it appears the only potential avenue for a  
26 deduction would be the taking of a casualty loss. (Int.Rev. Code, § 280A(b).) As noted above, under  
27 Applicable Law, a casualty is a total or partial destruction of property resulting from an identifiable  
28 event of a sudden or unexpected nature. (*Matheson v. Commissioner, supra*, 54 F.2d at 539.) In his

1 supplemental brief, appellant only claims that the “[e]xpenditures made for the replacement of the roof  
2 qualifies under [IRC section 165(c)(3)] as a casualty loss.” (App. Supp. Br., p. 2.) There is currently no  
3 evidence indicating that the roof was damaged as a result of a wind storm or any specific other type of  
4 casualty. To establish a casualty loss for purposes of IRC section 165(c)(3), appellant would need to  
5 provide evidence that such a casualty occurred. Moreover, appellant would need to show how he  
6 calculated the amount of the casualty loss. Pursuant to IRC section 165(h), as in effect in 2005, and  
7 Treasury Regulations section 1.165-7(b), appellant would first need to establish that the casualty loss  
8 amount is either (1) the lesser of the difference between the FMV of the property immediately before the  
9 unspecified casualty and its FMV immediately after or (2) the adjusted basis of the property  
10 immediately before the casualty, in excess of the \$100 floor, and then he would need to reduce that  
11 amount of casualty loss by 10 percent of his AGI.

#### 12 Federal Audit

13 In his supplemental brief, appellant argues that, because he and the IRS reached a  
14 compromise during the audit resulting in the IRS allowing a depreciation deduction for the roof repairs  
15 in the amount of \$263, he should be allowed to claim a depreciation expense deduction for the roof  
16 repair on his 2005 California return. It is well established, however, that respondent and the Board are  
17 not bound to adopt the conclusion reached by the IRS in any particular case, even when the  
18 determination results from a detailed audit. (*Appeal of David G. Bertrand*, 85-SBE-071, July 30, 1985;  
19 *Appeal of Raymond and Rosemarie J. Pryke*, 83-SBE-212, Sept. 15, 1983; *Appeal of Der*  
20 *Weinerschnitzel International, Inc.*, 79-SBE-063, Apr. 10, 1979.)

21 Staff notes in this regard that, with regard to some claimed itemized deductions,  
22 respondent has allowed greater amounts of deductions than those allowed by the IRS audit. For 2004,  
23 the IRS allowed a mortgage interest deduction of \$15,659, a miscellaneous itemized deduction for  
24 unreimbursed employee expenses of \$2,188 and a charitable contribution deduction of \$596, whereas  
25 respondent has allowed a mortgage interest deduction of \$15,663, a miscellaneous itemized deduction  
26 for unreimbursed employee expenses of \$2,758 and a charitable contribution deduction of \$750. For  
27 2005, the IRS allowed a mortgage interest deduction of \$18,579, a miscellaneous itemized deduction for  
28 unreimbursed employee expenses of \$1,756, and charitable contribution deduction of \$1,703, whereas

1 respondent has allowed a mortgage interest deduction of \$26,192, a miscellaneous itemized deduction  
2 for unreimbursed employee expenses of \$1,826, and a charitable contribution deduction of \$2,270.  
3 (Resp. Opening Br., pp. 2-3, exhibits E, L.)

4 Passive Activity Loss

5 If the Board determines that IRC section 280A prevents appellant from taking any rental  
6 losses, then it appears that the Board need not address any arguments concerning rental passive activity  
7 loss rules. As discussed above in Applicable Law, the passive activity loss rules do not apply if a  
8 taxpayer used a dwelling unit enough to qualify it as a residence, i.e., the greater of 14 days, or 10  
9 percent of the number of days during the tax year for which it is rented at a fair rental. (Int.Rev. Code,  
10 §§ 469(j)(10), 280A(c)(5) & (d)(1).) Here, it is undisputed that appellant's spouse used the Heaton  
11 Circle property as a residence for several months in 2005 and appellant did not receive any rental  
12 income during 2005. Thus, it appears that the gross income limitation of IRC section 280A(c)(5) applies  
13 and, consequently, the passive activity loss rules set forth in IRC section 469 do not apply.

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