

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of )  
 )  
Nicholas Schillace ) 93A-1566

For Appellant: Nicholas Schillace

For Respondent: Bruce R. Langston, Counsel

OPINION

This appeal is made pursuant to section 19045 (formerly section 18593)<sup>1/</sup> of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Nicholas Schillace against a proposed assessment of additional personal income tax in the amount of \$1,654 for the year 1983.

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<sup>1/</sup> Unless otherwise specified, all section references hereinafter in the text of this opinion are to sections of the Revenue and Taxation Code as in effect for the year in issue.

The primary issue presented in this appeal is whether this board has subject matter jurisdiction over questions involving unpaid interest on a deficiency. If this board does have subject matter jurisdiction, we must decide whether interest proposed to be assessed on appellant's 1983 deficiency should be waived.

Appellant and his former wife, Debra Schillace, filed a joint federal income tax return for the 1983 taxable year. The Internal Revenue Service (IRS) audited their 1983 return, and as a result, their federal taxable income for 1983 was increased. Pursuant to section 6103(d) of the Internal Revenue Code, the IRS informed respondent of the federal adjustments. Based on the information provided by the IRS, respondent made corresponding adjustments to the joint state personal income tax return filed by appellant and Debra Schillace. On June 25, 1993, respondent issued a notice of proposed assessment (NPA) for 1983, assessing additional tax in the amount of \$1,654. On October 6, 1993, respondent issued a notice of action affirming the NPA. Thereafter, appellant filed this timely appeal.<sup>2/</sup>

Appellant does not dispute the proposed assessment of additional tax in this appeal. Instead, he contends that the interest proposed to be assessed on the deficiency should be waived because he and his present wife have experienced great financial hardship over the past three years due to his loss of employment and damage to his personal residence caused by an earthquake on January 17, 1994.

Before addressing the merits of appellant's contentions, we must first decide whether this board has subject matter jurisdiction to decide questions involving unpaid interest on a deficiency. An administrative agency's jurisdiction depends upon the provisions of the statute, or other act of delegation, from which its powers are derived; and it cannot validly act in excess of the limits of jurisdiction which have been conferred upon it. (See Flickenger v. Industrial Accident Commission, 181 Cal. 425 (1919).)

This board's jurisdiction over franchise and income tax appeals is clearly set forth in the Revenue and Taxation Code.<sup>3/</sup> Former section 18593 provided that a taxpayer may file an appeal with this board within 30 days from the date the Franchise Tax Board (FTB) mails a notice of action on the taxpayer's protest against a proposed "deficiency" assessment. Taxpayers may only protest and appeal "deficiency" amounts.<sup>4/</sup>

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<sup>2/</sup> Debra Schillace is not a party to this appeal.

<sup>3/</sup> See Rev. & Tax. Code, §§ 18593, 19057, and 19058, renumbered as §§ 19045, 19324, and 19331, respectively, operative January 1, 1994.

<sup>4/</sup> Former section 18583, amended and renumbered as section 19033, operative January 1, 1994, provided that:

If the Franchise Tax Board determines that the tax disclosed by the original return is less than the tax disclosed by its examination, it shall mail notice or notices to the taxpayer of the deficiency proposed to be assessed. (emphasis added)

Former section 18590, renumbered as section 19041, operative January 1, 1994, provided that:

Within 60 days after the mailing of each notice of additional tax

The term "deficiency" is defined in former section 18591.1, amended and renumbered as section 19043, operative January 1, 1994. Basically, a "deficiency" is the amount by which the tax liability of the taxpayer exceeds the amount shown as the tax on the taxpayer's return.<sup>5/</sup> The term does not, therefore, include interest. Because interest is not a "deficiency" as defined by former section 18591.1, this board does not have subject matter jurisdiction over questions relating solely to unpaid interest on a deficiency.<sup>6/</sup>

This conclusion is fully in accord with numerous federal court cases interpreting Internal Revenue Code section 6211, which is substantially identical to former section 18591.1. These cases have consistently held that prepayment challenges to interest are premature, and not within the jurisdiction of the United States Tax Court (the only court where federal tax liabilities can be contested without prior payment of the amounts in dispute).<sup>7/</sup> (See Standard Oil Company v. McMahon, 244

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proposed to be assessed the taxpayer may file with the Franchise Tax Board a written protest against the proposed additional tax, specifying in the protest the grounds upon which it is based. (emphasis added)

<sup>5/</sup> Former section 18591.1 provided:

- (a) For purposes of this part, the term "deficiency" means the amount by which the tax imposed by this part exceeds the excess of-
  - (1) The sum of-
    - (A) The amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus
    - (B) The amounts previously assessed (or collected without assessment) as a deficiency, over-
  - (2) The amount of rebates, as defined in paragraph (2) of subdivision (b), made.
- (b) For purposes of this section-
  - (1) The tax imposed by this part and the tax shown on the return shall both be determined without regard to payments on account of estimated tax, and without regard to the credit under Section 18551.1.
  - (2) The term "rebate" means so much of an abatement, credit, refund, or other repayment as was made on the ground that the tax imposed by this part was less than the excess of the amount specified in paragraph (1) or of subdivision (a) over the rebates previously made.
  - (3) The term "deficiency" shall include the amount by which a credit subject to carryover is reduced by any action of the Franchise Tax Board.

<sup>6/</sup> In accord with federal practice, there appear to be certain limited exceptions to this board's lack of jurisdiction over issues involving unpaid and unassessed interest. For example, this board probably has subject matter jurisdiction over interest relating to transferee liability, jeopardy assessments, and overpayments. (See Rev. & Tax. Code, §§ 19071-19074, 19081 and 19340, operative January 1, 1994; see also 508 Clinton Street Corp. v. Commissioner, 89 T.C. 352 (1987).)

<sup>7/</sup> In the Estate of Baumgardner v. Commissioner, 85 T.C. 445 (1985), the United States Tax Court noted that:

F.2d 11 (2nd Cir. 1957); see also Bax v. Commissioner, 13 F.3d 54 (2nd Cir. 1993).) It is well settled that where a California statute is substantially similar to a federal statute on the same or analogous subject, as in this case, the federal authority interpreting the federal statute is highly persuasive as to the proper interpretation of the California statute. (See Holmes v. McColgan, 17 Cal.2d 426 [110 P.2d 428], cert. den., 314 U.S. 636 [86 L.Ed. 510] (1941).)

We therefore conclude that this board does not have subject matter jurisdiction over this appeal. In order for a taxpayer to appeal an action by FTB regarding interest on a deficiency, a taxpayer must first pay both the entire deficiency and the interest calculated thereon. Thereafter, a taxpayer may file a refund claim with the FTB for the amount of interest paid. Once a taxpayer's claim for refund is denied, this board has subject matter jurisdiction to hear a timely appeal challenging the FTB's denial of the refund claim.<sup>8/</sup> (See Rev. & Tax. Code, §§ 19057, 19058; renumbered as §§ 19324, 19331, respectively, operative January 1, 1994.)

Accordingly, this matter is hereby dismissed for lack of subject matter jurisdiction.

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As a practical matter, this Court would find it difficult to exercise jurisdiction over interest upon a deficiency. Interest does not accrue upon a deficiency, but only upon the existence of an underpayment . . . . In order for a deficiency or tax to be unpaid, the amount must be assessed or assessable. [Internal Revenue Code] Section 6213 limits the ability of [the IRS] to assess a deficiency until the decision of the Tax Court becomes final. Accordingly, as a practical matter, we would have logistic difficulty exercising jurisdiction over interest on an unpaid and unassessed deficiency.

<sup>8/</sup> It should be noted, however, that where an appeal of a denial of a claim for refund is jurisdictionally properly before this board, this board may lack the statutory authority to abate the interest assessed by FTB. For example, this board does not have the power to review FTB's exercise of its discretion to abate the assessment of the interest due to delays or errors by its officers or employees in performing a ministerial act. (See Appeal of Philip C. and Ellen Boesner Snell, 92-SBE-023, July 30, 1992 [discussing former Rev. & Tax. Code, § 18688, subd. (c)(1), renumbered as § 19104, subd. (c)(1), operative January 1, 1994]; see also Appeal of Murieta Sales Corp., 93-SBE-011, June 24, 1993 [discussing former Rev. & Tax. Code, § 25901b, subd. (c)(1), renumbered as Rev. & Tax. Code, § 19104, subd. (c)(1), operative January 1, 1994].) Similarly, this board may not have the statutory authority to review FTB's exercise of its discretion to waive or abate interest under the financial hardship exception. (See Rev. & Tax. Code, § 18693, renumbered as section 19112, operative January 1, 1994.)

ORDER

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, pursuant to section 19047 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Nicholas Schillace against the proposed assessment of additional personal income tax in the amount of \$1,654 for the year 1983 be and the same is hereby dismissed for lack of subject matter jurisdiction.

Done at Sacramento, California, this 2nd day of August, 1995, by the State Board of Equalization, with Board Members Mr. Klehs, Mr. Dronenburg, Mr. Andal, Mr. Sherman and Mr. Halverson present.

Johan Klehs \_\_\_\_\_, Chairman

Ernest J. Dronenburg, Jr. \_\_\_\_\_, Member

Dean F. Andal \_\_\_\_\_, Member

Brad J. Sherman \_\_\_\_\_, Member

Rex Halverson\* \_\_\_\_\_, Member

\*For Kathleen Connell, per Government Code section 7.9.