

1 William J. Stafford  
Tax Counsel  
2 Board of Equalization, Appeals Division  
450 N Street, MIC:85  
3 PO Box 942879  
Sacramento CA 95814  
4 Tel: (916) 323-3154  
Fax: (916) 324-2618  
5

6 Attorney for the Appeals Division

7 **BOARD OF EQUALIZATION**  
8 **STATE OF CALIFORNIA**  
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10 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
11 ) **PERSONAL INCOME TAX APPEAL**  
12 **KEVIN E. JONES<sup>1</sup>** ) Case No. 534416  
13 )

	<u>Year</u>	<u>Proposed</u>
	2006	Assessment
		\$965.10

14  
15  
16 Representing the Parties:  
17 For Appellant: Kevin E. Jones  
18 For Franchise Tax Board: Rachel Abston, Legal Analyst  
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- 20 QUESTIONS: (1) Whether the proposed assessment is barred by the statute of limitations.  
21 (2) Whether appellant has demonstrated error in the proposed assessment.  
22 (3) Whether appellant has demonstrated that interest should be abated.

23 HEARING SUMMARY

24 Background

25 Appellant filed a 2006 California resident income tax return, reporting wages of \$54,373  
26 and an overpayment of \$1,198, which the FTB refunded on February 20, 2007. Included with  
27

28 <sup>1</sup> Appellant resides in San Francisco County, California.

1 appellant's 2006 return were Form W-2's, showing that appellant earned wages totaling \$76,173 in  
2 2006. Later, the FTB received information from the Internal Revenue Service (IRS) that appellant  
3 reported federal wages of \$76,173, which was \$21,800 greater than the wages appellant reported on his  
4 2006 California return. On July 16, 2009, the FTB issued a Notice of Proposed Assessment (NPA),  
5 which increased appellant's wages by \$21,800, for a revised taxable income of \$72,763. The NPA also  
6 imposed (i) an additional tax of \$965.10, and (ii) interest for the period from April 15, 2007, to  
7 October 15, 2008. In addition, the NPA noted that pursuant to Revenue and Taxation Code (R&TC)  
8 section 19116, the FTB suspended interest beginning 18 months from the later of (a) the original due  
9 date of the return (without extensions) or (b) the date on which appellant filed his return. Furthermore,  
10 the NPA noted that interest would resume 15 days after the issuance of the NPA. Finally, the NPA also  
11 allowed an additional withholding credit of \$1,062.90.

12 Appellant timely protested the NPA by letter dated August 21, 2009, stating in part:

13 My tax forms accurately and completely reported my income . . . . The Notice of  
14 Proposed Assessment nowhere explains or lists the source of the claimed income  
15 differential. My taxes were accurately filed using all W-2 forms as they were provided to  
16 me by my employers. Additionally, the interest shown on the Notice is shown as running  
17 from April 15, 2007 through October 15, 2008 – I have at no time, previous the (sic) this  
18 Notice, been informed of any claimed Tax Return irregularities or claimed inaccuracies.

19 After reviewing appellant's protest, the FTB affirmed the NPA in a Notice of Action  
20 (NOA) dated May 7, 2010. This appeal followed.

### 21 Contentions

#### 22 Appellant

23 Appellant makes three arguments: First, appellant argues that the FTB's proposed  
24 assessment is barred by the statute of limitations.

25 Second, appellant argues that he used "[p]rofessional tax software" to prepare his returns,  
26 and appellant asserts that although the Board is "aware of issues with tax preparation software," the  
27 Board has failed to provide oversight to the companies that manufacture and market tax software. In  
28 this respect, appellant might be arguing that the difference between his state and federal wages (as  
reported) was caused by an error in his tax preparation software.

Finally, appellant argues that the FTB's proposed assessment imposes "predatory

1 interest,” and appellant asserts that the threat of accruing interest is being used to pressure him into  
2 paying the proposed assessment.

### 3 The FTB

4 The FTB makes three arguments: The FTB argues that it issued the NPA in a timely  
5 manner, and therefore, its proposed assessment is not barred by the statute of limitations.

6 Second, the FTB argues that appellant has not demonstrated error in the IRS’s reporting  
7 of appellant’s wages or in the FTB’s proposed assessment.

8 Finally, the FTB argues that appellant has not shown that interest should be abated.  
9 Also, the FTB notes that under R&TC section 19116, the FTB suspended interest from October 15, 2008  
10 (18 months from the return’s filing date) to July 31, 2009 (15 days after the NPA date).

### 11 Applicable Law

#### 12 Statute of Limitations

13 In general, the FTB must issue an NPA within four years of the date the taxpayer filed his  
14 or her California return. (Rev. & Tax. Code, § 19057.) Returns filed before the original due date of a  
15 personal income tax return are considered as filed on the original due date. (Rev. & Tax. Code,  
16 § 19066.)<sup>2</sup>

#### 17 Proposed Assessment

18 R&TC section 17041 imposes a tax “. . . upon the entire taxable income of every resident  
19 of this state . . .” and upon the entire taxable income of every nonresident or part-year resident which is  
20 derived from sources in this state.<sup>3</sup> R&TC section 18501 requires every individual subject to the  
21 Personal Income Tax to make and file a return with the FTB “stating specifically the items of the  
22 individual’s gross income from all sources and the deductions and credits allowable . . .”

23 If the FTB makes a tax assessment based on an estimate of income, the FTB’s initial  
24 burden is to show why its assessment is reasonable and rational. (*Todd v. McColgan* (1949) 89  
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26 <sup>2</sup> Here, the IRS apparently did *not* make an adjustment to appellant’s income. Instead, it appears that the IRS merely  
27 provided the FTB with information that appellant had federal wages of \$76,173 for 2006. Accordingly, the statute of  
28 limitations applicable when the IRS makes an adjustment to a taxpayer’s income (i.e., R&TC sections 19059 and 19060) are  
not applicable in this appeal.

<sup>3</sup> It appears undisputed that appellant resided in California during the 2006 tax year.

1 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.)<sup>4</sup> Federal courts have held  
2 that the taxing agency need only introduce some evidence linking the taxpayer with the unreported  
3 income. (See *Rapp v. Commissioner* (9th Cir. 1985) 774 F.2d 932.) The FTB's use of income  
4 information from the IRS and Form W-2's to estimate appellant's California taxable income is a  
5 reasonable and rational method of estimating taxable income. (See *Appeals of Walter R. Bailey*, 92-  
6 SBE-001, Feb. 20, 1992; *Appeals of R. and Sonja J. Tonsberg*, 85-SBE-034, Apr. 9, 1985.)

7           Once the FTB has met its initial burden, the assessment is presumed correct and appellant  
8 has the burden of proving it to be wrong. (*Todd v. McColgan, supra*; *Appeal of Michael E. Myers*,  
9 *supra*.) Unsupported assertions are not sufficient to satisfy appellant's burden of proof. (*Appeal of*  
10 *Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence of uncontradicted, credible,  
11 competent, and relevant evidence showing error in the FTB's determinations, they must be upheld.  
12 (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.) An appellant's failure to  
13 produce evidence that is within his control gives rise to a presumption that such evidence is unfavorable  
14 to his case. (*Appeal of Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.)

#### 15           Relief of Interest

16           Interest is required to be assessed from the date when payment of tax is due, through the  
17 date that it is paid. (Rev. & Tax. Code, § 19101.) Imposition of interest is mandatory; it is not a  
18 penalty, but is compensation for appellant's use of money after it should have been paid to the state.  
19 (*Appeal of Amy M. Yamachi*, 77-SBE-095, June 28, 1977.) There is no reasonable cause exception to  
20 the imposition of interest. (*Appeal of Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.)

21           To obtain relief from interest, appellant must qualify under one of three statutes: R&TC  
22 sections 19104, 19112 or 21012. R&TC section 21012 is not applicable, because there has been no  
23 reliance on any written advice requested of the FTB. R&TC section 19112 requires a showing of  
24 extreme financial hardship caused by significant disability or other catastrophic circumstance. However,  
25 there is no provision in R&TC section 19112 or other law that gives the Board jurisdiction to determine  
26 whether R&TC section 19112 applies in this instance. (However, the Legislature did provide the Board  
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28 <sup>4</sup> Board of Equalization cases are generally available for viewing on the Board's website ([www.boe.ca.gov](http://www.boe.ca.gov)).

1 jurisdiction over appeals of denied interest abatement requests under R&TC section 19104 as discussed  
2 below.)

3 Under R&TC section 19104, for tax years beginning on or after January 1, 1998, this  
4 Board may only abate or refund interest on appeal.

5 [T]o the extent that interest is attributable in whole or in part to any unreasonable error or  
6 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.

7 (Rev. & Tax. Code, § 19104, subd. (a)(1) [emphasis added].)

8 Further, the error or delay can be taken into account only if no significant aspect is  
9 attributable to the taxpayer, and the error or delay occurred after the FTB contacted the taxpayer in  
10 writing about the underlying deficiency. (Rev. & Tax. Code, § 19104, subd. (b)(1).) In the *Appeal of*  
11 *Michael and Sonia Kishner* (99-SBE-007), decided on September 29, 1999, the Board adopted the  
12 language from Treasury Regulation section 301.6404-2 (b)(2), defining a “ministerial act” as:

13 A procedural or mechanical act that does not involve the exercise of judgment or  
14 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.  
15 A decision concerning the proper application of federal tax law (or other federal or state  
law) is not a ministerial act.

16 This Board has not yet adopted a definition for the term “managerial act.” However,  
17 when a California statute is substantially identical to a federal statute (such as, with the interest  
18 abatement statute in this case), we may consider federal law interpreting the federal statute as highly  
19 persuasive. (*Douglas v. State of California* (1942) 48 Cal.App.2d 835.) In this regard, Treasury  
20 Regulations section 301.6404-2 (b)(1) defines a “managerial act” as:

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

#### 24 STAFF COMMENTS

##### 25 Statute of Limitations

26 Appellant filed his 2006 return by the original due date of April 15, 2007. Thus, the FTB  
27 had until April 15, 2011, to issue the NPA. Here, the FTB issued the NPA on July 16, 2009.  
28 Accordingly, the NPA appears to have been issued in a timely manner.

1                   Proposed Assessment

2                   The FTB’s use of income information from the IRS and Form W-2s is generally a  
3 reasonable and rational method of estimating income (see *Appeals of Walter R. Bailey, supra; Appeals*  
4 *of R. and Sonja J. Tonsberg, supra.*). Accordingly, at the oral hearing, appellant should be prepared to  
5 demonstrate error in the FTB’s proposed assessment. Pursuant to California Code of Regulations, title  
6 18, section 5523.6, if appellant has any additional evidence to present, appellant should provide his  
7 evidence to Board Proceedings at least 14 days prior to the oral hearing.<sup>5</sup>

8                   Abatement of Interest

9                   At the oral hearing, appellant should be prepared to show that interest accrued because of  
10 a delay in the performance of a ministerial or managerial act after the FTB contacted appellant in writing  
11 about the underlying deficiency.

12                   Staff notes that the NPA was issued prior to expiration of the statute of limitations. Staff  
13 also notes that under R&TC section 19116, the NPA suspended interest from October 15, 2008 (18  
14 months from the return’s filing date) to July 31, 2009 (15 days after the NPA date).

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18 Jones, Kevin\_wjs

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<sup>5</sup> Evidence exhibits should be sent to: Claudia Madrigal, Appeals Analyst, Board Proceedings Division, State Board of Equalization, P.O. Box 942879 MIC:80, Sacramento, California, 94279-0080.