

**BOARD OF TAX APPEALS
STATE OF LOUISIANA**

HERBERT AND JUDIE BOXILL,
Petitioners,

VS.

DOCKET NO. C05778A

KIMBERLY ROBINSON, SECRETARY,
DEPARTMENT OF REVENUE,
Respondent

JUDGMENT

This matter came before the Board for hearing on January 9, 2020, with Vice-Chairman Cade R. Cole presiding and Board Member Francis “Jay” Lobrano present. Judge Tony Graphia (Ret.), Chairman, recused himself from the case. Participating in the hearing were Herbert Boxill on behalf of himself and on behalf of Judie Boxill (“Petitioners”), and Adrienne Quillen, attorney for Kimberly Robinson, Secretary, Department of Revenue (the “Department”). After the hearing, the matter was taken under advisement. The Board now renders Judgment in accordance with the reasons attached herewith.

IT IS ORDERED, ADJUDGED AND DECREED that Judgment BE AND IS HEREBY RENDERED in favor of Petitioners and against the Department, the Assessment appealed from, dated January 8, 2018, bearing Letter ID L1531464288, BE AND IS HEREBY VACATED.

JUDGMENT RENDERED AND SIGNED AT BATON ROUGE,
LOUISIANA THIS 11 DAY OF MARCH, 2020.

FOR THE BOARD:



**VICE CHAIRMAN CADE R. COLE
LOUISIANA BOARD OF TAX APPEALS**

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REASONS FOR JUDGMENT

This matter came before the Board for hearing on January 9, 2020, with Vice-Chairman Cade R. Cole presiding and Board Member Francis “Jay” Lobrano present. Judge Tony Graphia (Ret.), Chairman, recused himself from the case. Participating in the hearing were Herbert Boxill on behalf of himself and on behalf of Judie Boxill (“Petitioners”), and Adrienne Quillen, attorney for Kimberly Robinson, Secretary, Department of Revenue (the “Department”). After the hearing, the matter was taken under advisement. The Board now renders Judgment in accordance with the following written reasons.

Petitioners appeal from an Assessment of individual income tax for the year 2001 dated January 8, 2018 (the “Assessment”). The Assessment is based on distributions received from a Ponzi scheme that Petitioners erroneously reported as income on their 2001 federal income tax return. In 2001, Petitioners received the distributions at issue from Bernard L. Madoff Investment Securities LLC (“Madoff Securities”). Madoff Securities later filed bankruptcy after the discovery of the now-infamous Madoff Ponzi scheme. Petitioners’ position is that the distributions were not income, but actually were a return of their initial investment. In addition,

Petitioners claim that they were not residents of Louisiana in 2001, and therefore were not subject to Louisiana's individual income tax.

The Department's argument is that the distributions must be included in Petitioners' taxable Louisiana income under La. R.S. 47:293 and 295. Under those provisions, Louisiana "piggy-backs" off of a taxpayer's federal Adjusted Gross Income ("AGI") when calculating the state's income tax. Petitioners included the distributions from Madoff Securities in their AGI as reported on their 2001 federal income tax return. Petitioners were unaware of Madoff's fraud in 2001, and believed the distributions to be income. By the time the Madoff Ponzi scheme was uncovered in 2008, it was too late for Petitioners to amend their 2001 federal return.

Before turning to the merits of the case, it should be noted that the Assessment is not barred by prescription. The Louisiana Constitution provides that taxes are generally subject to a three-year prescriptive period, but that prescription may be interrupted or suspended as provided by law. La. Const. Art. 7 § 16. La. R.S. 47:1580(C)(1) provides: "The failure to file any return required to be filed by this Subtitle shall interrupt the running of prescription, and prescription shall not commence to run again until the subsequent filing of such return." Petitioners did not file a Louisiana individual income tax return for 2001 until February 2016.¹ The Department issued the Assessment within three years from the date of filing.

Petitioners argue that they moved from Louisiana to Florida before or during 2001. La. R.S. 47:31, in relevant part, imposes the state's individual income tax on Louisiana residents. For this purpose, a Louisiana resident is defined, in part, as a natural person domiciled in the state, or who maintains a permanent place of abode

¹ Counsel for the Department also stated that a non-filer assessment was issued to Petitioners in 2004. That document was not made a part of the record. In any event, the Department and Petitioners apparently agree that the non-filer assessment was superseded and replaced by the 2018 Assessment.

within the state. La. R.S. 47:31(1). It is undisputed that the Petitioners were domiciled in Louisiana at some time before moving to Florida. There is a legal presumption against a change of domicile, and a party seeking to show that domicile has changed bears the burden of proof. *Becker v. Dean*, 03–2493, p. 11 (La. 9/18/03), 854 So.2d 864, 871; *Russell v. Goldsby*, 00–2595, p. 5 (La. 9/22/00), 780 So.2d 1048, 1051. Petitioners were unable to provide any evidence showing when they had changed their domicile to Florida.

The Board recognizes the difficulty faced by Petitioners in obtaining documents relevant to this issue after twenty years. Therefore, at the conclusion of the hearing in this matter, the Board ordered that the record be held open for thirty days to allow Petitioners an opportunity to provide supplemental evidence. On February 6, 2020, Petitioners submitted a letter to the Board stating that they were unable to obtain any additional documents in support of their residency argument. Petitioners further asked the Board to resolve the case on the Madoff issue. Accordingly, the Board finds that Petitioners did not carry their burden of demonstrating a change in domicile.

The factual history of the Madoff Ponzi scheme and its eventual collapse are detailed in *In re Bernard L. Madoff Securities LLC*, 424 B.R. 122 (Bankr. S.D.N.Y., 2010). It is undisputed that Petitioners were unwitting victims of the Ponzi scheme. Petitioners believed that Madoff Securities would invest their money in the stock market. No such investment occurred. In fact, Madoff Securities simply took Petitioners' money and redistributed it to other investors, to Bernard Madoff himself, and/or to his friends and family.

Madoff repeatedly lied about his investments to create the illusion of profit. Deceived as they were, when Petitioners withdrew money from their account, they

believed they were realizing capital gains. Petitioners reported these capital gains on their federal income tax returns. Petitioners also received what they thought were dividends from their investments. Petitioners reported these distributions as income on their federal returns as well.

The nature of a Ponzi scheme is to rob Peter to pay Paul. When an investor wanted to make a withdrawal, Madoff Securities did so with money from another investor's account. Madoff was able to maintain this fraud for over thirty years by continuously attracting new investors to supply cash to pay off earlier investors. During the 2008 financial crisis, however, the amount of withdrawals overwhelmed the amount of new investments, and the scheme collapsed.

Unfortunately, Petitioners wound up in the role of Peter. Petitioners continuously invested in Madoff Securities from 1993 to 2008. Petitioners also withdrew money from time to time, but ultimately deposited more money than they withdrew. When the scheme collapsed, the money that Petitioners thought they had left in their account disappeared.

The IRS devised a special procedure for handling the tax consequences for Petitioners and other victims of the Madoff Ponzi scheme. Rev. Rul. 2009-09; Rev. Proc. 2009-20, 2009-26. Generally, the IRS would make a highly factual determination as to how to characterize losses from a Ponzi scheme. *See* Rev. Proc. 2009-20 § 2.03. However, given the number of Madoff's victims, the IRS created a "safe harbor" for affected taxpayers to claim a Net Operating Loss ("NOL") due to theft in 2008 with a carryback of up to five years. Rev. Rul. 2009-09; Rev. Proc. 2009-20. This spared taxpayers the burden of having to prove how much of their reported income was fictitious. Rev. Proc. 2009-20 § 2.04. Petitioners availed themselves of the safe harbor and claimed NOL deductions for 2008, with a five

year carryback. After some adjustments, the IRS allowed the deductions and granted the Petitioners refunds and/or abatements of tax.

Louisiana's income tax laws do not provide the NOL deduction for resident individuals.² Nevertheless, a portion of this deduction, taken at the federal level, can work its way into the calculation of Louisiana taxable income. La. R.S. 47:293(9)(a)(xi) provides that excess federal itemized personal deductions are subtracted from Louisiana AGI when calculating tax table income. La. R.S. 47:293(3) defines excess federal itemized personal deductions as fifty percent of the amount by which federal itemized personal deductions exceed the applicable federal standard deduction. The NOL is an itemized deduction. IRC § 63, 172. Therefore, if an individual taxpayer takes the NOL deduction at the federal level, and their federal itemized deductions exceed the applicable standard deduction, then half of the the excess will be deducted from the individual's Louisiana AGI when calculating Louisiana taxable income. This is the method that Petitioners ask the Board to use to calculate their 2001 Louisiana taxable income.

However, under federal law, Petitioners could not have claimed the NOL deduction for 2001. The IRS classified losses from the Madoff Ponzi scheme as theft losses. Rev. Rul. 2009-09. Under federal law, theft losses are generally treated as sustained during the taxable year in which the taxpayer discovers the loss. IRC § 165(e); 26 C.F.R. § 1.165-1(d)(4). For the Madoff Ponzi scheme, the IRS determined the year of discovery to be 2008, the year Madoff was indicted.³ The Petitioners in this case did not discover Madoff's fraud in 2001. Because the year of discovery

² La. RS. 47:293 and subsequent statutes list the items that are added or subtracted from federal AGI to determine tax table income. The federal NOL deduction is not one of those items. In the corporate context, La. R.S. 47:287.73(B)(1) explicitly deletes the federal NOL deduction from the computation of a corporation's net income. Louisiana law provides its own version of the NOL deduction for corporations in La. R.S. 47:287.86.

³ Rev. Proc. 2009-20 §.02, .04, *modified sub nom.* Rev. Proc. 2011-58.

was not 2001, Petitioners could not have claimed a theft loss for that year. Therefore, Petitioners could not have claimed the NOL on their 2001 federal return, and could not have had the excess itemized deductions they now claim.

From a purely computational perspective the petitioners' deduction is trapped in years where they were not Louisiana's residents, and they cannot use that deduction to defeat 2001 liability—it cannot be brought back that far pursuant to applicable law. However, the Board finds that under these unique and exceptional facts that there is no need to apply a deduction to Petitioners' income because, in reality, the distributions from Madoff Securities were not actually income in the first place.

Under federal law, gross income means “all income from whatever source derived,” including, among other items, gains derived from dealings in property, interest, and dividends. I.R.C. 61(a). Courts interpreting federal law have recognized that income does not include money received in extraordinary cases involving fraudulent schemes where a taxpayer can establish that the payments they received were simply a return of capital and no gain or other return occurred. *E.g. Johnson v. United States*, 79 Fed. Cl. 266, 271 (2007). The United States Tax Court has held that distributions from a Ponzi scheme represent a return of taxpayers' capital investments and are not income. *Greenberg v. Comm'r*, 71 T.C.M. (CCH) 3191 (T.C. 1996).

The sole issue framed by the parties at the hearing and in pleadings is whether Louisiana's piggybacking off federal AGI requires Petitioners to pay tax on the distributions at issue. There is no dispute that had the taxpayer amended its 2001 return, this item would have been removed from income. The taxpayer simply selected the safe harbor carryback option instead of going through the steps of

amending a tax return from almost 20 years ago. This selection did not cost the state of Louisiana anything, the taxpayer had already changed his residence prior to those periods.

The Board perceives no dispute over the facts and circumstances of the distributions. It is undisputed that all of the distributions at issue were merely a return of Petitioners' own money. If there were an actual dispute by the Department as to whether the distributions were really income, the Board might reach a different conclusion. However, given the undisputed facts in this case, the Board has little doubt that the distributions would not actually be considered income under federal law.

The distributions are not income under Louisiana law, either. Unless expressly stated otherwise, Louisiana's individual income tax law conforms to the United States Internal Revenue Code. La. R.S. 47:290(A). Conformity with federal law is intended to simplify the filing of returns, reduce the taxpayer's accounting burden, and to facilitate the collection and administration of the individual income tax. *Id.* La. R.S. 47:42 defines "gross income" to include:

[G]ains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealing in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

The listed forms of income parallel the forms of income specified in IRC 61(a). A return of capital is not one of the listed forms of income under Louisiana law. Therefore, Louisiana law, interpreted in conformity with the interpretation of federal

law by federal courts, does not treat the mere return of capital from a Ponzi scheme as income.

It is true that La. R.S. 47:293 and 295 establish federal AGI as the starting point for determining an individual's Louisiana income tax liability. Read carefully, however, La. R.S. 47:293 and 295 do not define Louisiana income literally as only the taxpayer's reported federal AGI. The express text of La. R.S. 47:293 defines "Adjusted gross income" as the adjusted gross income of the individual for the taxable year that is "**reportable**," not the gross income *reported*, on the individual's federal income tax return. Logically, income is reportable if it should have been reported, whether it was actually reported or not. This is the same basis and framework by which the Department brings audit assessments against taxpayers even when the IRS does not.

The distributions from Madoff Securities were not income and Petitioners should not have reported them as such on their federal return. The fact that Petitioners were deceived by Madoff does not change the nature of the distributions. La. R.S. 47:295 does not alter the Board's conclusion. La. R.S. 47:295(A) states that the amount of an individual's tax is to be determined from tax tables promulgated by the Secretary of Revenue. On their face, the tax tables provide a method of calculating tax liability, they do not themselves change the express definition of income adopted into law by the legislature.

For the foregoing reasons, the Board finds that the Assessment is based on distributions that were, in fact, merely the return of Petitioners' investment in a Ponzi scheme. These distributions are not income under Louisiana law. Because the distributions are not income, they are not subject to Louisiana's income tax. The

Assessment incorrectly seeks to tax distributions that are not income, and must be invalidated. Accordingly, Judgment will be entered in favor of the Petitioners.

Baton Rouge, Louisiana, this 11 day of March, 2020.

FOR THE BOARD:



VICE CHAIRMAN CADE R. COLE
LOUISIANA BOARD OF TAX APPEALS