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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 **FRANK N. PALUMBO AND**) Case No. 479933
13 **CAROL A. STRIKE-PALUMBO¹**)
14 _____)

<u>Years</u>	<u>Amount²</u>
1995	\$0
1996	\$0
1999	\$0
2000	\$0
2001	\$0
2002	\$0
2003	\$0

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20 Representing the Parties:

21 For Appellants: Terry A Gottlieb, EA
22 For Franchise Tax Board: Mark McEvilly, Tax Counsel III

23 **QUESTIONS:** (1) Whether the Board has jurisdiction to grant appellants' request to require the
24 Franchise Tax Board (respondent or FTB) to accept appellants' change of filing
25 status for closed tax years.
26

27 ¹ Appellants reside in Hawthorne in the County of Los Angeles.

28 ² Appellants are not seeking refunds as they concede the appeal years are "out of statute." (Appellants' Appeal Ltr. at 1.)

1 (2) If jurisdiction exists, whether the closed statute of limitations precludes appellants
2 from changing their filing status.

3 HEARING SUMMARY

4 Background

5 Neither of the appellants filed timely California returns for the tax years at issue.

6 *1995 and 1996*

7 For 1995 and 1996, respondent received information that appellant-wife received income
8 sufficient to require the filing of a return. No return was timely filed, so for 1995 and 1996 Notices of
9 Proposed Assessments (NPA(s)) were issued by respondent to appellant-wife in the amounts of \$1,498
10 and \$1,419, respectively. Appellant-wife subsequently filed returns for 1995 and 1996 on a single filing
11 status on January 4, 1999 and July 3, 1998, respectively, showing total respective tax liabilities of
12 \$2,083 and \$2,764.

13 *1999*

14 For 1999, appellant-wife filed her return on November 15, 2001, on a head of household
15 status reporting a total tax liability of \$1,073. Appellant-husband did not file a return for 1999.
16 Respondent received information that appellant-husband received income sufficient to require the filing
17 of a return. An NPA showing additional tax due of \$24,629 was issued by respondent to appellant-
18 husband for 1999 on October 9, 2001.

19 *2000*

20 For 2000, respondent received information showing appellant-wife received income
21 sufficient to require the filing of a return. No return was filed and respondent issued an NPA for \$1,715
22 on August 28, 2002. Appellant-wife filed a 2000 return on November 2, 2002, on a head of household
23 filing status reporting total tax due of \$1,066.

24 For 2000, respondent received information showing appellant-husband received income
25 sufficient to require the filing of a return. No return was filed and respondent issued an NPA for \$324
26 on August 28, 2002.

27 *2001, 2002 and 2003*

28 The facts for the remaining tax years are similar to those for 2001; i.e., respondent

1 determined that appellant-wife received sufficient income to require a tax return filing, no return was
2 initially filed, an NPA was issued by respondent and appellant-wife subsequently filed late returns using
3 head of household status for 2001, 2002 and 2003 on October 15, 2003, September 27, 2004 and
4 September 28, 2005, respectively. Appellant-husband did not file returns at all for 2001, 2002 and 2003.
5 For these years, respondent determined that sufficient income was received by appellant-husband and so
6 NPAs were issued.

7 *Amended Returns*

8 On August 15, 2008, appellants submitted amended returns for 2000 and 2001. On
9 September 15, 2008 appellants submitted amended returns for 1995, 1996, 1999, 2002 and 2003.
10 Refunds were claimed on these amended returns, with appellants claiming a filing status of married
11 filing jointly. For all of the tax years at issue, respondent notified appellants that their claimed filing
12 status would not be accepted as the statute of limitations already expired. This timely appeal followed.

13 Contentions

14 The parties are disputing the meaning of California Revenue and Taxation Code (R&TC)
15 sections 18522 and 18526 and the application of Internal Revenue Code (IRC) section 6013(b). In order
16 to place the parties' contentions into perspective, Board staff believes a review of the language of these
17 provisions prior to discussing their contentions would be helpful. R&TC section 18522 provides:

18 If an individual has filed *a separate return*³ for a taxable year for which a joint return
19 could have been made by him or her and his or her spouse under Section 18521, and the
20 time prescribed for filing the return for that taxable year has expired, that individual and
21 his or her spouse may nevertheless make a joint return for that taxable year, *provided a*
22 *joint federal income tax return is made under the provisions of Section 6013(b)*⁴ of the
23 Internal Revenue Code. A joint return filed by the husband and wife in that case shall
24 constitute the return of the husband and wife for that taxable year, and all payments,
25 credits, refunds, or other repayments made or allowed with respect to the separate return
26 of either spouse for that taxable year shall be taken into account in determining the extent
27 to which the tax based upon the joint return has been paid.

24 (Rev. & Tax. Code, § 18522 (emphasis added).)

26 _____
27 ³ For reasons that will become clear below, what "a separate return" means under R&TC section 18522 appears to be the
28 central substantive tax issue of this appeal.

⁴ It appears that this italicized language prohibits a filing change under R&TC section 18522, unless a joint federal return is
also made under IRC section 6013(b). This statutory requirement will be referred to as the 6013(b) filing requirement.

1 IRC section 6013(b) provides:

2 (b) Joint return after filing separate return.

3 (1) In general. Except as provided in paragraph (2), if an individual has filed *a*
4 *separate return* for a taxable year for which a joint return could have been made by him
5 and his spouse under subsection (a) and the time prescribed by law for filing the return
6 for such taxable year has expired, such individual and his spouse may nevertheless make
7 a joint return for such taxable year. A joint return filed by the husband and wife under
8 this subsection shall constitute the return of the husband and wife for such taxable year,
9 and all payments, credits, refunds, or other repayments made or allowed with respect to
10 the separate return of either spouse for such taxable year shall be taken into account in
11 determining the extent to which the tax based upon the joint return has been paid....

12 (2) Limitations for making of election. *The election provided for in paragraph (1) may*
13 *not be made--*

14 (A) *after the expiration of 3 years from the last date prescribed by law for filing the*
15 *return for such taxable year (determined without regard to any extension of time granted*
16 *to either spouse);....*⁵

17 (IRC section 6013(b) (emphasis added).) Finally, R&TC section 18526 provides the following:

18 A joint return may not be made under Section 18522 in any of the following situations:

19 (a) *After the expiration of four years from the last date prescribed by law for filing the*
20 *return for the taxable year (determined without regard to any extension of time granted to*
21 *either spouse).*⁶

22 (Rev. & Tax. Code, § 18526 (emphasis added).)

23 *Appellants' Contentions*

24 Appellants contend that R&TC section 18522 does not prohibit a change of filing status
25 from "head of household" to "married filing jointly." (Appellants' Appeal Ltr. at 2.) Appellants point
26 out that they "did not change their status from married filing separate to married filing joint as
27 incorrectly claimed by the FTB." (*Id.*) It appears to Board staff that appellants are contending that "a
28 separate return" under R&TC section 18522 is limited to "married filing separately." (*See supra* n.3 and
accompanying text.) Appellants argue that:

[t]here is no provision in the California Revenue and Tax [sic] Code that prohibits this
change of filing status. In fact, the attached California Revenue and Tax [sic] Code
Section 18522 fully allows this change with no statute, provided a joint federal income
return is made under provisions of the attached IRC Section 6013(b), which was done.

⁵ Board staff will refer to this emphasized language as the 6013(b) three-year limitation requirement.

⁶ Board staff will refer to this emphasized language as the R&TC section 18526 four-year limitation.

1 (*Id.*) Finally, appellants explain that they are not seeking refunds due to the fact that the statute is
2 closed, but the goal is to "get the spouse [presumably appellant-husband] in compliance while getting
3 the final results correct...." (*Id.*)

4 *Respondent's Contentions*

5 Board staff understands respondent's contentions as follows:

- 6 1. The "separate return" phrase used in R&TC section 18522 and IRC section 6013(b) applies to all
7 non-joint return filings (such as single, head of household, married filing separate). Thus, since
8 appellant-wife is attempting to change from her prior separate return filings to a joint return
9 filing, R&TC section 18522 applies. Board staff will refer to this contention as respondent's
10 separate return argument.
- 11 2. In order to be allowed to make the joint return election filing under R&TC section 18522, the
12 6013(b) filing requirement must be satisfied. (*See supra* n.4.) Respondent contends that
13 appellants have not provided any federal joint returns for the tax years at issue, so appellants
14 have not demonstrated that they satisfied the 6013(b) filing requirement.
- 15 3. The 6013(b) filing requirement cannot be satisfied unless the 6013(b) three-year limitation
16 requirement is satisfied. (*See supra* n.5.) Respondent contends that since no federal returns have
17 been provided, appellants have not demonstrated that federal joint returns were filed within three
18 years of their due dates. Thus, respondent contends the 6013(b) three-year limitation
19 requirement was not satisfied.
- 20 4. Finally, respondent contends that even if appellants timely filed federal joint returns within three
21 years of their due dates (meeting both the 6013(b) filing requirement and the 6013(b) three-year
22 limitation requirement), since appellants did not elect to file a California joint return pursuant to
23 R&TC section 18522 within four years of the original due date, they failed to satisfy the R&TC
24 section 18526 four-year limitation requirement. (*See supra* n.6.) Respondent contends therefore
25 that a joint filing election can no longer be made.

26 Respondent characterizes appellants' contention as arguing that "a separate return" under
27 R&TC section 18522 is limited to "married filing single" situations. Respondent contends that, by (1)
28 narrowly limiting the "separate return" language to only apply to "married filing single" situations and

1 then by contending that (2) appellant-wife never filed under the "married filing single" status, appellants
2 are trying to make R&TC section 18522 inapplicable in this case. Respondent claims that its separate
3 return argument is supported by Revenue Ruling 83-183, 1983-2 C.B. 220 which directly addressed
4 what "a separate return" meant under IRC section 6013(b):

5 If one of the spouses has filed a return claiming unmarried status, a joint return may not
6 be filed more than 3 years after the due date of the returns. This holding also applies to a
7 case in which one of the spouses has filed a return claiming head of household status, as
8 well as to a case in which a spouse has filed a return claiming married filing status.

8 Respondent claims this ruling explains that the predecessor of IRC section 6013(b) was enacted in 1951
9 at a time when there were no rate schedules for "married filing separate," "heads of household," or
10 "unmarried individuals." Respondent contends the ruling explains that all individuals not filing as
11 married persons filing joint returns were required to file "separate returns" under the same rate schedule.
12 Thus, respondent states that the reference in IRC section 6013(b) to the prior filing of a "separate
13 return," should be viewed as a reference to any non-joint (i.e. separate) return under IRC sections 1(b)
14 (head of household status), 1(c) (unmarried status), or 1(d) (married filing separately). Based on this
15 ruling, respondent claims R&TC section 18522 applies to appellant-wife's earlier "separate returns," i.e.,
16 to the head of household returns (filed by appellant-wife for 1999 through 2003) as well as to appellant-
17 wife's 1995 and 1996 single filing status returns.

18 Applicable Law

19 *Jurisdiction Rules*

20 R&TC section 19324 provides that a denial of a refund claim from respondent may be
21 appealed to the Board. California Code of Regulations, title 18 (CCR) section 5412, subdivision (a)(3)
22 further states that the Board has jurisdiction to hear and decide a timely filed appeal if respondent mails
23 a Notice of Action on a refund which denies any portion of a perfected claim for a refund. Subdivision
24 (b) of CCR section 5412 provides that

25 The Board's jurisdiction is limited to determining the correct amount owed by, or due to,
26 the appellant for the year or years at issue in the appeal. The Board has determined that it
27 does not have jurisdiction to consider the following issues:

27 ***

28 (5) Whether the appellant is entitled to a remedy for the Franchise Tax Board's actual or
alleged violation of any substantive or procedural right, unless the violation affects the
adequacy of a notice, the validity of an action from which a timely appeal was made, or

1 the amount at issue in the appeal.

2 *R&TC sections 18522 and 18526, and IRC section 6013(b)*

3 The relevant sections of R&TC section 18522 and 18526 were cited above, as well as
4 IRC section 6013(b). Revenue Ruling 83-183 which respondent cited in support of its reading of "a
5 separate return" was also discussed above.

6 *The Separate Return Debate*

7 Although neither party cited the following case law, Board staff notes there is some legal
8 support for appellants' interpretation that a "separate return" under IRC section 6013(b) (and R&TC
9 section 18522, by implication) is limited to "married filing separate" returns. In *Glaze v. U.S.* (5th Cir.
10 1981) 641 F. 2d 339, a decedent taxpayer's estate administrator filed decedent's income tax return as a
11 single individual. Thereafter, a woman who had lived with the decedent sued and obtained a verdict that
12 she was the decedent's common-law wife. The administrator then filed an amended joint return seeking
13 a refund. In reviewing this case, the Fifth Circuit stated that married persons are "authorized ... to file
14 either joint or separate returns; that is, they can file 'married individuals filing joint returns' or 'married
15 individuals filing separate returns.'" *Glaze* at 340. Using this reasoning, the Fifth Circuit then stated:

16
17 In the absence of some contrary indication, courts construing the [IRC] must assume the
18 authors intended the words used to be accorded their ordinary meaning [citations
19 omitted.] Use of the word 'separate' can only be deemed to refer to the filing status of
20 'married, filing separately.' The term 'election' embodies the notion of choice. A reading
21 of Section 6013(b)(1) and Section 6013(b)(2) leads to only one inference, i.e., the section
22 is applicable only to the situation where a married taxpayer has made an election to file a
23 separate (not 'single') return and later decides that he/she wants to revoke that choice.

24
25 In the instant case, there was never any election until the filing of the joint return on
26 December 17, 1974. The decedent had never made a previous election to file a separate
27 return.⁷ He had, by his administrator, filed a 'single' return. This is an entirely distinct
28 category from 'married, filing separately.' It is clear that Section 6013 was never
intended to cover situations such as the one presented here where a taxpayer erroneously
lists his status as single rather than married.

(*Glaze* at 342.)

On the other hand, respondent's historic contentions raised by the Internal Revenue
Service (IRS) in Revenue Ruling 83-183, appear to be the IRS's continued litigating position, which the

⁷ Board staff believes the Fifth Circuit's reference to "separate" in this passage means "married filing separate."

1 IRS Office of Chief Counsel recently further explained in a Chief Counsel Notice:

2 This Notice alerts Chief Counsel attorneys to our position regarding the impact of *Glaze*
3 *v. United States*, 641 F.2d 339 (5th Cir. 1981), on the ability of taxpayers to elect 'married
4 filing joint return' status under I.R.C. § 6013(b).

5 ***

6 In *Glaze v. United States*, 641 F.2d 339 (5th Cir. 1981), the court held that the reference
7 in section 6013(b) to 'separate return' refers only to a married person who elects to file as
8 'married filing separately,' and not to individuals who erroneously filed as 'single'
9 taxpayers. Under the rationale of *Glaze*, taxpayers who have previously filed tax returns
10 claiming either 'single' or 'head of household' filing status are not subject to the 'married
11 filing joint return' election limitations of section 6013(b)(2). In *Bonner v. City of*
12 *Prichard*, 661 F.2d 1206 (11th Cir. 1981), the Eleventh Circuit adopted as its own all
13 existing Fifth Circuit precedent thereby making *Glaze* precedential throughout both the
14 Fifth and Eleventh Circuits.

15 The Office of Chief Counsel announced that it would not follow *Glaze* in Action on Dec.,
16 1981-140 (June 2, 1981); the Service announced it would not follow *Glaze* in Rev. Rul.
17 83-183, 1983-2 C.B. 220. Both pronouncements noted that *Glaze* failed to acknowledge
18 that Congress never intended 'separate returns' to refer to the status of married filing
19 separately because the married filing separately rate schedule did not exist at the time the
20 predecessor of section 6013(b) was enacted in 1951. A separate rate schedule for married
21 filing separately was not enacted until 1969. *See* Pub. L. No. 91-172, § 803(a), 83 Stat.
22 675 (1969).

23 POSITION

24 We continue to disagree with the rationale and holding of *Glaze*, which holding is
25 inconsistent with Tax Court cases that have applied the limitations under section
26 6013(b)(2) when a married person has erroneously filed an earlier return as a single
27 taxpayer or head of household, and later wishes to file an amended joint return. *See, e.g.,*
28 *Blumenthal v. Commissioner*, T.C. Memo. 1983-737; *Saniewski v. Commissioner*, T.C.
Memo. 1979-337. *See also Phillips v. Commissioner*, 86 T.C. 433, 439 (1986) ('[W]e
believe that that reading of section 6013(b) [in *Glaze*] is too narrow'), *aff'd in part and*
rev'd in part on another issue, 271 U.S. App. D.C. 265, 851 F.2d 1492 (D.C. Cir. 1988).

Chief Counsel attorneys should advise the Service to follow the holding in *Glaze* in cases
that would be appealable to either the Fifth or Eleventh Circuits.⁸ Chief Counsel
attorneys with cases appealable to other circuits should look for appropriate cases to
litigate that challenge *Glaze*.

(Chief Couns. Notice (March 2, 2006) 2006-010 at 1-3.)

The California Supreme Court stated that in interpreting a statute:

[W]e begin with the words of a statute and give these words their ordinary meaning. If
the statutory language is clear and unambiguous, then we need go no further. If,
however, the language is susceptible to more than one reasonable interpretation, then we
look to 'extrinsic aids, including the ostensible objects to be achieved, the evils to be
remedied, the legislative history, public policy, contemporaneous administrative
construction, and the statutory scheme of which the statute is a part.'

⁸ Board staff points out that California is in the Ninth Circuit.

1 (*Hoechst Celanese Corp. v. Franchise Tax Bd.*, (2001) 25 Cal. 4th 508, 519 (citations omitted).)

2 Where the legislature has patterned a California tax statute on a federal statute, federal
3 decisions interpreting substantially identical statutes constitute unusually strong persuasive precedent for
4 construction of the California statute. (*People v. Hagen*, (1998) 19 Cal. 4th 652, 661.) As for revenue
5 rulings, such rulings are not promulgated by the Internal Revenue Service (IRS) after a notice and public
6 comment procedure. Consequently, a revenue ruling is not binding on courts, since it represents the
7 contention of one party (the government) to a case in court and is entitled to no greater weight than that
8 given to any party's litigating position. (*Stubbs, Overbeck & Assocs. v. U.S.* (5th Cir. 1971) 445 F.2d
9 1142, 1146-1147.)

10 STAFF COMMENTS

11 *Does the Board have Jurisdiction over the Remedy Requested*

12 Although the parties have not raised the issue of the Board's jurisdiction over this appeal,
13 Board staff believes the circumstances of this appeal raise a threshold question as to whether the Board
14 has jurisdiction to grant the remedy requested by appellants; namely, to force respondent to accept
15 amended returns and change the filing status of appellants for closed years. As stated above, the Board's
16 jurisdiction is generally limited to determining the correct amount of tax for a given tax year. This
17 appeal originated as a refund claim with respondent, which was timely appealed. However, at appeal,
18 appellants conceded that the refunds requested are time-barred. Thus, appellants, who apparently have a
19 non-filing and late-filing history, are contending that respondent has somehow violated their procedural
20 or substantive rights. Since this appeal does not involve a correct determination of tax for the relevant
21 tax years, it appears that appellants are asking for an appeal remedy (in the nature of an injunction or
22 declaratory action) which this Board in CCR section 5412 subdivision (b)(5) has indicated it would not
23 entertain. Accordingly, at the oral hearing, prior to discussing the merits of the contentions, the parties
24 should first present argument as to whether the Board has jurisdiction to hear this appeal. In addressing
25 this question, the parties should be prepared to discuss the following:

- 26 1. Appellants should specifically explain what they want the Board to do and why such relief is
27 important.

28 ///

- 1 2. Appellants should explain what harm they would face if no relief is granted.⁹
2 3. Both parties should then discuss whether the Board has legal jurisdiction to grant the remedy
3 requested.

4 Assuming the Board has Jurisdiction

5 If the Board concludes it has jurisdiction over the substantive issues in this case, then it
6 appears to Board staff that the major issue in this case is what "a separate return" means under R&TC
7 section 18522. It appears to Board staff that since the Fifth Circuit in *Glaze* and the IRS, as cited above,
8 appear to be at complete odds as to how "a separate return" should be interpreted under IRC section
9 6013(b), then an argument exists that the term would be susceptible to more than one reasonable
10 interpretation. If this is true, then the "separate return" language would be considered ambiguous under
11 the reasoning of *Hoechst Celanese Corp.* discussed above. Moreover, since R&TC section 18522 uses
12 this term and is apparently modeled on the federal statute, based on *Hagen* above, *Glaze* should
13 normally constitute strong persuasive authority as to how "a separate return" should be interpreted for
14 California purposes.

15 The *Glaze* court did not question whether the term "separate return" was ambiguous, but
16 resolved the question by appealing to the normal "authorized" filing methods for married people; i.e.,
17 "married filing separate" or "married filing joint." Thus, the *Glaze* court's reasoning is based on its
18 expectation that the author (i.e., Congress) must have intended "separate return" to mean "married filing
19 separate," because there were no other authorized choices that Congress intended for married individuals
20 to make. On the other hand, as the facts of this appeal and the facts of *Glaze* indicate, married taxpayers
21 will sometimes file in categories outside of those contemplated by the *Glaze* court. Board staff also
22 notes that the *Glaze* court, although it purported to be performing a plain language analysis, did not
23 appear to conclusively demonstrate that the term "a separate return" under the commonly understood
24 meaning of these words meant (and can only mean) "married filing separate." Instead, the *Glaze* court's
25 "structure of filing methods for married individuals" argument appears to be more of a "statutory
26 scheme" argument, which is one of the extrinsic tools used to interpret an ambiguous statute. (See
27

28 ⁹ Since the tax years are now closed, the tax benefit of using the married filing jointly tax tables is no longer available.

1 *Hoechst Celanese Corp., supra.*)

2 Revenue Ruling 83-183 and the Chief Counsel Notice discussed above relied on
3 legislative history and historical context to explain that when the predecessor of IRC section 6013(b)
4 was introduced in 1951 there were no rate schedules for "married individuals filing separate," "heads of
5 household" or "unmarried individuals." At that time, all individuals who were not filing married joint
6 returns filed separate returns under the same rate schedule. The IRS's point seems to be that it would be
7 illogical to limit the term "separate return" (which was in existence as early as 1939)¹⁰ to the status of
8 "married filing separately," when this status did not even come into existence until 1969.¹¹

9 It appears to Board staff, that if the term "separate return" is limited to "married filing
10 separately," then R&TC section 18522 may not apply in this case. If this were to occur, then respondent
11 would need to raise a different legal argument to contend that the changing of appellants' filing status
12 was prohibited under the R&TC. On the other hand, if "separate return" applies to single returns and
13 head of household returns, then respondent's reliance upon R&TC section 18522 would appear correct.

14 Accordingly, at the oral hearing the parties should be prepared to discuss the following:

- 15 1. Whether the term "separate return" is ambiguous, and if so, whether the *Glaze* court's
16 interpretation or respondent's (and the IRS's) interpretation should be adopted. In doing so, if
17 appellants maintain that a "separate return" only refers to the "married filing separately" filing
18 category, appellants should be prepared to explain what a "separate return" meant from 1939 to
19 1969 when the term was apparently being used in the absence of the "married filing jointly"
20 filing category.
- 21 2. If the Board adopts respondent's interpretation, appellants should be prepared to provide copies
22 of the federal returns to demonstrate that the IRC section 6013(b) filing requirement and the
23 6013(b) three-year limitation requirement were met. Even if appellants were able to meet these

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26 ¹⁰ Rev. Rul. 83-183 at 5 ("the reference in section 6013(b) to the prior filing of a separate return...was taken verbatim from
27 section 51(d) of the [IRC] of 1939....")

28 ¹¹ See *supra* Chief Couns. Notice 2006-010 at 2 ("A separate rate schedule for married filing separately was not enacted until
1969. See Pub. L. No. 91-172, § 803(a), 83 Stat. 675 (1969).")

1 requirements, appellants should be prepared to discuss how its 2008 amended return filings satisfied
2 the four-year limitation requirement of R&TC section 18526.

3 3. If the Board adopts the *Glaze* court's interpretation, respondent should be prepared to argue that
4 even in the absence of R&TC section 18522, appellants' filing status change could not be
5 permitted.

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