

1 Charles E. Potter, Jr.
Tax Counsel
2 Board of Equalization, Appeals Division
450 N Street, MIC: 85
3 PO Box 942879
Sacramento CA 95814
4 Tel: (916) 323-3150
Fax: (916) 201-6622
5

6 Attorney for the Appeals Division

7 **BOARD OF EQUALIZATION**
8 **STATE OF CALIFORNIA**
9

10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **THOMAS LITAWA¹**) Case No. 522390
13

	<u>Year</u>	<u>Proposed Assessment</u>
	2005	\$484

16 Representing the Parties:

17 For Appellant: Thomas Litawa
18 For Franchise Tax Board: Rachel Abston, Legal Analyst
19

20 QUESTIONS: (1) Whether respondent correctly adjusted appellant's itemized deductions.
21 (2) Whether appellant has shown that respondent Franchise Tax Board (FTB or
22 respondent) unreasonably erred or delayed in the performance of a ministerial or
23 managerial act in the processing of his 2005 return such that FTB's denial of
24 interest constitutes an abuse of discretion.

25 ///
26 ///

27 _____
28 ¹ Appellant resides in Pittsburg, California in Contra Costa County.

1 HEARING SUMMARY

2 Background

3 Appellant filed a joint² 2005 return that was received by respondent on June 15, 2007.
4 This return reported federal adjusted gross income (AGI) of \$103,314.94, less itemized deductions of
5 \$16,233.74 for taxable income of \$87,081.20 and tax of \$4,038.00. After applying withholding of
6 \$4,263.48, appellant reported an overpayment of \$225.48.

7 In processing this return, respondent determined appellant claimed two personal
8 exemption credits and one dependent exemption credit, totaling \$446, which appellant failed to subtract
9 from its tax of \$4,038. Therefore, respondent increased the overpayment of \$225.48 by \$446.00 and
10 allowed \$3.39 in interest, refunding \$674.87 to appellant on August 8, 2007.

11 Thereafter, respondent received information from the Internal Revenue Service (IRS) that
12 showed appellant's itemized deductions claimed on the federal return totaled \$15,308, which included
13 \$4,263 in state and local taxes. Using the federal return itemized deductions amount, respondent
14 subtracted state and local taxes and recalculated appellant's allowed California itemized deductions as
15 \$11,045 (i.e., \$15,308 minus \$4,263). Based on these adjustments, respondent issued a Notice of
16 Proposed Assessment (NPA) proposing additional tax of \$756 and a late filing penalty of \$100, plus
17 applicable interest.

18 Appellant protested the NPA asserting the state and local tax adjustment of \$4,263 was
19 inappropriately "conjured up." Appellant conceded he made an error in listing his federal itemized
20 deductions as \$16,233, when they were actually \$15,308. Appellant claimed "simple arithmetic shows
21 the difference as \$1,075" which appellant claims was because he had to pay \$1,075 in property tax that
22 was not included on documents received from his mortgage company.³ Appellant claimed he filed as
23 married with one dependent and that \$272 for his son's exemption was incorrectly omitted. On October
24 23, 2009, respondent sent a position letter to appellant indicating it was revising the NPA to allow the
25 \$272 dependent exemption credit (as was allowed by respondent during the processing of the return but
26

27 ² This appeal is in appellant's name only as appellant's former spouse did not sign the appeal letter.

28 ³ Board staff notes that \$16,233 minus \$15,308 equals \$925, not \$1,075.

1 omitted on the NPA) and canceling the late filing penalty. Thus, respondent claimed the revised tax due
2 was \$484 (i.e., \$756 minus \$272). Respondent subsequently issued a Notice of Action (NOA) for \$484
3 in additional tax, removing the late filing penalty, and adjusting applicable interest accordingly.

4 This timely appeal followed.

5 Contentions

6 In appellant’s appeal letter, he contends his original taxes “were off by \$37.”
7 (Appellant’s Appeal Letter (AAL) at p. 1.) Appellant contends the errors in this case were made by
8 respondent, that respondent has incorrectly recalculated his taxes. Appellant also indicates he wants to
9 resolve this matter by either (1) paying 50 percent of the overpayment (which he contends would be
10 approximately \$230) with no interest or (2) through a neutral court. (AAL at p. 2.)

11 Respondent contends it did not cause a “transfer” error of \$4,263.83; rather it was
12 appellant that incorrectly reported his total amount of federal itemized deductions of \$16,233.76 on line
13 18 of his 540 return, instead of the \$11,970.26 from line 44 of his Schedule CA that should have been
14 transferred to line 18 of his 540. Respondent notes that appellant’s transfer amount of \$11,970.26 on
15 line 44 of his Schedule CA properly included his subtraction of \$4,263 in state and local taxes as
16 required under R&TC section 17220, subdivision (a), but appellant failed to transfer the \$11,970.26 to
17 line 18 of his 540 return (as instructed on line 44 of Schedule CA). (Respondent’s Opening Brief (ROB)
18 at p. 4.)

19 Respondent agrees it omitted \$272 of the exemption amounts allowed during the
20 processing of the return from the NPA, but corrected that error at protest (so that the NOA reflects the
21 correct exemption amounts). (ROB footnote 5.) In its opening brief, respondent provided a corrected
22 540 return setting forth a revised income tax calculation, as shown below, and contends that the
23 additional tax due of \$484 is understated, and should have been \$856. (ROB at p. 5; exhibit G.)

24 ///

25 ///

26 ///

27 ///

28 ///

Federal AGI	\$103,315
California Adjustments (Additions)	
Tuition & Related Expenses	\$4,000
California Itemized Deductions	(\$11,045)
Revised Taxable Income	<u>\$96,270</u>
Tax	\$4,894
Exemption Credits	-\$446
Previously Paid Tax	-\$3,592
Additional Correct Tax Due	<u>\$856</u>

Respondent contends that tuition and related expenses are allowable under Internal Revenue Code section 222, but that California does not conform to this provision, citing R&TC section 17204.7. (ROB footnote 7.) Respondent asserts that its failure to disallow this amount means the amount of additional tax that should have been proposed (i.e., \$856) is \$372 greater than the amount (\$484) actually proposed. (ROB at p. 5.) Respondent indicates that the proposed additional tax of \$484 is the only amount shown on the NOA and therefore the Board can only act on this amount, plus applicable interest. (*Id.*) Respondent contends that appellant has not shown any error in its calculation of his itemized deductions or the proposed assessment. (*Id.*)

Respondent claims that no unreasonable error or delay in its performance of a ministerial or managerial act with respect to the processing of appellant's 2005 return exists to abate interest in this case. Respondent contends that in processing the return, it allowed appellant's personal and dependent exemption credits, which appellant failed to include. (ROB at p. 7.) Respondent claims appellant may be arguing that this processing decision constituted an "error" on respondent's part, i.e., if respondent had not taken upon itself to allow a credit of \$446 for exemptions and then to refund this amount to him, then appellant would have had \$446 to apply against the \$484 assessment.⁴ (ROB footnote 8.) However, respondent claims that it cannot ignore clear errors on a return, and once it discovered appellant's mistake, it properly allowed the exemption credits. (*Id.*)

With respect to respondent's failure to allow an exemption credit of \$272 in the NPA calculation, respondent claims this error was corrected on the NOA and that no additional interest was

⁴ Respondent contends this may explain appellant's contention that he only underpaid by \$37 (i.e., \$484 minus \$446).

1 charged as a result of this error. (*Id.*) Respondent claims it cannot abate interest based on this error
2 because no tax or interest resulted from that error. (*Id.*) Finally, respondent contends that even if an
3 error existed, interest abatement can only be provided for periods after the first written contact, which
4 occurred with the issuance of the NPA.⁵ (ROB at p. 8.)

5 Applicable Law

6 A presumption of correctness attends respondent's determinations as to issues of fact and
7 the taxpayer has the burden of proving such determinations erroneous. (*Appeal of Oscar D. and Agatha*
8 *E. Seltzer*, 80-SBE-154, June 29, 1980.) This presumption is a rebuttable one and will support a finding
9 only in the absence of sufficient evidence to the contrary. (*Id.*) Respondent's determination cannot,
10 however, be successfully rebutted when the taxpayer fails to present uncontradicted, credible,
11 competent, and relevant evidence to the contrary. (*Id.*) To overcome the presumed correctness of
12 respondent's findings as to issues of fact, a taxpayer must introduce credible evidence to support his
13 assertions. When the taxpayer fails to support his assertions with such evidence, respondent's
14 determinations must be upheld. (*Id.*) A taxpayer's unsupported assertions are not sufficient to satisfy
15 his burden of proof. (*Appeal of James C. and Monablanché A. Walshe*, 75-SBE-073, Oct. 20, 1975.)

16 *Itemized Deductions*

17 Deductions and exclusions are a matter of legislative grace and are allowable only where
18 the conditions established by the legislature have been satisfied. (*New Colonial Ice Co. v. Helvering*,
19 (1934) 292 U.S. 435; *Appeal of Frederick A. Sebring*, 80-SBE-164, Dec. 9, 1980.) Respondent's
20 determination that a deduction or exclusion should be disallowed is presumed correct (*Welch v.*
21 *Helvering*, (1933) 290 U.S. 111; *Appeal of John A. and Julie M. Richardson*, 80-SBE-135, Oct. 28,
22 1980), and appellants must prove their entitlement to the claimed deductions or exclusion. (*Appeal of*
23 *Ambrose L. and Alice M. Gordos*, 82-SBE-062, Mar. 31, 1982.)

24 California conforms to federal tax law in allowing itemized deductions, with some
25 exceptions: state and local income taxes are not deductible; nor are qualified tuition and related
26 expenses. (Rev. & Tax. Code, §§ 17201, 17220 & 17204.7.)

27 _____
28 ⁵ The NPA shows an issuance date of August 28, 2008. (ROB exhibit C.)

1 *Interest Abatement*

2 Interest is mandatory and respondent is not allowed to abate interest except where
3 authorized by law. (*Appeal of Amy M. Yamachi*, 77-SBE-095, June 28, 1977.) The imposition of
4 interest is not a penalty, but is merely intended to compensate California for appellant’s use of money
5 that should have been turned over earlier to California. (*Appeal of Audrey C. Jaegle*, 76-SBE-070, June
6 22, 1976.) Under R&TC section 19104, respondent is authorized to abate interest if there has been an
7 unreasonable error or delay in the performance of a ministerial or managerial act by an employee of
8 respondent. Such abatement can only occur if no significant aspect of the error or delay can be
9 attributed to the taxpayer and after respondent has first contacted the taxpayer in writing. (Rev. & Tax.
10 Code, § 19104, subd. (b)(1).)

11 In the *Appeal of Michael and Sonia Kishner*, 99-SBE-007, decided on September 29,
12 1999, the Board adopted the language from Treasury Regulation section 301.6404-2(b)(2), defining a
13 “ministerial act” as:

14 [A] procedural or mechanical act that does not involve the exercise of judgment or
15 discretion, and that occurs during the processing of a taxpayer’s case after all
16 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.

17 This Board has not yet adopted a definition for the term “managerial act.” However,
18 when a California statute is substantially identical to a federal statute (such as with the interest
19 abatement statute in this case),⁶ we may consider federal law interpreting the federal statute as highly
20 persuasive. (*Appeal of Michael and Sonia Kishner*, *supra*, (citing *Douglas v. State of California* (1942)
21 48 Cal.App.2d 835).) In this regard, Treasury Regulations section 301.6404-2(b)(1) defines a
22 “managerial act” as:

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

26 ///

27 _____
28 ⁶ Revenue and Taxation Code section 19104, subdivisions (a) and (b)(2)(B) are substantially identical to Internal Revenue
Code section 6404 (e) and (h).

1 STAFF COMMENTS

2 *The Itemized Deductions Adjustment*

3 Appellant concedes his federal itemized deductions were \$15,308.00 and a review of
4 appellant's return provided by respondent (ROB exhibit A, Adjustments to Federal Itemized Deductions,
5 Part II), shows: (1) federal itemized deductions listed as \$16,233.74; (2) state and local taxes of
6 \$4,263.48 subtracted from this amount (for a revised amount of \$11,970.26) and (3) an instruction that
7 the revised amount of \$11,970.26 should be transferred to line 18 of his return. However, line 18 of
8 appellant's return (ROB exhibit A, at p. 1) shows an itemized deduction amount of \$16,233.74. Thus,
9 from appellant's return, it appears appellant did not start with his federal itemized deduction amount of
10 \$15,308, and then did not reduce this amount by his state and local taxes.⁷ Since respondent's
11 determinations are presumed correct, at the oral hearing appellant will need to explain how respondent
12 erred in adjusting his itemized deductions.

13 *Interest Abatement*

14 Although respondent omitted the total exemption amount it allowed during the
15 processing of appellant's 2005 return from the NPA, respondent corrected this error so that the correct
16 exemption amount was included in the NOA. It does not appear that this error lead to the assessment of
17 any additional tax or interest on the NOA. Further, it does not appear that respondent made any
18 unreasonable error or delay in the performance of a ministerial or managerial act during the processing
19 of appellant's 2005 return to which interest is attributable. To the extent appellant is arguing that the
20 deduction of the state and local taxes amount by respondent is an error, staff notes that appellant himself
21 subtracted the state and local income tax amounts from his Schedule CA on his 540 return, which is
22 correct under California law. Despite making this subtraction correctly, appellant failed to transfer the
23 adjusted itemized deduction amount to line 18 of his 540 and started with the wrong federal itemized
24 deductions amount of \$16,233.74. Therefore, it does not appear that appellant has as yet shown any
25 basis for which interest may be abated.

26 Litawa_cep
27 _____
28

⁷ This appears to explain respondent's referring to this as appellant's "Itemized Deduction Transfer Error" on the NOA. (ROB exhibit F.)