

1 Sheriene Anne Ridenour
 2 Tax Counsel III
 3 Board of Equalization, Appeals Division
 4 450 N Street, MIC:85
 5 PO Box 942879
 6 Sacramento, CA 95814
 7 Tel: (916) 323-3108
 8 Fax: (916) 324-2618

9 Attorney for the Appeals Division

10 **BOARD OF EQUALIZATION**
 11 **STATE OF CALIFORNIA**

12 In the Matter of the Appeal of:) **HEARING SUMMARY**
 13) **PERSONAL INCOME TAX APPEAL**
 14 **IRVIN J. HIMMELBERG AND**) Case No. 866627
 15 **PEGGY JO HIMMELBERG**)

	<u>Years</u>	<u>Claim For Refund</u>
	2007	\$4,679.20 ¹
	2008	\$3,840.00 ²

16 Representing the Parties:

17 For Appellants: Irvin J. Himmelberg and Peggy Jo Himmelberg
 18 For Franchise Tax Board: Kathleen B. Cooke, Tax Counsel III

19 ¹ This amount is the amount indicated in appellant-husband's June 19, 2014, request for interest abatement, which respondent
 20 treated as a refund claim. This Board's records list the amount of \$5,216.59, which is based on the Notice of Determination –
 21 Not to Abate Interest (NOD). The Franchise Tax Board (FTB or respondent) states, and it appears to staff, that the NOD lists
 22 an incorrect amount and that the actual amount of interest charged for 2007, and the amount potentially at issue, is \$4,775.51.
 23 (Resp. Op. Br., p. 1, Exhibits C and T; Appeal Letter, attachments.)

24 ² This amount is the amount indicated in appellant-husband's June 19, 2014, request for interest abatement, which respondent
 25 treated as a refund claim. As of July 14, 2015, interest of \$3,944.73 had accrued for 2008. The amount of \$3,840.00 reflects
 26 the interest charged for 2008 of \$3,944.73, less \$22.43 that the FTB wrote off in September of 2014. The FTB states in its
 27 additional brief that appellants are also entitled to an \$89.41 interest credit, which the FTB will refund or credit to appellants
 28 at the conclusion of this appeal, as a result of Avon and May Department Stores interest adjustments. (See
<https://www.ftb.ca.gov/Archive/professionals/taxnews/2015/August/03.shtml>.) As a result of these adjustments,
 approximately \$3,832 (rounded) is at issue for 2008. (Resp. Op. Br., p. 1, Exhibits G and T; Resp. Add'l Br., p. 5, Exhibits
 AA and BB.)

1 QUESTION: Whether appellants have demonstrated that they are entitled to interest abatement for
2 the tax years at issue.

3
4 HEARING SUMMARY

5 Background

6 For 2007, appellants filed a joint California return (Form 540)³ on April 15, 2008,
7 reporting adjusted gross income (AGI) of \$154,859, less itemized deductions of \$38,329, resulting in
8 taxable income of \$116,530 and tax of \$6,448. After applying exemption credits totaling \$376,
9 appellants reported a total tax of \$6,072. After applying estimated tax payments of \$2,700, the couple
10 reported a tax liability of \$3,372, and remitted a payment of \$3,516 with the return. It appears that,
11 based on the information reported on the return, appellants would have been due a refund of \$144 (i.e.,
12 \$3,372 - \$3,516), had the FTB accepted the entire 2007 return as filed. (Resp. Op. Br., pp. 1-2, Exhibits
13 A and B.)

14 When processing the 2007 return, the FTB accepted the return as filed, except for the
15 claimed estimated tax payments. Since, according to the FTB's records, appellants over claimed
16 estimated tax payments by \$700, the FTB reduced appellants' claimed estimated tax payments from
17 \$2,700 to \$2,000. On August 6, 2008, the FTB issued a Return Information Notice (RIN) showing a
18 total tax liability of \$6,072 (the same as reported by appellants), estimated tax payments of \$2,000, and a
19 payment of \$3,516 remitted with the return, for a total of \$5,516 in payments, resulting in an outstanding
20 tax liability of \$556 (i.e. \$6,072 - \$5,516). The RIN also showed an estimated tax penalty of \$222.68
21 and interest of \$13.32, for a revised balance due of \$792.00 (i.e., \$556.00 + \$222.68 + \$13.32).⁴ On
22 October 15, 2008, the FTB received payments of \$800.81 and \$64.19, for a total of \$865.00 in
23 payments, which the FTB applied to appellants' 2007 account. After applying the payments, appellants'
24 2007 account reflected an overpayment of \$64.29, which the FTB refunded to appellants in November
25

26 _____
27 ³ The FTB's information is based on its electronically-stored data for the couple's 2007 tax year account.

28 ⁴ In footnote 5 of its opening brief, the FTB notes that, instead of increasing appellants' tax liability by \$700 to reflect the reduction in estimated tax payments, the FTB initially appears to have reduced the couple's tax liability from \$3,372 to \$700. However, this error appears to have been corrected in the RIN, which reflects \$2,000.00 in estimated tax payments.

1 of 2008. (Resp. Op. Br., p. 2, Exhibits B and C; App. Reply Br., attachments.)

2 On December 15, 2008, appellants filed an amended 2006 joint California return
3 (Form 540X), reporting an overpayment of \$3,015, which the couple requested be transferred to another
4 tax year as an estimated payment.⁵ The FTB processed the 2006 amended return, revised appellants'
5 2006 overpayment from \$3,015.00 to \$1,839.96,⁶ and issued appellants a RIN advising the couple of
6 discrepancies between the amounts appellants reported on their 2006 amended tax return and the
7 amounts reflected in the FTB's records. After processing appellants' 2006 amended return, the FTB
8 transferred overpayments of \$1,839.96 and \$5,872.04, for a total of \$7,712.00 transferred from
9 appellants' 2006 account to their 2007 account, with an effective date of April 15, 2007.⁷ Subsequently,
10 the FTB determined that appellants' 2007 account reflected a credit balance and, therefore, in February
11 of 2009, the FTB transferred \$6,687.72 to the couple's 2005 account and transferred \$455.96 back to

12 ///

13 ///

15 ⁵ The FTB states that it is unable to clarify the year appellants requested the overpayment be applied to since, due to R&TC
16 section 19530 and the FTB's document retention policy, the couple's 2006 state tax return is no longer available. Appellants
17 state that they requested the overpayment be applied to their 2007 or 2008 tax years. (Resp. Add'l Br., p. 2; App. Add'l Br.,
18 p.1, Exhibit 2.)

18 ⁶ In their additional brief, appellants contend that "[t]here is no support" for the FTB revising appellants' 2006 overpayment
19 from \$3,015.00 to \$1,839.96. (App. Add'l Br., p.1.) At the oral hearing, the FTB should be prepared to explain, with any
20 available documentation, its revision of appellants' 2006 overpayment.

20 ⁷ With regard to the transfer of \$7,712.00 from appellants' 2006 account to their 2007 account, the FTB asserts that based on
21 its policy of refunding and/or crediting an overpayment on a taxpayer's account (unless otherwise directed by the taxpayer),
22 and a letter from the FTB to appellants, dated February 18, 2009, it appears that appellants requested on their amended 2005
23 and 2006 returns that overpayments be applied to each following tax year, respectively. (Resp. Add'l Br., p. 2, Exhibit V.)

23 The FTB states that it transferred: (1) a \$1,839.96 overpayment from appellants' 2006 account to their 2007 account; (2) a
24 \$5,417.00 overpayment from appellants' 2005 account to their 2006 account; and then (3) \$5,872.04 from appellants' 2006
25 account to their 2007 account. The FTB states since the transfer of \$5,872.04 from appellants' 2006 account to their 2007
26 account exceeded the credit balance of \$5,417.00 that was transferred from appellants' 2005 account to their 2006 account,
27 the FTB immediately transferred \$455.96 back to appellants' 2006 account. (Resp. Add'l Br., pp. 2-4, Exhibits W, and X.)

26 While appellants contend in their additional brief that there was no transfer from their from their 2005 account to their 2006
27 account, or from their 2006 account to their 2007 account, referring to a letter dated October 21, 2015 (App. Add'l Br., pp.1-
28 2, Exhibit 1), it appears to staff that the FTB did transfer the amounts, as discussed above, from appellants' 2006 account to
their 2007 account. It appears to staff that the October 21, 2015 letter lists payments appellants made, and the tax year the
payment was applied, and does not list amounts that were transferred between tax accounts. In addition, staff reviewed the
2007 Tax Year Monetary Display and the 2007 Tax Year History of Activity Display that the FTB included with its
additional brief (Resp. Add'l Br., Exhibits W, and X), and notes that the documents reflect the transfers.

1 their 2006 account; and, in March of 2009, refunded the couple \$1,254.11.⁸ (Resp. Op. Br., p. 2,
2 Exhibits C and D; Resp. Add'l Br., pp. 2-4, Exhibits V, W, X and Y.)

3 In response to appellants' request, the FTB sent the couple an account reconciliation
4 letter (account letter), dated April 1, 2009. The account letter explains that, as of the date of the letter,
5 appellants had a zero balance due for the 2007 tax year. (Resp. Op. Br., p. 3; Appeal Letter,
6 attachments.)

7 For 2008, appellants filed a joint California return on April 15, 2009, reporting federal
8 AGI of \$101,498, California adjustments (subtractions) of \$104,108, and California AGI of negative
9 \$2,610. After applying itemized deductions of \$49,643 and exemptions credits totaling \$705,
10 appellants reported a tax liability of zero. After reporting estimated tax payments of \$5,600, appellants
11 reported a \$5,600 overpayment of tax. Appellants requested that \$2,000 of the \$5,600 overpayment be
12 applied towards the couple's 2009 estimated tax and that \$3,600 be refunded to appellants. (Resp. Op.
13 Br., p. 3, Exhibit E.)

14 When processing the 2008 return, the FTB reduced appellants' claimed estimated tax
15 payments from \$5,600 to \$3,735, which reduced appellants' overpayment of tax from \$5,600 to \$3,735.
16 The FTB applied \$2,000 of the \$3,735 overpayment to the couple's 2009 account, and refunded
17 appellants \$1,735 (i.e., \$3,735 - \$2,000) on May 16, 2009. (Resp. Op. Br., p. 3, Exhibits F and G.)

18 By a letter dated January 12, 2011, the FTB notified appellants that their 2007, 2008, and
19 2009 tax returns were assigned for examination and requested that appellants provide additional
20 information and documentation. The FTB, upon completion of the examination, disallowed certain
21 claimed rental losses and claimed Individual Retirement Account (IRA) subtractions that are not at issue
22 on appeal. Based on the disallowance, the FTB issued Notices of Proposed Assessments (NPAs) on
23 February 22, 2012, for each the 2007 and 2008 tax years. The 2007 NPA, which disallowed claimed
24 rental losses of \$199,319 and claimed IRA subtractions of \$19,090, increased appellants' taxable income
25

26 ⁸ The FTB states that after it transferred \$5,872.04 from appellants' 2006 account to their 2007 account, it transferred
27 \$455.96 back to appellants' 2006 account (as discussed above), transferred \$6,687.72 from appellants' 2007 account to their
28 2005 account, and abated the remaining portion of the 2007 estimate tax penalty. The FTB states that the adjustments
resulted in appellants' 2007 account having a credit balance of \$1,236.73, and, therefore, the FTB refunded appellants
\$1,254.11 (i.e., \$1,236.73 + \$17.38 in interest). (Resp. Add'l Br., p. 4, Exhibits V, X, and Y.)

1 from \$116,530 to \$334,936, and proposed additional tax of \$20,312, plus interest. The 2008 NPA,
2 which disallowed claimed rental losses of \$223,819 and claimed IRA subtractions of \$83,914, increased
3 appellants' taxable income from negative \$52,253 to \$255,480, and proposed additional tax of \$18,446,
4 plus interest. (Resp. Op. Br., p. 3, Exhibits H and I.)

5 On March 5, 2012, appellants timely protested both NPAs. Appellants' protest of the
6 2008 NPA consisted of a copy of the 2008 NPA, and appellants' protest of the 2007 NPA consisted of
7 the following: (1) a copy of the 2007 NPA; (2) an amended 2007 joint California return, signed by
8 appellants on March 3, 2012; and (3) a copy of what appears to be a portion of appellants' original
9 2007 California tax return. Thereafter, on March 20, 2012, appellants apparently supplemented their
10 protest by providing an amended 2008 joint California return, signed by appellants on March 17, 2012.
11 It appears that appellants did not provide substantive arguments with their protests. (Resp. Op. Br.,
12 p. 3, Exhibits J and K.)

13 By a letter dated March 21, 2012, the FTB acknowledged the receipt of appellants'
14 protests for both tax years, which the FTB consolidated into a single protest. During the protest, the
15 FTB sent the following correspondence to appellants:

16 (1) A letter dated October 24, 2012, indicating that appellants did not state a reason for
17 their protest, and that since the amended tax returns that appellants provided did not
18 identify or explain the reported changes made on the amended returns, it was the
19 protest officer's position to disallow the amended changes. The letter informed
20 appellants that the protest officer agreed with the audit adjustments and that if
21 appellants still disagreed, to provide an explanation of their position and supporting
22 documentation. The letter also requested appellants provide various enumerated
23 returns for 2007 and 2008, as well as an explanation for each amended item made on
24 appellants' amended returns.

25 (2) A letter dated December 27, 2012, acknowledging the receipt of appellants' letter
26 dated November 5, 2012, and informing appellants that the FTB was attempting to
27 verify appellants' contention that their modified adjusted gross income (MAGI) did
28 not exceed \$150,000 each year.⁹ The December 27, 2012 letter referenced a
conversation between the FTB and appellants on December 12, 2012, and indicated
that additional information was needed to verify the changes made on appellants'

⁹ The letter indicated that appellants' amended returns included changes made to "the Ted Staren loss (2007 and 2008) and to the Madoff loss (2008)" and that the FTB was attempting to verify appellants' MAGI by analyzing the losses. It appears that appellants agreed to the audit findings and did not appeal the proposed additional tax liabilities for the 2007 and 2008 tax years. (Resp. Op. Br., Exhibit M.)

1 amended returns in order to verify appellants' MAGI, and requested additional
2 information regarding appellants' "Madoff and Ted Staren losses," including
3 documentation supporting the amounts invested during 2007 and 2008. The letter
4 also indicated that appellants stated in their November 5, 2012 letter that they agreed
5 with the IRA taxable amount adjustments made during audit and; therefore, the IRA
6 adjustments are affirmed. The FTB requested that, if appellants still disagreed with
the FTB's position regarding the passive rental losses, to provide an explanation of
their position as well as documentation and legal authority supporting appellants'
position.

7 (3) A position letter dated May 28, 2013, acknowledging the receipt of a letter dated
8 January 3, 2013 and documentation that appellants provided on January 16, 2013.
9 The position letter stated that the protest officer's position was to affirm all of the
10 audit adjustments. The FTB requested that, if appellants still disagreed with the FTB,
they should provide documentation supporting appellants' position.

11 (4) A letter dated September 9, 2013, acknowledging the receipt of appellants' letter
12 dated June 23, 2013. The September 2013 letter indicated that while appellants'
13 claimed in the June 2013 letter passive income from partnership K-1s, appellants did
14 not provide the FTB with copies of the referenced K-1s. The letter also indicated that
15 the amended tax returns that appellants provided were incomplete.¹⁰ The letter
16 requested copies of appellants' K-1s for the 2007 and 2008 tax years, copies of
17 appellants' original and amended returns, as well as additional information to
18 substantiate appellants' rental losses and Ponzi losses.

19 (5) A supplemental position letter, dated November 20, 2013, acknowledging the receipt
20 of appellants' letter dated February 2, 2013. The supplemental position letter stated
21 that while the 2007 and 2008 NPAs adjusted appellants' rental losses and IRA
22 subtractions, appellants reported theft losses on their amended returns (which were
provided to the FTB during protest). The letter indicated that appellants conceded to
the FTB's adjustments made on appellants' claimed IRA subtractions (in appellants'
November 5, 2012 letter), as well as to the adjustments made on appellants' claimed
rental losses (in appellants' November 2, 2013 letter), and, therefore, the letter was
regarding the reported theft losses. The position letter stated that the protest officer's
position was to deny the reported theft losses.

23 (6) A closing letter, dated January 24, 2014, acknowledging the receipt of appellants'
24 letter dated January 6, 2014, and affirming the protest officer's position. (Resp. Op.
Br., p. 4, Exhibit M.)

25 On February 7, 2014, the FTB issued separate Notices of Action (NOAs) for each of the

26 ///

27 _____
28 ¹⁰ The letter informed appellants that the FTB had not processed the 2007 and 2008 amended California returns, and that the
FTB was treating the amended returns as correspondence.

1 2007 and 2008 tax years, affirming the proposed assessments.¹¹ Both NOAs advised appellants that the
2 proposed assessments would become final unless appellants filed an appeal with the Board by
3 March 10, 2014. (Resp. Op. Br., p. 4, Exhibit N; Resp. Add'l Br., Exhibit CC.)

4 On February 28, 2014, in response to appellants' request, the FTB sent the couple
5 account letters for each of the 2007 and 2008 tax years. The 2007 and 2008 account letters state that, as
6 of the date of the letters, appellants had a zero balance due for the 2007 and 2008 tax years,
7 respectively.¹² The amount due on the letters does not reflect the proposed assessments as the
8 assessments were not final as of the date of the letters. As noted below, according to the FTB's
9 records, the FTB informed appellants' representative of this in a telephone conversation on March 25,
10 2014. (Resp. Op. Br., p. 4, Exhibits O and P; Appeal Letter, attachments.)

11 The NOAs became final on March 10, 2014, when appellants did not file an appeal for
12 either tax year. (Resp. Op. Br., p. 4, Exhibit N.)

13 On March 25, 2014, during a conversation with appellants' representative, the FTB
14 discussed the NPAs and the February 28, 2014 account letters for the 2007 and 2008 tax years.
15 According to the FTB's records, the FTB explained during the telephone conversation that the
16 February 28, 2014 letters reflected then-current account balances, and that the FTB had yet to update
17 appellants' 2007 and 2008 account balances to reflect the assessments shown on the NPAs.
18 Subsequently, the FTB updated appellants' 2007 and 2008 tax year accounts to reflect the additional
19 tax and interest stated on the NOAs. Thereafter, on April 7, 2014, the FTB issued appellants Notices of
20 Income Tax Due, for each tax year.¹³ (Resp. Op. Br., pp. 4-5, Exhibits P, Q and R; App. Reply Br.,
21 attachments.)

22 By letter dated June 19, 2014, appellant-husband requested the abatement of interest of
23

24 _____
25 ¹¹ Pursuant to R&TC section 19116, the 2007 NOA reflected interest suspension from April 16, 2011, to March 8, 2012.
(Resp. Op. Br., p. 4; App. Reply Br., attachments.)

26 ¹² Each letter includes a summary of appellants' tax year account (which includes the debit or credit item name, date, and
27 amount, along with the total credit, debit, and balance). The letter states that the computation lists all tax liabilities, penalties,
fees, interest, and payments that the FTB has applied to the tax year, as of the date of the letter. (Resp. Op. Br., p. 4,
28 Exhibit O; Appeal Letter, attachments.)

¹³ Copies of the 2007 and 2008 notices are attached to appellants' reply brief. (Resp. Op. Br. p. 5, Exhibits Q and R; App.
Reply Br., attachments.)

1 \$4,679.20 and \$3,840.00 for tax years 2007 and 2008, respectively.¹⁴ Appellant-husband asserted that
2 correcting the couple's 2007 and 2008 tax returns involved time, as the process started in 2011, and that
3 the communication between appellants' tax preparer (H&R Block), appellants, and the FTB took
4 "several months to reach a point of understanding." Appellant-husband contended that the
5 communication from the FTB was "confusing in many ways," and referred to the February 28, 2014
6 account letters for the 2007 and 2008 tax years, which indicated that appellants had a zero balance due
7 for the 2007 and 2008 tax years, and the Statements of Tax Due, which indicated that appellants had
8 outstanding balances for the 2007 and 2008 tax years. Appellant-husband asserted that "[d]ue to the
9 time involved and the confusion in communication" interest should be abated. (Resp. Op. Br., p. 5,
10 Exhibit T.)

11 On July 15, 2014 and August 15, 2014, the FTB received payments of \$9,055.00 and
12 \$16,473.59, respectively, to be applied toward appellants' 2007 tax year, which satisfied the 2007
13 balance due. On August 15, 2014, the FTB also received a payment of \$22,368.30 to be applied
14 towards appellants' 2008 tax year, which satisfied the 2008 balance due. The FTB sent appellants an
15 account balance letter, dated October 27, 2014, notifying appellants that, as of August 15, 2014, they
16 had a zero balance due for the 2007 and 2008 tax years. (Resp. Op. Br., p. 5, Exhibits C, G, and S.)

17 Since appellants' 2007 and 2008 tax accounts did not have an outstanding liability due
18 to the payments received, the FTB treated appellant-husband's request for interest abatement as a claim
19 for refund. After considering the claim for refund, the FTB issued appellants an NOD dated
20 November 25, 2014, which stated that appellants had not established that interest should be abated
21 under the provisions of Revenue and Taxation Code (R&TC) section 19104. This timely appeal
22 followed. (Resp. Op. Br., p. 5; Appeal Letter, attachments.)

23 ///

24 ///

26 ¹⁴ In appellant-husband's request, he refers to "a letter from the FTB showing" the interest amounts stated in his request. The
27 Appeals Division staff requested the FTB to provide a copy of the letter appellant-husband references. In response, the FTB,
28 in its additional brief, provided the February 28, 2014 account letters for the 2007 and 2008 tax years. (Resp. Add'l Br.,
pp. 4-5, Exhibit Z.) After reviewing the account letters, staff is still unable to locate the amounts of interest that are reflected
in appellant-husband's request. At the oral hearing, the FTB should be prepared, as necessary to clarify where the interest
amounts appellant-husband refers to is located on the February 28, 2014 account letters for the 2007 and 2008 tax years.

1 Contentions

2 Appellants' Appeal Letter

3 Appellants contend that their claim for refund should be granted.¹⁵ Appellants refer to,
4 and attach to their appeal letter: (1) the April 1, 2009 account letter, which indicated that, as of the date
5 of the letter, appellants had a zero balance due for the 2007 tax year; (2) the February 28, 2014 account
6 letters, which indicated that, as of the date of the letters, appellants had a zero balance due for the 2007
7 and 2008 tax years; and (3) the November 25, 2014 NOD, which appellants contend indicates that
8 appellants owe interest of \$5,216.59 and \$3,922.30 for tax years 2007 and 2008, respectively.¹⁶
9 Appellants argue that the interest which accrued between April 1, 2009 (the date of the first account
10 letter) and November 25, 2014 (the date of the NOD) should be abated. (Appeal Letter, attachments.)

11 Respondent's Opening Brief

12 The FTB contends that appellants have not demonstrated that they are entitled to a refund
13 of the accrued interest for the 2007 and 2008 tax years. The FTB asserts, citing R&TC section 19101,
14 that if the FTB assesses additional tax and that assessment becomes due and payable, interest accrues on
15 the resulting balance due, compounded daily. The FTB contends that interest is mandatory and that the
16 FTB is not allowed to abate interest except where authorized by law, citing the Board's decision in the
17 *Appeal of Amy M. Yamachi*, 77-SBE-095, decided on June 28, 1977.¹⁷ The FTB contends that interest
18 may not be abated based on reasonable cause arguments. The FTB asserts that "[n]either the passage of
19 time during audit and protest, nor a perceived miscommunication is a basis for abatement of interest
20 under the law." The FTB contends that, in determining whether interest should be abated, the Board
21 must apply the abuse of discretion standard of review, citing R&TC section 19104, subdivision
22 (b)(2)(B), and that appellants have the burden to show that the FTB abused its discretion by clear and
23

24 _____
25 ¹⁵ In their appeal letter, appellants request the abatement of interest in the amount of \$9,138.89 (i.e., \$5,216.59 + \$3,922.30),
26 which reflects the interest indicated on the NOD for the 2007 and 2008 tax years.

27 ¹⁶ It appears to staff that appellants may misunderstand the amounts stated on the NOD. The NOD is not indicating that
28 appellants' have an outstanding balance for the 2007 and 2008 tax years; rather, the NOD is denying a claim for refund of
interest paid. As acknowledged by the FTB in its opening brief, appellants' 2007 and 2008 accounts are paid in full and the
FTB is not alleging that appellants currently owe the sums stated on the NOD. (Resp. Op. Br, p. 1; Appeal Letter,
attachments.)

¹⁷ Board of Equalization cases (designated "SBE") may generally be found at: www.boe.ca.gov.

1 convincing evidence, citing the *Appeal of Royal Crown Cola Co.*, 74-SBE-047, decided by the Board on
2 November 12, 1974. The FTB states that, pursuant to R&TC section 19104, interest may only be abated
3 to the extent that a taxpayer shows that there is an unreasonable error or delay in the FTB's performance
4 of a ministerial or managerial act occurring after the FTB's first written contact with the taxpayer with
5 regard to the deficiency. (Resp. Op. Br., pp. 6, 7, and 9, Exhibit U.)

6 The FTB argues that there was no unreasonable error or delay due to a ministerial or
7 managerial act by the FTB. With regard to appellants' contention that interest that accrued as of April 1,
8 2009 (the date the FTB sent the first account letter to appellants for the 2007 tax year) should be abated,
9 the FTB contends that the April 1, 2009 and February 28, 2014 account letters correctly informed
10 appellants that they did not have balances due as of the dates of each of the FTB's letters. The FTB
11 asserts that, since appellants' self-assessed liability was fully satisfied, and no additional tax had been
12 assessed for the 2007 tax year, as of April 1, 2009, the account letter correctly stated that appellants did
13 not have a 2007 tax liability as of the date of the letter. Concerning the February 28, 2014 account
14 letters for the 2007 and 2008 tax years, the FTB asserts that, since the letters were issued before the
15 proposed liabilities reflected on the 2007 and 2008 NOAs became final liabilities, the account letters
16 correctly stated that appellants had a zero balance for the 2007 and 2008 tax years, as of the date of the
17 letter. In addition, the FTB contends that appellants had reason to know when reviewing the
18 February 28, 2014 letters that the additional tax and interest assessed for the 2007 and 2008 tax years
19 would not become final assessments until March 10, 2014, the date the NOAs indicated was the last day
20 to appeal the proposed assessments. The FTB also contends that its records reflects that appellants'
21 representative contacted the FTB on March 25, 2014¹⁸ concerning the NPAs (which the NOAs
22 affirmed), and that the FTB explained that the FTB had yet to update appellants' 2007 and 2008 account
23 balances to reflect the assessments shown on the NPAs. The FTB argues that, since the April 1, 2009
24 and February 28, 2014 account letters correctly reflected zero balances, there was no error in the letters
25 and, therefore, appellants failed to establish an error or delay by the FTB. (Resp. Op. Br., pp. 7-8,
26 Exhibits O and P; Appeal Letter, attachments.)

27
28

¹⁸ While the FTB states the conversation took place on March 25, 2012, it appears to staff that this is a typographical error and that the correct date of the conversation is March 25, 2014. (Resp. Op. Br., p. 8, Exhibit P.)

1 With regard to appellants' contention concerning the time involved in "correcting"
2 appellants' 2007 and 2008 returns, the FTB asserts that appellants' contention does not support a
3 determination of unreasonable delay by the FTB. The FTB contends that, by letter dated January 12,
4 2011, the FTB notified appellants of the audit of the 2007 and 2008 tax years. The FTB asserts that,
5 during the audit period, there was ongoing communication with appellants; that appellants submitted
6 documentation and information, which the FTB reviewed; and that at the end of the 12-month audit
7 period, the FTB issued appellants NPAs on February 22, 2012 for the 2007 and 2008 tax years. The
8 FTB argues that it was also diligent and efficient during the protest period for both tax years. The FTB
9 contends that, by letter dated March 21, 2012, it acknowledged appellants' protest and that, during the
10 protest period, the FTB corresponded regularly with appellants to obtain information and documentation
11 for the FTB to review, and that the FTB advised appellants of its position on outstanding issues with
12 position letters. The FTB asserts that, at the end of the protest period, it sent appellants a closing letter
13 on January 24, 2014, followed by the issuance of NOAs for both tax years, dated February 7, 2014. The
14 FTB contends that "[n]ot only was there an absence of unreasonable delay with respect to 'correcting'"
15 appellants' 2007 and 2008 tax returns, "there was no delay at all because the audit and protest were
16 promptly administered." (Resp. Op. Br., p. 8, Exhibits H, L, and M.)

17 In addition, the FTB contends that no interest may be abated prior to the date of the first
18 written contact by the FTB concerning the liability, citing R&TC section 19104, subdivision (b). The
19 FTB asserts that the first written contact from the FTB concerning the 2007 and 2008 liabilities were
20 the NPAs dated February 22, 2012, and, therefore the FTB does not have discretion to abate any
21 interest that accrued before February 22, 2012. (Resp. Op. Br., p.9.)

22 Appellants' Reply Brief

23 Appellants contend that "[b]ased on the confusion between" notices that informed
24 appellants that no additional taxes were due and notices that informed appellants that additional taxes

25 ///

26 ///

27 ///

28 ///

1 were due, interest and penalties¹⁹ for the 2007 and 2008 tax years should be abated. In support of their
2 contention, appellants included a chronological listing of documents, which appellants attached to their
3 reply brief, relating to the 2007 and 2008 tax years, including, but not limited, to the following:

4 (1) A RIN dated August 6, 2008 for the 2007 tax year, which showed a total tax liability
5 of \$6,072.00, payments totaling \$5,516.00, an estimated tax penalty of \$222.68, and
6 interest of \$13.32, for a revised balance due of \$792.00.

7 (2) A February 18, 2009 letter from the FTB informing appellants that an overpayment of
8 \$1,236.73 for the 2007 tax year would be refunded to appellants, and for appellants to
9 disregard “the previous balance due notice” that they received.

10 The April 1, 2009 account letter reflecting a total of \$14,534.08 applied towards
11 appellants’ 2007 tax year²⁰ and a zero balance due, as of the date of the letter.

12 An undated Information Notice from the FTB that appellants contend they received
13 on April 3, 2009, which notifies appellants that according to the FTB’s records,
14 appellants have made estimate payments totaling \$3,735 toward the 2008 tax year.²¹

15 (3) A Notice of Tax Change dated May 21, 2009 for the 2008 tax year, which showed a
16 zero tax liability, payments totaling \$3,735, and a transfer of \$2,000 to appellants’
17 2009 estimated tax payments, for a revised balance credit of \$1,735.

18 (4) The 2007 NPA, dated February 22, 2012, proposing additional tax of \$20,312, plus
19 interest.²² Appellants note that the 2007 NPA reflects interest that accrued from
20 April 15, 2008 to April 15, 2011, the possibility of which appellants question since
21 the April 1, 2009 account letter reflects a zero balance due.

22 ¹⁹ Appellants refer to a \$222.68 estimated tax penalty reflected on an August 6, 2008 RIN for the 2007 tax year, as well as
23 other “unknown” penalties for the 2007 and 2008 tax years. As discussed below, the FTB contends in its reply brief that the
24 only penalty it assessed for appellants’ 2007 and 2008 tax years was an estimated tax penalty for the 2007 tax year. The FTB
25 asserts that it abated the 2007 estimated tax penalty on February 11, 2009. (Resp. Reply Br., p. 1; Resp. Add’l Br., p.4,
26 Exhibit X.)

27 ²⁰ Staff notes that appellants handwrote “2008 & 2009” next to the tax year 2007, and contend that the April 1, 2009 account
28 letter reflects a payment of \$5,381 toward the 2008 tax year. Staff was unable to locate a lined item reflecting a \$5,381
29 payment toward the 2008 tax year on the April 1, 2009 account letter. It appears to staff that the only year, besides 2007, that
30 the letter includes a lined item for is 2006 (to reflect transfers between appellants’ 2007 account and their 2006 account). It
31 appears to staff that while the April 1, 2009 account letter reflects transactions that took place between 2007 and 2009, the
32 transactions all relate to appellants’ 2007 account and, therefore, the letter pertains to appellants’ 2007 tax year only.

33 ²¹ While appellants contend that there is a payment difference of \$1,646 (i.e., \$5,381- \$3,735) between the payments reflected
34 on the April 1, 2009 account letter and the Information Notice, staff notes that the Information Notice was for the 2008 tax
35 year and, as discussed above, the April 1, 2009 account letter was for tax year 2007 only.

36 ²² The 2007 NPA reflects the accrual of interest, in accordance with R&TC section 19116.

- 1 The 2008 NPA, dated February 22, 2012, proposing additional tax of \$18,446, plus
2 interest. Appellants contend that the 2008 NPA was the first notice they received
3 informing the couple that interest was accruing on their 2008 account.
- 4 (5) The 2007 NOA, dated February 7, 2014, indicating additional tax of \$20,312.00, and
5 total interest of \$4,845.88 (i.e., \$3,365.13 + \$1,480.75) (which accrued from April 15,
6 2008 to April 15, 2011 (\$3,365.13), as well as from March 8, 2012 to February 7,
7 2014 (\$1,480.75).
- 8 (6) The February 28, 2014 account letters for the 2007 and 2008 tax years indicating that
9 appellants had a zero balance due for the 2007 and 2008 tax years, as of the dates of
10 the letters.
- 11 (7) A March 28, 2014 letter from appellant-husband to the protest officer thanking him
12 for “expediting the closure of the audit” and that appellants agreed that the audit was
13 closed.
- 14 (8) A 2007 Notice of State Income Tax Due, dated April 7, 2014, that showed tax of
15 \$26,384.00, interest of \$4,527.07, and payments and adjustments totaling \$5,630.92,
16 for a total amount due of \$25,280.15.²³
- 17 A 2008 Notice of State Income Tax Due, dated April 7, 2014, that showed tax of
18 \$18,446.00, and interest of \$3,706.69, for a total amount due of \$22,152.69.
- 19 (9) An Income Tax Due Notice, dated June 3, 2014, for the 2007 and 2008 tax years
20 showing a total balance due of \$47,655.57 (i.e., \$25,398.86 + \$22,256.71). For 2007,
21 the notice showed tax of \$26,384.00, interest of \$4,645.78, payments of \$6,949.32,
22 and adjustments of \$1,318.40, for a balance due of \$25,398.86. For 2008, the notice
23 showed tax of \$18,446.00, interest of \$3,810.71, payments of \$1,735.00, and
24 adjustments of \$1,735.00, for a balance due of \$22,256.71.
- 25 (10) A Final Notice Before Levy, dated July 11, 2014, for the 2007 and 2008 tax years,
26 which stated the same balance summary amounts as the Income Tax Due Notice,
27 expect for the new accrued interest of \$4,725.23 and \$3,880.33 for 2007 and 2008,
28 respectively.
- (11) A July 14, 2014 computation for the 2007 tax year stating a total tax liability of
\$26,384.00, interest of \$4,733.60, and after taking into account the debits and credits
on the account, a balance due of \$25,486.68.

²³ Staff notes a handwritten note next to the tax of \$26,384.00 on the 2007 Notice of State Income Tax Due stating “refer to 2/7/14 tax \$25,157.88.” It appears to staff that appellants are referring to the 2007 NOA which indicates “total additional tax and interest” of \$25,157.88, which includes additional tax of \$20,312.00, as opposed to \$26,384.00. Staff notes that appellants self-reported a tax liability of \$6,072 on their 2007 return. Thereafter, the FTB examined appellants’ 2007 return and issued an NPA in February of 2012 proposing additional tax of \$20,312. The 2007 NOA reflects appellants’ total tax liability of \$26,384 (i.e., \$6,072 + \$20,312) for the 2007 tax year.

1 (12) A copy of a checking account transaction history indicating appellants' payment of
2 \$9,055 to the FTB on July 17, 2014. Appellants contend the payment was "supposed
3 to resolve the tax and interest associated with [their] tax account."

4 (13) A copy of a check for \$38,841.89 dated August 20, 2014 that appellants made out to
5 the FTB, a portion of which appellants assert was to pay their 2007 and 2008
6 liabilities, and the remaining portion of \$14,218 was to be applied to their 2014 tax
7 year. (App. Reply Br., pp. 1-2, 16-17, attachments.)

8 Respondent's Reply Brief

9 The FTB asserts that the documents appellants provided do not support the couple's
10 contention that the FTB issued erroneous computations of tax or billing notices. The FTB contends that,
11 if a proposed assessment is protested and an NOA is issued on the protest, the proposed assessment is
12 not final until the taxpayer has failed to appeal the NOA within 30 days of the notice date. The FTB
13 asserts, that after the appeal period has expired, it takes roughly an additional 15 days for the FTB's
14 computer system to finalize the liability and initiate collection activities, and, therefore, in aggregate, it
15 takes approximately 45 days from the NOA date before a proposed assessment becomes a final liability
16 in the FTB's primary computer system. (Resp. Reply Br., pp. 1-3.)

17 The FTB contends that appellants' 2007 and 2008 proposed assessments became final on
18 or about April 2, 2014, and that the FTB issued appellants a billing notice for each tax year (the FTB
19 references the Statement of Tax Due Notices) on April 7, 2014. The FTB contends that any 2007 billing
20 notices it issued to appellants after November 15, 2008 (when appellants paid their 2007 self-assessed
21 taxes), and prior to April 7, 2014 (when the FTB issued the 2007 the Statement of Tax Due Notice),
22 correctly indicated a zero balance due. The FTB also contends that any 2008 billing notices it issued to
23 appellants after April 15, 2009 (when appellants filed their 2008 tax return reporting zero tax liability),
24 and prior to April 7, 2014 (when the FTB issued the 2008 Statement of Tax Due Notice), correctly
25 indicated a zero balance due. The FTB asserts that the 2007 and 2008 billing notices it issued to
26 appellants after April 7, 2014 correctly reflected the proposed assessment amounts after these amounts
27 became final liabilities. The FTB argues that it did not commit any error related to either tax year at
28 issue, including any notices the FTB issued to appellants that reflected their account balances for the
2007 and 2008 tax years, and, therefore there is no legal basis for interest abatement. (Resp. Reply Br.,

1 p. 2; App. Reply Br., attachments.)

2 Regarding appellants' contention that they are entitled to the abatement of penalties for
3 the 2007 and 2008 tax years, the FTB contends that the only penalty it assessed for appellants' 2007 and
4 2008 tax years was an estimated tax penalty for the 2007 tax year. The FTB asserts that it abated the
5 2007 estimated tax penalty on February 11, 2009.²⁴ (Resp. Reply Br., p. 1.)

6 Appellants' Supplemental Brief

7 Appellants contend that the time delays between appellants providing the FTB with the
8 information it requested and the FTB's "extremely excessive" response time, caused "this review to last
9 for several years." Appellants assert that the delays caused interest to accrue, which appellants argue
10 should be abated. Appellants also assert that the penalties should be abated. Appellants contend that the
11 interest, penalties, and an alleged overpayment of tax of \$10,357.32 should be applied to the couple's
12 2015 tax year. In support of their contentions, appellants included a chronological listing of documents,
13 which appellants attached to their supplemental brief, relating to the 2007 and 2008 tax years. While a
14 majority of the documents were already included in appellants' opening and reply briefs, appellants
15 included the following new documentation:

- 16 (1) A letter from the FTB dated February 3, 2012, indicating that the audit for tax years
17 2007, 2008, and 2009 is complete. The letter also addresses additional information
18 provided to the FTB after it issued its Audit Presentation Sheets 001-003. Appellants
19 refer to the portion of the letter stating that "The Revised Tax Computation Schedules
20 for the 2007 and 2008 tax years to reflect the changes are attached. The [Staren] theft
21 loss of \$350,000 offsets the adjustments made in 2009, which results in an increased
22 NOL and no additional tax due in that year." Appellants assert that their amended tax
23 return²⁵ "was prepared to agree with the findings" in the February 3, 2012 letter and

24 ///

25 ///

26 ²⁴ Staff notes that while appellants' 2007 Tax Year Display indicates an estimated tax penalty and a late filing penalty, dated
27 August 6, 2008 and April 15, 2008, respectively, and appellants' 2008 Tax Year Display indicates a late filing penalty, dated
28 April 15, 2009, there are no correlating amounts for the penalties, and, therefore it appears to staff that either the penalties
where not imposed, or, if imposed, the penalties were subsequently abated. As such, it does not appear that there are penalty
amounts to dispute and possibly refund. (Resp. Op. Br., Exhibits C and G.)

²⁵ It is unclear to staff if appellants are referring to their amended 2007 return (signed March 3, 2012) or their amended 2008
return (signed March 17, 2012), as appellants merely refer to Exhibit 2B, which includes both returns. Staff notes that it does
not appear that the FTB accepted the returns, which were submitted with appellants' protest of the NPAs, and that the NOAs
for the proposed tax liability went final when appellants did not appeal either the 2007 NOA or the 2008 NOA.

1 that appellants' tax should be reduced "per Exhibit 2B."²⁶

2 (2) A summary of appellants' 2007 tax year, dated October 20, 2015, which also included
3 a list of payments made between August 15, 2006 to December 12, 2010, and the tax
4 year the FTB applied the respective payments.

5 (3) Tax year computation summaries, each dated October 21, 2015, of appellants' 2007
6 and 2008 accounts, reflecting a refund of \$1,318.40 and \$1,735.00, respectively,
7 which appellants contend that they did not receive.²⁷ (App. Supp. Br., pp. 1-3, 21-23,
8 attachments.)

9 Appellants, in referring to the April 1, 2009 letter (which indicates that appellants' 2007
10 account had a zero balance as of the date of the letter), and the 2007 NPA, dated February 22, 2012,
11 (which indicates that interest accrued from April 15, 2008 to April 15, 2011), contend that it is "just
12 plain wrong" to receive a letter stating no balance due and subsequently receive a notice stating
13 retroactive interest. Appellants also refer to the February 28, 2014 account letter for the 2007 year,
14 which indicated that appellants had a total tax liability of \$6,072, and the June 3, 2014 Income Tax Due
15 Notice, which notified appellants that their tax balance for 2007 was \$26,384, and question how the tax
16 liability increased by \$20,000 in four months.²⁸ In addition, appellants refer to the 2008 NPA (which
17 indicates that interest accrued until February 22, 2012), and contend that the NPA was the first notice
18 appellants received regarding interest being charged to their 2008 account, and that the retroactive

19 _____
20 ²⁶ According to the FTB's letter to appellants, dated December 27, 2012, the Staren losses, totaling \$350,000 were allowed in
21 2009. The letter states that, since appellants indicated that they did not have any investment in Staren in 2007 or 2008, it
22 appears that appellants reported on their 2007 and 2008 amended tax returns net operating loss carrybacks from 2009. The
letter explains that, while the net operating loss carrybacks are allowed under federal law, such carrybacks are not allowed
under California law, which only allows net operating losses to be carried forward into subsequent periods, citing R&TC
section 17276, subdivision (c). (Resp. Op. Br., Exhibit M.)

23 ²⁷ Staff notes that, according to appellants' 2007 Tax Year Display, appellants received refunds of \$64.29 and \$1,254.11 on
24 November 17, 2009 and March 11, 2009, respectively, for a refund sum of \$1,318.40, and that according to appellants' 2008
25 Tax Year Display, appellants received a refund of \$1,735.00 on May 16, 2009. The refunds of \$1,318.40 and \$1,735.00, for
26 2007 and 2008, respectively, also appear to be reflected on the Income Tax Due Notice, dated June 3, 2014, for the 2007 and
27 2008 tax years as "adjustments." At the oral hearing, both parties should be prepared to discuss the apparent refunds, and
28 whether appellants received them. (Resp. Op. Br., Exhibits C and G; App. Supp. Br., attachments.)

²⁸ As noted above, appellants self-reported a total tax liability of \$6,072 on their 2007 tax return. Since the 2007 proposed
assessment of \$20,312 was not final by the date of the February 28, 2014 account letter, the letter reflected the self-reported
tax liability of \$6,072. Subsequently, the 2007 proposed assessment went final in March of 2014 and became a tax liability.
The 2007 Notice of State Income Tax Due Notice, dated April 7, 2014, reflects appellants' total tax liability of \$26,384 (i.e.,
\$6,072 + \$20,312) for 2007.

1 interest is “unfair and inequitable.” (App. Supp. Br., pp. 1-3, 21-23, attachments.)

2 Appellants contend that they have overpaid a total of \$10,357.32 for the 2007 and 2008
3 tax years. Appellants assert that, in calculating the alleged \$10,357.32 overpayment, they used the
4 information provided in the Income Tax Due Notice, dated June 18, 2014, and in the summaries dated
5 October 20, 2015 and October 21, 2015. Appellants contend that, for 2007, they made seven payments
6 between April 15, 2008 to August 15, 2014 totaling \$31,909.59 (i.e., \$3,516.00 + \$1,000.00 + \$1,000.00
7 + \$800.81 + \$64.19 + \$9,055.00 + \$16,473.59), and that for 2008 they made four payments between
8 April 15, 2008 to August 15, 2014 totaling \$26,103.30 (i.e., \$1,500.00 + \$1,235.00 + \$1,000.00 +
9 \$22,368.30) for payments totaling \$58,012.89 (i.e., \$31,909.59 + \$26,103.30) for the 2007 and 2008 tax
10 years. Appellants assert that, since the Income Tax Due Notice indicates a total balance due of
11 \$47,655.57 for the 2007 and 2008 tax years, they overpaid by \$10,357.32 (i.e., \$58,012.89 -
12 \$47,655.57).²⁹ (App. Supp. Br., pp. 1-3, 21-23, attachments.)

13 Appellants contend that, for 52 years, they have acted in good faith “in paying an
14 equitable amount of tax” and that it is “only fair that the FTB recognize [appellants’] promptness in
15 paying [their] tax in full and on time.” Appellants assert that they are both in their eighties and “have
16 always contributed [their] fair share of taxes to the best of [their] knowledge.”

17 ///

18 _____
19 ²⁹ It does not appear to staff that appellants made an overpayment for either tax year.

20 For 2007, appellants made the following payments prior to the audit: two estimated tax payments of \$1,000.00 each;
21 \$3,516.00 with their 2007 return; and, after the FTB processed appellants’ 2007 return and issued the couple a billing notice
22 for unpaid tax, appellants submitted payments of \$800.81 and \$64.19. Per the April 1, 2009 account letter, appellants had a
23 zero balance due for the 2007 tax year, as of the date of the letter. Subsequently, the FTB audited appellants’ 2007 tax year
24 and on February 22, 2012 issued a 2007 NPA proposing additional tax, plus interest, which appellants protested. After the
25 close of protest (January 24, 2014), but before the FTB issued the 2007 NOA (dated November 25, 2014) affirming the NPA,
26 appellants submitted payments of \$9,055.00 and \$16,473.59, which satisfied the 2007 balance due after the audit.

27 For 2008, prior to the audit, appellants made three estimated tax payments totaling \$3,735.00 (i.e., \$1,500.00 + \$1,235.00 +
28 \$1,000.00). Since appellants self-reported a zero tax liability for 2008, it appears that part of the \$3,735 overpayment was
29 transferred to appellants’ 2009 account and that the remainder was refunded to appellants. Subsequently, the FTB audited
appellants’ 2008 tax year and on February 22, 2012 issued a 2008 NPA proposing additional tax, plus interest, which
appellants protested. After the close of protest (January 24, 2014), but before the FTB issued the 2008 NOA (dated
November 25, 2014) affirming the NPA, appellants made a payment of \$22,368.30, which satisfied the 2008 balance due
after the audit.

On October 27, 2014, the FTB sent appellants an account balance letter notifying appellants that, as of August 15, 2014, they
had a zero balance due for the 2007 and 2008 tax years.

1 Appeals Division’s Request for Additional Briefing

2 The Appeals Division staff requested additional briefing from the FTB in order to
3 facilitate a thorough presentation of this appeal to the Board. In response to the Appeals Division’s
4 request for additional information, the FTB submitted an additional brief. The FTB’s responses in its
5 additional brief are incorporated throughout this summary. The FTB also provided, in response to the
6 Appeals Division request for a detailed and chronological accounting for each 2007 and 2008 tax year
7 (that includes an itemization of charges, refunds, transfers, and payments pertaining to the tax years at
8 issue), a copy of a “Tax Year History of Activity Display” for each of the 2007 and 2008 tax years.
9 (Resp. Add’l Br., p. 6, Exhibits X and DD.)

10 Thereafter, on March 14, 2016, appellants submitted an additional brief dated March 7,
11 2016. In their additional brief, appellants request clarification by the FTB on issues already addressed
12 by staff in this summary (such as, the amounts of interest that that are reflected in appellant-husband’s
13 request are not apparent on the account letters (FTB Add’l Br., Exhibit Z) the FTB provided in response
14 to Appeals Division’s request for additional information), as well as provide contentions that are
15 incorporated throughout this summary. In addition, appellants contend that the Tax Year History of
16 Activity Display” for each of the 2007 and 2008 tax years (Resp. Add’l Br., Exhibits X and DD) do not
17 agree with the October 21, 2015 letter that appellants provide with their additional brief (App. Add’l Br.,
18 p.2, Exhibit 1).³⁰ Appellants contend that the FTB’s responses in its additional brief are ambiguous,
19 erroneous or provide no answer, and that based on the discrepancies between the October 21, 2015 letter
20 and the transactions asserted by the FTB, it is “impossible to arrive at the correct numbers.” Appellants
21 request a refund of the \$16,473.59 and \$22,368.30 payments that appellants made on August 15, 2014
22 toward their 2007 and 2008 tax years, which satisfied the respective balances due.³¹ (App. Add’l Br.,
23 pp.1-3, Exhibits 1 and 2.)

24 _____
25 ³⁰ As discussed above, it appears to staff that the October 21, 2015 letter only lists payments appellants made, and the tax
26 year the payment was applied, and does not include charges, refunds, and transfers.

27 ³¹ Staff notes that the August 15, 2014 payments appellants made toward their 2007 and 2008 tax years of \$16,473.59 and
28 \$22,368.30, respectively, satisfied the outstanding balances due, which consisted of an outstanding tax liability, and accrued
interest. As discussed above, the 2007 and 2008 NOAs became final when appellants did not file an appeal for either tax
year, and it does not appear that appellants overpaid their taxes for either tax year. In addition, as discussed below, this
appeal is limited to the FTB’s denial of interest abatement for the 2007 and 2008 tax year.

1 section 19043, subdivision (b)(2), made.

2 In the *Appeal of Michael and Sonia Kishner*, 99-SBE-007, decided on September 29,
3 1999, the Board adopted the language from Treasury Regulation section 301.6404-2(b)(2), defining a
4 “ministerial act” as:

5 [A] procedural or mechanical act that does not involve the exercise of judgment or
6 discretion, and that occurs during the processing of a taxpayer’s case after all
7 prerequisites to the act, such as conferences and review by supervisors, have taken place.
8 A decision concerning the proper application of federal tax law (or other federal or state
9 law) is not a ministerial act.

10 When a California statute is substantially identical to a federal statute (such as with the
11 interest abatement statute in this case),³³ the Board may consider federal law interpreting the federal
12 statute as highly persuasive. (*Appeal of Michael and Sonia Kishner, supra.*) Treasury Regulation
13 section 301.6404-2(b)(1) defines a “managerial act” as:

14 [A]n administrative act that occurs during the processing of a taxpayer’s case involving
15 the temporary or permanent loss of records or the exercise of judgment or discretion
16 relating to management of personnel. A decision concerning the proper application of
17 federal tax law (or other federal or state law) is not a managerial act.

18 Examples of a ministerial act that provides a basis for interest abatement include the
19 following circumstances:

20 A taxpayer contacts an IRS employee and requests information with respect to the
21 amount due to satisfy the taxpayer’s income tax liability for a particular taxable year.
22 Because the employee fails to access the most recent data, the employee gives the
23 taxpayer an incorrect amount due. As a result, the taxpayer pays less than the amount
24 required to satisfy the tax liability. Accessing the most recent data is a ministerial act.

25 (Treas. Reg., § 301.6404-2(c), example 11.)

26 A decision concerning the proper application of federal tax law, or other federal or state
27 laws, to the facts and circumstances surrounding a taxpayer’s tax liability is not a ministerial or
28 managerial act. (Treas. Reg., § 301.6404-2(b); *Bucaro v. Commissioner*, T.C. Memo. 2009-247.)
Workload constraints are not a basis for an abatement or refund of interest. (*Leffert v. Commissioner*,

³³ R&TC section 19104, subdivisions (a) and (b)(2)(B), are substantially identical to IRC sections 6404 (e) and (h).

1 T.C. Memo. 2001-194; *Strang v. Commissioner*, T.C. Memo. 2001-104.)

2 Respondent's determination not to abate interest is presumed correct and the burden is
3 on a taxpayer to prove error. (*Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.) The
4 Board's jurisdiction in an interest abatement case is limited by statute to a review of respondent's
5 determination for an abuse of discretion. (Rev. & Tax. Code, § 19104, subd. (b)(2)(B).) To show an
6 abuse of discretion, a taxpayer must establish that, in refusing to abate interest, respondent exercised its
7 discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Woodral v. Commissioner*
8 (1999) 112 T.C. 19, 23.) Interest abatement provisions are not intended to be routinely used to avoid
9 the payment of interest, thus abatement should be ordered only "where failure to abate interest would
10 be widely perceived as grossly unfair." (*Lee v. Commissioner* (1999) 113 T.C. 145, 149.) The mere
11 passage of time does not establish error or delay in performing a ministerial or managerial act. (*Id.* at
12 p. 150; *Howell v. Commissioner*, T.C. Memo. 2007-204; *Bucaro v. Commissioner, supra*; *Larkin v.*
13 *Commissioner*, T.C. Memo. 2010-73.)

14 STAFF COMMENTS

15 In order to provide potential grounds for the abatement of interest, an alleged
16 unreasonable error or delay must occur after respondent initially contacts the taxpayer regarding the
17 deficiency. (Rev. & Tax. Code, § 19104, subd. (b)(1); *Teichert, supra*, 99-SBE-006.)³⁴ Here, the first
18 written contact regarding the deficiencies occurred when the FTB issued the NPAs, which was on
19 February 22, 2012. Appellants paid the amount due on August 15, 2014, so no interest accrued after this
20 date. As a result of the foregoing, the parties will want to focus their discussion on alleged unreasonable
21 errors or delays occurring between February 22, 2012 and August 15, 2014.

22 Staff notes that the account letter dated April 1, 2009, preceded the FTB's first written
23 contact about a proposed deficiency by more than two years. At that time, the FTB had no knowledge
24 that appellants had understated their income tax due. The FTB was only able to determine that
25 appellants had understated their income tax due as a result of its audit, which commenced on or about
26

27
28 ³⁴ R&TC section 19043, subdivision (a), defines a "deficiency," in part, as the amount by which the imposed personal income tax exceeds the excess of (1) the sum of (A) the amount of tax shown on the tax by the taxpayer on an original or amended return, if an original or amended return was filed, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over (2) the amount of rebates, as defined in R&TC section 19043, subdivision (b)(2), made.

1 January 12, 2011.

2 The parties should be prepared to discuss whether the issuance of the February 28, 2014
3 account letters constituted an unreasonable error in the performance of a ministerial act. According to
4 Treas. Reg., § 301.6404-2(c), example 11, a failure to access the most recent data is a ministerial act.
5 Since the February 28, 2014 account letters were sent to appellants after the NOAs were issued, but
6 before the deadline for appellants to appeal the NOAs, the proposed assessments had not become final;
7 therefore, the proposed assessments had yet to become outstanding liabilities. At that point, it appears to
8 staff that the account letters would have been in error if they had reflected additional amounts as due
9 which were still subject to appeal. The parties should be prepared to discuss whether the fact the
10 account letters did not reference or explain the proposed liabilities shown in the NOAs constituted an
11 unreasonable error or delay in the performance of a ministerial or managerial act.

12 The parties should also be prepared to discuss whether any alleged error in the account
13 letters caused additional interest to accrue. Here, appellants received NOAs advising them of the
14 proposed assessments and their appeal rights prior to receiving the February 28, 2014 account letters.
15 The FTB's records reflect that appellants called the FTB on March 25, 2014 and that the FTB explained
16 that the proposed assessments were not reflected in the account letters because the assessments were not
17 yet final. Appellants' request for interest abatement, which was made on June 19, 2014, requested
18 abatement because the process started in 2011, it took several months to reach an understanding between
19 appellants' tax preparer and the FTB, and there was "confusion in communication." If there was any
20 confusion as a result of the February 28, 2014 account letters, the parties should be prepared to discuss
21 whether any such confusion could have been clarified with a telephone call prior to March 25, 2014, and
22 whether any alleged confusion was in fact clarified during the March 25, 2014 telephone call.

23 With regard to appellants' contention that it is "just plain wrong" to receive a letter
24 stating no balance due (referring to the account letters), and subsequently receive notices (referring to
25 the NPAs) stating "retroactive" interest, it does not appear that the FTB was in error in imposing interest
26 on unpaid tax for the period prior to its discovery of the unpaid tax. As explained above, as of the date
27 of the account letters, appellants did not have outstanding liabilities for the 2007 and 2008 tax years. It
28 was not until the FTB audited appellants' 2007 and 2008 tax years and proposed assessments based on

1 the audit findings, which went final when appellants did not appeal the NOAs, that appellants had 2007
2 and 2008 outstanding liabilities. The proposed assessments resulted from an audit of appellants' 2007
3 and 2008 tax returns and the FTB's disallowance of certain claimed rental losses and IRA subtractions
4 that appellants self-reported on their 2007 and 2008 tax returns. Therefore, the tax deficiencies relate
5 back to the original due date for the 2007 and 2008 tax returns, which is April 15, 2008 and April 15,
6 2009, respectively. The imposition of interest on a tax deficiency is mandatory. (Rev. & Tax. Code,
7 § 19101, subd. (a).) As such, the interest on the tax deficiencies correctly began to accrue on the
8 original due date of the respective returns.

9 As noted above, a decision concerning the proper application of federal tax law, or other
10 federal or state laws, to the facts and circumstances surrounding a taxpayer's tax liability is not a
11 ministerial or managerial act. (Treas. Reg., § 301.6404-2(b); *Bucaro v. Commissioner, supra.*) Here,
12 during the protest, communication commenced between the protest officer and appellants regarding the
13 disallowed items, newly claimed Ponzi losses, and the examination of documentation and information
14 provided by appellants. To the extent appellants allege that an unreasonable error or delay occurred
15 during the protest process, appellants will need to show that the error or delay occurred in the
16 performance of a ministerial or managerial act and that no significant aspect of the error or delay was
17 attributable to them.

18 While staff is sympathetic to appellants' contention that interest should be abated because
19 they are in their eighties and that they have always acted in good faith in promptly paying their tax
20 liabilities, these arguments are reasonable cause-type arguments that do not provide grounds for the
21 abatement of interest under R&TC section 19104.

22 In appellants' briefs, they contend that they are entitled to the abatement of penalties and
23 a transfer to their 2015 tax year of an alleged overpayment of tax paid. As discussed above, it appears to
24 staff that the only penalty the FTB assessed for appellants' 2007 and 2008 tax years was an estimated
25 tax penalty for the 2007 tax year, and it appears to staff that that the FTB abated the 2007 estimated tax
26 penalty. In addition, it does not appear that appellants overpaid their taxes for either tax year. Also, this
27 appeal arises from an NOD denying interest abatement, which the FTB treated as a claim for refund.
28 Neither the NOD nor the appeal letter mentions the alleged penalties or the overpayment of tax and,

1 therefore, this appeal is limited to the FTB’s denial of interest abatement for the 2007 and 2008 tax year.

2 Additional Evidence

3 Pursuant to California Code of Regulations, title 18, section 5523.6, if either party has
4 any additional evidence to present, they should provide their evidence to the Board Proceedings
5 Division at least 14 days prior to the oral hearing.³⁵

6 ///

7 ///

8 ///

9 HimmelbergIP_rev1_sar

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

³⁵ Evidence exhibits should be sent to: Khaaliq Abd’Allah, Appeals Analyst, Board Proceedings Division, State Board of Equalization, P.O. Box 942879 MIC:80, Sacramento, California 94279-0080.