Steven Mark Kamp
Tax Counsel III
Board of Equalization, Appeals Division
450 N Street, MIC:85
PO Box 942879
Sacramento CA 95814
Steve.kamp@boe.ca.gov[1]
Tel: (916) 322-8525/203-5661
Fax: (916) 324-2618
Attorney for the Appeals Division

BOARD OF EQUALIZATION

STATE OF CALIFORNIA

In the Matter of the Appeal of:	**HEARING SUMMARY**
	PERSONAL INCOME TAX APPEAL
WILLARD M. CHRISTINE[2]	Case No. 468893

Year	Proposed Assessment[3]
2004	$374

Representing the Parties:

For Appellant: Willard M. Christine, appellant in propria persona

For Franchise Tax Board: Zarsanga Safi, Tax Technician

QUESTIONS: (1) Whether appellant was entitled to subtract the total amount of Social Security

[1] The electronic mail address is the preferred one for any contact.

[2] Appellant resides in Redondo Beach, Los Angeles County. Although the return at issue was a joint filing status return filed by appellant and Patricia Borgia, and the Franchise Tax Board (FTB), Notice of Action (NOA) was addressed to both, the Appeal Letter was signed by and listed only Willard M. Christine. Therefore, appellants are referred to "appellant" herein.

[3] This amount is the tax amount in respondent's NOA. The NOA also assesses interest totaling $69.40 for the period between April 15, 2005 and October 15, 2006, as well as the period between August 4, 2007 and September 11, 2008, with interest suspended between these periods pursuant to Revenue & Taxation Code (R&TC) section 19116. As discussed herein, on October 28, 2007, appellant unsuccessfully attempted to pay $411.68 to respondent; on August 27, 2008, appellant paid $450.00 to respondent.

NOT TO BE CITED AS PRECEDENT - Document prepared for Board review. It does not represent the Board's decision or opinion.

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

benefits received in calculating his California taxable income, rather than the amount of taxable Social Security benefits?

(2) Whether any of the interest may be abated due to appellant's payment of $411.68 on October 28, 2007, which respondent refunded on October 30, 2007, because no balance showed on appellant's tax account due to his protest of the proposed assessment?

HEARING SUMMARY

Background

Appellant and his spouse timely filed a 2004 Form 540 return using the joint filing status. On the return[4], appellant reported $114,871 in federal adjusted gross income (AGI) and $32,051 in subtractions, resulting in a California AGI of $82,820, from which appellant subtracted the $6,330 standard deduction for the married filing jointly status, resulting in taxable income of $76,430. Appellant reported his pre-credit tax amount as $3,651; subtracted $340 in exemption credits, and reported a total tax amount of $3,311. Because appellant had $3,996 in withholding credits, he requested a $685 refund. Respondent reviewed the return and determined that appellant overstated his tax liability by $1,119, and therefore sent appellant a $1,119 refund and a Return Information Notice (RIN) explaining the revisions made to the return.[5] Subsequently, respondent received information from the IRS that appellant's 2004 *taxable* Social Security benefits were $26,198 out of total 2004 Social Security benefit payments of $30,822.[6] After comparing this information with appellant's return, respondent determined that appellant understated his California taxable income by $4,624[7]. Therefore, on July 20, 2007, respondent issued to appellant a Notice of Proposed Assessment (NPA) that proposed $374.00 in additional tax plus $32.70 interest for the period between April 15, 2005 and October 15,

///

[4] Respondent's Opening Brief, Exhibit A.

[5] In his return, appellant subtracted $30,822 on Schedule CA, line 20, column B and as part of the $32,051 total subtraction amount on form 540 line 14.

[6] Respondent's Opening Brief, Exhibit B, lines 1 and 2.

[7] $30,822 minus $26,198.

NOT TO BE CITED AS PRECEDENT - Document prepared for Board review. It does not represent the Board's decision or opinion.

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

2006.[8] The NPA stated in pertinent part as follows: "The amount of social security income you claim as an adjustment should be the same amount you included as taxable income on your federal return"[9] and that such amount was $26,198 rather than the $30,822 "subtracted amount on state return."[10] Appellant protested the NPA, and in his protest letter, claimed that his "[n]et Social Security benefits [for 2004] were $30,822" and enclosed SSA-1099 forms issued to appellant and his spouse that totaled this amount.[11] After filing his protest letter, appellant on October 28, 2007 paid the full NPA amount of $411.68, which respondent refunded on October 30, 2007 because the matter was in protest (not final) and no balance due showed on appellant's 2007 account.[12]

Respondent held a protest hearing attended by appellant on August 27, 2008, and at the hearing appellant paid $450 to cover the NPA amount plus any additional interest.[13] The protest hearing officer's memorandum explained that the IRC treated as taxable only $26,198, that appellant's subtraction of $30,822 was outside the scope of R&TC section 17087; and that the latter statute only allowed appellant to subtract $26,198. According to the protest hearing officer, appellant "[a]t the hearing held on August 27, 2008, you [appellant] indicated you are in agreement with the assessment and paid $450."[14] At the end of his memorandum, the protest hearing officer stated that the NPA "will be affirmed", but said nothing about the $450.00 acknowledged payment made by appellant and whether

///

///

---

[8] Respondent's Opening Brief, Exhibit C, fourth and fifth unnumbered pages.

[9] Respondent's Opening Brief, Exhibit C, fourth unnumbered page, paragraph 4, sentence 3.

[10] Respondent's Opening Brief, Exhibit C, fourth unnumbered page, paragraph 2, lines 1-3.

[11] Respondent's Opening Brief, Exhibit C, first unnumbered page, paragraph 6; Exhibit C, unnumbered second and third pages.

[12] See Respondent's Opening Brief, Exhibit D (protest unit hearing officer memorandum), page 2, paragraphs 3-4.

[13] Respondent's Opening Brief, Exhibit D, page 1, first sentence ("Thank you, for the information and $450 payment provided at the hearing held on August 27, 2007." The year in the date reference is obviously an error, because on page 2 of Exhibit D, respondent's hearing officer states as follows in paragraph 13: "The hearing was held on August 27, 2008. You paid $450 at the hearing." Exhibit D is dated August 27, 2008. See also, Exhibit D, page 2, paragraph 5.

[14] Respondent's Opening Brief, Exhibit D, page 2, paragraph 5.

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

it would be offset against the NPA liability of $406.70.[15] On September 11, 2008, respondent issued the NOA in the amount of $443.40, and in the NOA, expressly stated that its NOA calculation "does not take into consideration your $450.00 payment received on August 27, 2008."[16]

Contentions

Appellant's Contentions

Prior to the protest hearing, appellant appeared to argue that he could subtract on his California return the full amount of Social Security benefits rather than the federally taxable amount. Based on appellant's actions at the protest hearing and his payment of $450 to respondent at the protest hearing, appellant appears to have abandoned this position.

Appellant does not make an argument for interest abatement, but as discussed herein, appellant may be entitled to a partial abatement of interest assessed between October 28, 2007 and September 11, 2008.

Respondent's Contentions

Respondent argues that R&TC section 17087 only excludes from California taxable income the portion of Social Security benefits taxed by IRC section 86. Since only $26,198 was so taxed, appellant's subtraction of $30,822 understated his California taxable income by $4,624, and therefore appellant owes the NPA and NOA tax amount of $374 plus the interest amounts from the two periods on either side of the R&TC section 19116 suspension period. These amounts are $32.70 for the period between April 15, 2005 and October 15, 2006, and $36.70 for the period between August 4, 2007 and September 11, 2008.

Respondent in its Opening Brief does not address appellant's attempted payment of $411.68 on October 28, 2007; however, this is discussed in the protest hearing officer's memorandum

///

///

---

[15] Compare Respondent's Opening Brief, Exhibit D (two references acknowledging FTB receipt of appellant's payment of $450.00 on August 27, 2008) and the NPA dated July 20, 2007 and listing a "total additional tax and interest" amount of $406.70 as of July 20, 2007. The NPA is in Exhibit C, fourth unnumbered page.

[16] Appellant's Appeal Letter, attaching Respondent's NOA, page 1, final sentence.

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

attached as Exhibit D to Respondent's Opening Brief.[17] Respondent does not take any position regarding interest abatement.

Applicable Law Regarding Federal and California Tax Treatment of Social Security Benefits

Since 1984, Internal Revenue Code (IRC) section 86[18] has required taxpayers to include on line 20 of the federal 1040 return[19] both the total amount of Social Security benefits received in the tax year and the taxable amount of Social Security benefits. The first number is reported in line 20a; the second in line 20b.[20] Under IRC section 86(a)(1), gross income includes the lesser of one-half of Social Security benefits received in the tax year, or one half of an "excess" amount, calculated per IRC sections 86(a)(2), 86(b) and 86(c). Thus, the federal income tax does not apply to all Social Security benefits, even though the entire benefit amount is reported to taxpayers in box 3 of form SSA-1099 and must be reported in line 20a of the 1040. Only the taxable IRC section 86 amount determined by using the IRS worksheet is actually subject to federal income tax; this amount is reported by the taxpayer in line 20b and is one of the entries in lines 7 through 21 used to calculate line 22 total income. Thus, on the federal 1040 only the line 20b taxable amount makes its way into line 22 taxable income and lines 36/37 adjusted gross income.

California expressly *excludes* Social Security benefits from the form 540 line 17 California adjusted gross income or line 19 California taxable income amounts, pursuant to R& TC section 17087[21], which states as follows in subdivision (a): "Section 86 of the Internal Revenue Code, relating to Social Security and Tier 1 Railroad Retirement Benefits, shall not apply." Hence, the 540 Schedule CA[22] includes a three-part line 20 that requires taxpayers to report the following amounts: in

---

[17] Respondent's Opening Brief, Exhibit D, page 2, paragraphs 3-4.

[18] Added by Public Law 98-21.

[19] Or on line 14 of the 1040A. Taxpayers with taxable Social Security benefits are not allowed to use the 1040EZ form; see IRS 2004 1040EZ instructions, page 11 worksheet.

[20] See the 1040 form and instructions (page 24, lines 20a and 20b) for the tax year in this case (2004) available on the Internal Revenue Service (IRS) website, www.irs.gov, "Forms and Publications", "Prior Years." Respondent did not include a copy of appellant's 1040 or 1040A from 2004 with its Opening Brief, only the 540.

[21] Added by the Statutes of 1984, Chapter 1458.

[22] The form and instructions for 2004 are available on respondent's website, www.ftb.ca.gov, "Forms", "Prior Tax Years."

NOT TO BE CITED AS PRECEDENT - Document prepared for Board review. It does not represent the Board's decision or opinion.

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

line 20(a), "Social Security benefits"; in Column A, line 20(b), "Federal Amounts (*taxable* amounts from your federal return)[23]; and in Column B, line 20, a cross-reference to the Schedule CA instructions, which on page 4, right-hand column references line 20 Column B and instructs taxpayers as follows:

> **Line 20 – U.S. Social Security Benefits**
> California does not tax U.S. social security benefits or equivalent Tier 1 railroad retirement benefits. Enter in column B the amount of U.S. social security benefits or equivalent Tier 1 railroad retirement benefits shown in column A.

This entry is part of the Schedule CA subtractions backed out from California taxable income on form 540, line 14. Thus, California taxpayers are entitled only to subtract the "amount that is actually taxable on their federal return" of Social Security benefits, as determined from the IRS worksheet applying IRC section 86.

In addition, in situations where respondent's tax instruction or other forms conflict with the applicable provisions of the R&TC, the R&TC provisions as statutes determine tax liability, regardless of what is said or how the taxpayer interprets Franchise Tax Board instructions. When the FTB's tax instructions are alleged to be unclear or misleading, taxpayers must follow the law, and not the instructions. (*Appeal of Melvin D. Collamore*, 72-SBE-031, October 24, 1972; *Appeal of Robert P. and Carolyn R. Schalk*, 76-SBE-072, June 22, 1976; *Transamerica Occidental Life Ins. Co. v. State Bd. of Equal.* (1991) 232 Cal.App.3d 1048, 1055.) Taxpayers should not regard tax instruction pamphlets as sources of authoritative law giving rise to the doctrine of equitable estoppel. (*Appeal of Priscilla L. Campbell*, 79-SBE-035, February 8, 1979.)

Applicable Law Regarding Interest Abatement

California law imposes interest from the date on which any personal or corporate income tax is due until the date the entire balance is paid in full. (Rev. &Tax Code §19101, subd. (a).) Interest is paid, assessed, and collected in the same manner as the underlying tax. (*Id.*, subd. (c).) The Board has long recognized that the assessment of interest on any unpaid tax is mandatory. (*Appeal of Amy M. Yamachi*, 77-SBE-095, June 28, 1977.) The Board has also recognized that interest is not a penalty, but is simply compensation to the state for the lost time-value of money received after the due date. (*Appeal*

[23] Emphasis added.

NOT TO BE CITED AS PRECEDENT - Document prepared for Board review. It does not represent the Board's decision or opinion.

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

of Alan F. and Rita K. Shugart, 2005-SBE-001, July 1, 2005.) As such, the law provides no reasonable cause exception to the imposition of interest. (See *Id.*) While there is no general reasonable cause exception to interest, the Legislature has enacted R&TC section 19104 that provides limited relief from interest under specified circumstances. R&TC section 19104 allows the Board to hear appeals from respondent's denial of interest abatement and to order interest abatement where it determines respondent has abused its discretion in denying interest abatement, where the accrual of interest is attributable to an error or delay by an employee of the FTB "in performing a ministerial or managerial act" (see Rev. & Tax C. §19104, subd. (a); *Appeal of Ernest J. Teichert*, 99-SBE-006, Sept. 29, 1999; *Appeal of Michael and Sonia Kishner*, 99-SBE-007, Sept. 29, 1999; *Appeal of Alan F. and Rita K. Shugart, supra*.). An error or delay shall be taken into account only where no significant aspect of that error or delay is attributed to the taxpayer involved and after the FTB has contacted the taxpayer in writing with respect to that deficiency or payment. (Rev. and Tax. Code, section 19104, subd. (b)(1)).

Federal Treasury Regulation 301.6404-2(b)(2) defines "ministerial act" as meaning:

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

Federal Treasury Regulation[24] 301.6404-2(b)(1) defines "managerial act" as meaning:

> an administrative act that occurs during the processing of a taxpayer's case involving the temporary or permanent loss of records or the exercise of judgment or discretion relating to management or personnel. A decision concerning the proper application of federal tax law (or other federal or state law) is not a managerial act. Further, a general administrative decision, such as the IRS's decision on how to organize the processing of tax returns or its delay in implementing an improved computer system, is not a managerial act for which interest can be abated.

STAFF COMMENTS

According to respondent, appellant at the FTB protest hearing stated that he agreed that the NPA tax amount (based on the amount of incorrectly claimed nontaxable Social Security benefits)

[24] Because section 19104 is patterned after federal legislation on the same subject, the interpretation and effect given the federal provision by the federal courts and administrative bodies are relevant in determining the proper construction of the California statute. *Andrews v. Franchise Tax Board* (1969) 275 Cal.App.2d 653, 658; *Rihn v. Franchise Tax Board* (1955) 131 Cal.App.2d 356, 360.

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

was correct. Appellant did not file a reply to respondent's Opening Brief.

Respondent's first written contact with appellant occurred on July 20, 2007, when respondent issued the NPA for $374.00 in tax and $32.70 in interest accruing between the April 15, 2005 tax payment due date and October 15, 2006. Under R&TC section 19104, subdivision (b)(1), this amount appears to be outside the realm of abatement, because respondent's first contact occurred subsequent to the accrual of interest.

According to respondent's NOA, respondent suspended interest between October 16, 2006, and August 3, 2007. On August 4, 2007, respondent began assessing interest for a second period of approximately 405 or 406 calendar days[25] that ended on September 11, 2008, for a total amount of $36.70. On October 28, 2007, 85 or 86 days into the second interest period, appellant gave respondent a check for $411.68, which respondent accepted and refunded two calendar days later.[26] On August 27, 2008, appellant paid $450.00 to respondent, which respondent acknowledges receiving, and which presumably stopped the accrual of interest after August 27, 2008, pursuant to R&TC section 19041.5. Respondent should be prepared to address at the oral hearing the manner in which it held the $450 payment and the calculation of interest from that date forward, if any.

Appellant does not specifically request interest abatement, but it appears to staff that respondent's October 28, 2007 action in accepting appellant's payment of $411.68 and then refunding it on October 30, 2007 may constitute "unreasonable error or delay by an officer or employee of the Franchise Tax Board (acting in his or her official capacity) in performing a ministerial or managerial act" as this language is used in R&TC section 19104, subdivision (a)(1). Respondent may wish to address why the payment was not accepted as a deposit to stop the accrual of interest pursuant to R&TC section 19041.5 instead of refunding the payment to appellant. Should the Board determine that respondent erred in refunding the $411.68 payment, then it appears appellant would be entitled to a partial abatement of interest accrued during the period between October 28, 2007, when the payment was made, through September 11, 2008.

---

[25] Including February 29, 2008.

[26] Respondent's Opening Brief, Exhibit D, page 2, paragraphs 3-4.

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

Finally, staff notes that appellant's inability to report the correct amount of taxable income may stem from the instructions in respondent's 2004 Form 540, which do not appear to expressly alert taxpayers that only the taxable Social Security benefit amount number may be subtracted. The language from the 540 instructions states in pertinent part as follows:

> **Line 20 – U.S. Social Security Benefits**
> California does not tax U.S. social security benefits or equivalent Tier 1 railroad retirement benefits. Enter in column B the amount of U.S. social security benefits or equivalent Tier 1 railroad retirement benefits shown in column A.

Staff notes that the Form 540 Schedule CA parenthesized language at the top of column A specifies "taxable amounts"; however, respondent may wish to further clarify its instructions that the full SSA-1099 amount may not be deducted, only the amount that is entered on Line 18 of the Social Security Benefits Worksheet on page 25 of the IRS 2004 Form 1040 instructions.

///

///

///

Willard_smk

STATE BOARD OF EQUALIZATION
PERSONAL INCOME TAX APPEAL

NOT TO BE CITED AS PRECEDENT - Document prepared for Board review. It does not represent the Board's decision or opinion.