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

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10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **FRANCHISE INCOME TAX APPEAL**
12 **PRUDENT STAFFING SERVICES¹**) Case No. 602283
13)
14)

15 Year Claim for
2010 Refund
\$722.98²

16
17 Representing the Parties:

18 For Appellant: Eno Oduok, Director of Operation
19 For Franchise Tax Board: Eric A. Yadao, Tax Counsel

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21 **QUESTIONS:** (1) Whether the late payment penalty imposed under Revenue and Taxation Code
22 (R&TC) section 19132 should be abated;
23 (2) Whether the penalty for the underpayment of the estimated tax should be abated;
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25 ¹ Appellant is located in West Sacramento, Yolo County.

26 ² Respondent indicates that the actual amount paid and not refunded for appellant's 2010 tax year account is \$640.98, which
27 includes a collection fee of \$249.00, a late payment penalty of \$52.00, an underpayment of the estimated tax penalty of
28 \$29.28, interest of \$10.70, and bank fees of \$300.00. According to respondent, the difference of \$82.00 between the amount
on appeal of \$722.98 and respondent's total of \$640.98, was transferred and applied to appellant's 2011 balance.
Respondent notes that at the conclusion of this appeal, it will abate the collection fee of \$249.00, leaving a remaining
amount in dispute of \$391.98.

1 (3) Whether appellant is entitled to interest abatement; and

2 (4) Whether respondent must compensate appellant for the \$300 in bank fees which
3 appellant incurred as a result of respondent's collection activity.

4 HEARING SUMMARY

5 Background

6 Appellant is a C corporation and calendar-year filer who is required to file a return by
7 March 15th in the year following the close of its tax year. For 2010, appellant's return was due
8 March 15, 2011. Appellant filed its 2010 return on June 15, 2011, but did not make any payments for
9 the 2010 tax as of that filing date. (Resp. Op. Br., p. 1-2, Exhs. A & B.)

10 Appellant subsequently remitted a check dated June 17, 2011, for an \$800 estimated tax
11 payment. The check included a notation "for 2011 Form 100-ES" and was accompanied by a
12 Corporation Estimated Tax Form 100-ES payment voucher for the 2011 tax year. According to
13 respondent's records, respondent applied that payment to appellant's 2011 tax year account because
14 the payment and estimate voucher both indicated that it was for the 2011 tax year which was due
15 April 15, 2011. (Resp. Op. Br., p. 2, Exh. C.)

16 On or about July 16, 2011, respondent issued a notice of balance due, advising
17 appellant that it owed \$900.18 for the 2010 tax year.³ Appellant then contacted respondent by
18 telephone and advised respondent that it understood the notice and would pay the amounts due in full.
19 Respondent advised appellant that it had been paying late each year and that an estimated tax penalty
20 would also apply to the late tax year 2011 payment. (Resp. Op. Br., p. 2, Exh. D.)

21 When appellant did not make a payment of the 2010 balance by September 6, 2011,
22 respondent issued a Corporation Past Due Notice. The notice advised appellant that, if the amounts
23 due remained unpaid, respondent might start collection action that could result in a collection fee and a
24 levy of corporate accounts receivable and bank accounts. According to respondent, appellant then
25 contacted the FTB, stating that it should not owe any money and that it paid every year. Appellant
26 stated that it would pay the penalty and interest but asserted that it did not owe an additional \$800.

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28 ³ This amount included the following: minimum franchise tax of \$800.00, interest of \$10.90, an estimated tax penalty of \$29.28, a monthly penalty of \$20.00 and a late payment penalty of \$40.00.

1 Respondent advised appellant that collection action would continue until full payment was made.
2 (Resp. Op. Br., p. 2, Exh. E.)

3 When respondent did not receive payment, it issued a Corporation Formal Demand on
4 October 21, 2011. The notice advised appellant again that it must pay the balance to avoid the
5 imposition of a collection fee and an attachment of corporate accounts receivable and bank accounts.
6 Respondent then issued a Corporation Final Notice Before Levy on December 2, 2011. When
7 appellant did not make or otherwise arrange for the payment of the balance due, respondent issued an
8 Order to Withhold (OTW) against appellant's bank account with Wells Fargo Bank for the balance
9 then due. (Resp. Op. Br., pp. 2-3, Exhs. F, G & H.)

10 According to respondent, appellant contacted the FTB on or about February 10, 2012,
11 regarding the OTW. Appellant stated that the corporation was in severe financial straits and that the
12 June 17, 2011 check was intended as payment for the 2010 tax year. Appellant requested that the
13 payment be transferred to its 2010 account. At the request of the Taxpayer's Advocate's Office
14 (Advocate), a temporary hold was placed on collection activity until May 30, 2012. The Advocate
15 reviewed appellant's payment history and explained to appellant that it fell behind its annual payments
16 after the 2006 tax year when appellant began filing its tax liability after it filed its return. The
17 Advocate further explained that appellant incurred penalties and interest for each year that it paid tax
18 late. The Advocate advised appellant that it would not transfer the late 2011 estimate payment to the
19 2010 liability because it would result in similar late penalties and interest for the 2011 tax year. (Resp.
20 Op. Br., p. 3, Exh. I.)

21 Appellant subsequently provided bank statements from its Wells Fargo bank account to
22 show that it had no funds and was under financial hardship. Thereafter, respondent withdrew its OTW
23 from the Wells Fargo account. Because appellant's 2010 tax year account remained unpaid and
24 unresolved after the expiration of the hold date, respondent issued a second OTW against appellant's
25 account with Wells Fargo on June 5, 2012. On the same day, respondent issued a Final Notice Before
26 Suspension/Forfeiture, informing appellant that, if the balance due remained unpaid, appellant's ability
27 to conduct business as a registered entity would be suspended on September 4, 2012. Respondent also
28 discovered that appellant maintained an account with the Bank of the West and issued an OTW on that

1 account on July 5, 2012. (Resp. Op. Br., p. 3, Exhs. J, K, L, & M.)

2 According to respondent, in August 2012, the Advocate granted appellant's request to
3 move the 2011 estimate payment of \$800 to appellant's 2010 balance retroactive to the date of the
4 FTB's receipt of appellant's June 17, 2011 check.⁴ Appellant then made a payment of the remaining
5 balance and requested a refund in a letter dated September 4, 2012. After consideration, respondent
6 denied appellant's claim for refund. (Resp. Op. Br., p. 3; Appeal Letter, Atth.)

7 This timely appeal then followed.

8 Contentions

9 Appellant

10 Appellant contends that it intended to pay the tax for 2010 by its check dated June 17,
11 2011. Appellant further contends that the FTB agreed that appellant paid \$800 by June 2011.
12 Appellant requests that the Board draw a line between this issue regarding the 2010 tax and the 2012
13 tax filing period. Appellant contends that it followed the directions of its tax preparer to mail the 2011
14 tax year payment voucher with the check dated June 17, 2011. Appellant asserts that the FTB saw the
15 tax preparer's name and signature as shown on the June 17, 2011 payment. Appellant further contends
16 that it requested that the FTB fix this issue before the 2012 tax was due. Appellant asserts that the
17 payment of tax was delayed and the return was filed late due to its tax preparer. Appellant contends
18 that filing and paying a tax late should not result in the FTB denying the tax payment and starting the
19 collection process. Appellant contends that it was harassed by the FTB with its repeated notices and
20 threat to seize and suspend appellant's business corporation certificate which resulted in appellant
21 dissolving its corporation certificate. Appellant contends that its representative went to the FTB office
22 to request a copy of the Tax Computation Guide. Appellant asserts that it never failed to pay any
23 annual payments and feels abused by the FTB's actions. Appellant contends that the FTB successfully
24 levied its business bank accounts but, due to the lack of funds in the accounts, the banks charged
25 appellant a \$100 processing fee for each levy order for a total of \$300. Appellant contends that the
26 only amounts appellant should be required to pay is the late penalty for paying the 2010 tax in June
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⁴ Although appellant's check was dated June 17, 2011, respondent appears to state that it received the payment on June 16, 2011. Respondent may wish to clarify the date it received appellant's check dated June 17, 2011.

1 2011, rather than March 15, 2011. Appellant contends that it would have paid the 2011 tax by March
2 15, 2012. (Appeal Letter, Atths.)

3 Respondent

4 Respondent initially notes that a review of appellant's tax computations reflects that
5 appellant timely paid its estimated tax payment and minimum tax prior to the 2007 tax year.
6 Respondent notes that, in 2007 and beyond, appellant's payment and filing compliance changed. The
7 records reflect that appellant did not make a timely estimated tax payment and its minimum tax was not
8 paid until it filed its 2007 through 2010 returns on April 15th of the year following each tax year.
9 Respondent contends that appellant continued this pattern of non-compliance in the 2010 tax year.
10 (Resp. Op. Br., p. 4, Exh. I.)

11 Respondent contends that it properly imposed the late payment penalty in accordance
12 with R&TC section 19132 and appellant has not shown that reasonable cause exists to abate the late
13 payment penalty.⁵ Respondent contends that appellant made no payments for the 2010 tax year on or
14 before the filing deadline of March 15, 2011. Respondent further contends that the FTB did not receive
15 appellant's full payment for the 2010 tax year until June 2011, when the FTB applied appellant's 2011
16 estimated tax payment to the 2010 tax year. Respondent notes that appellant acknowledged the
17 propriety of the late payment penalty in its appeal letter and respondent asserts that appellant does not
18 provide any argument that reasonable cause exists to abate the late payment penalty. (Resp. Op. Br.,
19 p. 5.)

20 With regard to the underpayment of the estimated tax penalty, respondent contends that
21 appellant did not make an estimated tax payment for the 2010 tax year, that was due on April 15, 2010,
22 until June 2011, which was more than one year late. Respondent contends that the amount of the
23 required installment was \$800, the minimum franchise tax amount, and no payment was received on or
24 prior to the estimated tax due date of April 15, 2010. As such, the amount of the underpayment is \$800
25 for the 2010 tax year. Respondent contends that, when it initially received the June 2011 payment, it
26 applied that payment as instructed by appellant to appellant's 2011 account. Respondent contends that
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28 ⁵ Respondent calculated the penalty as follows: $\$800 \times 5\% = \40 for the underpayment portion of the late payment penalty;
 $\$800 \times 0.5\% \times 3 \text{ months} = \12 for the monthly portion of the late payment penalty, for a total of \$52.

1 appellant did not assert that the payment was incorrectly applied until February 2012, and appellant did
2 not arrange with the Advocate to have that payment applied (as of June 2011) to appellant's 2010 tax
3 year, until August 2012. Therefore, respondent contends that the underpayment of the estimated tax
4 penalty for the 2010 tax year was properly imposed. (Resp. Op. Br., pp. 5-6.)

5 Respondent notes that appellant makes a reasonable cause type argument in its
6 contention that it relied on the instructions of its tax preparer and sent that payment that it intended for
7 2010 with a 2011 estimated tax payment voucher. Respondent contends that, when the June 2011
8 payment was made, the 2011 tax year estimated tax was overdue, as the 2011 estimated tax was due on
9 March 15, 2011.⁶ As such, respondent contends that, when the FTB received that payment with the
10 2011 estimate payment voucher and the notation on the check stating that the payment was for the 2011
11 tax year, respondent properly applied the payment to appellant's 2011 liability. Respondent further
12 argues that any instruction which appellant received from its enrolled agent to remit that payment for
13 2011 was not incorrect advice, as the payment was overdue. Respondent contends that the Advocate's
14 willingness to grant appellant's request to transfer the payment from 2011 to 2010 was done to
15 accommodate appellant and to help satisfy its 2010 account liability. (Resp. Op. Br., p. 6.)

16 Respondent further asserts that, when there is an underpayment of the estimated tax, the
17 addition to tax is mandatory even if the full amount of the tax was paid on or before the due date of the
18 return, citing R&TC section 19142 and Internal Revenue Code (IRC) section 6655(a). Respondent also
19 notes that the Board has held that the law requires the imposition of the estimated tax penalty upon the
20 finding of such an underpayment and that relief from the estimated tax penalty is not available upon a
21 showing of reasonable cause or a lack of willful neglect, citing the *Appeal of Weaver Equipment*
22 *Company*, 80-SBE-048, decided by the Board on May 21, 1980, the *Appeal of J. F. Shea Co., Inc.*,
23 79-SBE-120, decided by the Board on August 16, 1979, and the *Appeal of Decoa, Inc.*, 76-SBE-032,
24 decided by the Board on April 5, 1976. Accordingly, respondent contends that it cannot abate the
25 penalty because the underpayment of the estimated tax penalty is mandatory. (Resp. Op. Br., p. 6.)

26 With regard to interest, respondent contends that appellant has not provided any
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⁶ Respondent may want to clarify whether the estimated tax for the 2011 tax year was due on March 15, 2011 or April 15, 2011.

1 evidence to support an abatement of interest in this case under R&TC section 19104. Therefore,
2 respondent contends that it is obligated to charge interest on appellant's unpaid liability from the
3 original due date of the return. Respondent contends that appellant has not offered any explanation or
4 evidence that respondent committed an error or delay in the performance of a ministerial or managerial
5 act. Respondent further contends that the accrual of interest is solely attributable to appellant's late
6 payment of its minimum franchise tax and is not due to any delay or error in the performance of a
7 ministerial or managerial act. (Resp. Op. Br., p. 6-7.)

8 With regard to appellant's request for a reimbursement of the bank charges, respondent
9 contends that appellant is not entitled to the reimbursement. Respondent contends that, while R&TC
10 section 21018 provides that a taxpayer may file a claim for reimbursement of charges imposed by
11 unrelated business entities as a result of erroneous collection action, appellant has made no such claim
12 with respondent. Respondent further contends that there is no language in the statute that gives the
13 Board jurisdiction to consider respondent's actions on claims of reimbursement under that provision.
14 Respondent also contends that the collection action was not erroneous. Respondent contends that it
15 issued the OTW to satisfy outstanding tax liabilities pursuant to R&TC section 18670.⁷ Respondent
16 contends that appellant had an outstanding liability regarding its 2010 tax year account and established
17 a pattern of late payment of its annual minimum tax. Respondent provided numerous notices to
18 appellant regarding the balance due for 2010 and, when appellant's 2010 balance remained unpaid,
19 respondent asserts that it properly undertook collection actions including the attachment of appellant's
20 bank accounts. Respondent contends that its OTWs were not issued in error and that appellant has not
21 provided any authority that would allow for a reimbursement of the OTW processing fee charged by
22 the banks. (Resp. Op. Br., pp. 7-8.)

23 Applicable Law

24 Burden of Proof

25 The FTB's determination is presumed correct and an appellant has the burden of proving
26 it to be wrong. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*,

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28 ⁷ R&TC section 18670 provides that the FTB may require an entity, such as a bank, to withhold and transfer to the FTB amounts belonging to a taxpayer who failed to satisfy its tax liability.

1 2001-SBE-001, May 31, 2001.) In the absence of uncontradicted, credible, competent, and relevant
2 evidence showing an error in the FTB's determinations, respondent's determinations will be upheld.
3 (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.)

4 Filing Requirement

5 R&TC section 18601 generally provides that a corporate taxpayer shall file a tax return
6 on or before the 15th day of the third month after the close of its tax year. R&TC section 18604,
7 subdivision (a), provides for a reasonable extension of time to file a return, not to exceed seven months.
8 However, R&TC section 18604, subdivision (b), provides that an extension of time granted to file a
9 return is not an extension of time for the payment of the tax required to be paid on or before the original
10 due date of the return.

11 Late Payment Penalty

12 R&TC section 19132 provides that a late payment penalty is imposed when a taxpayer
13 fails to pay the amount shown as due on the return on or before the due date of the return. The late
14 payment penalty has two parts. The first part is 5 percent of the unpaid tax. (Rev. & Tax. Code,
15 § 19132, subd. (a)(2)(A).) The second part is a penalty of 0.5 percent per month, or portion of a month,
16 calculated on the outstanding balance. (Rev. & Tax. Code, § 19132, subd. (a)(2)(B).) The late
17 payment penalty may be abated if the taxpayer can show that the failure to make a timely payment of
18 tax was due to reasonable cause and was not due to willful neglect. (Rev. & Tax. Code, § 19132,
19 subd. (a).) The taxpayer bears the burden of proving that both conditions existed. (*Appeal of*
20 *Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983.) To establish "reasonable cause" for the late payment of
21 tax, the taxpayer must show that its failure to make a timely payment of the proper amount of tax
22 occurred despite the exercise of ordinary business care and prudence. (*Id.* See also *Appeal of Robert T.*
23 *and M.R. Curry*, 86-SBE-048, Mar. 4, 1986.) The taxpayer bears the burden of proving that an
24 ordinarily-intelligent and prudent businessperson would have acted similarly under the circumstances.
25 (*Id.* See also *Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982.)

26 Underpayment of Estimated Tax Penalty

27 R&TC section 19025 requires that corporate taxpayers pay at least the entire amount of
28 the minimum franchise tax as an estimated tax payment on or before the 15th day of the fourth month

1 of the taxable year. R&TC section 19142 provides that, when there is an underpayment of the
2 estimated tax, an amount shall be added to the tax for the taxable year, on the amount of the
3 underpayment for the period of the underpayment. The amount of the underpayment is equal to the
4 excess of the amount of the required installment over the amount of the installment (if any) paid before
5 the due date for the installment. (Rev. & Tax. Code, § 19144, subd. (a).) The imposition of the
6 estimated tax penalty is mandatory. (*Appeal of George S. and Jean D. McEwen*, 85-SBE-081, Aug. 20,
7 1985.) The Board has held that relief from the penalty for the underpayment of the estimated tax is not
8 available upon a showing of “extenuating circumstances, “reasonable cause”, or “a lack of willful
9 neglect.” (*Appeal of Weaver Company, supra.*)

10 Interest Abatement

11 Interest is not a penalty but is merely compensation for the taxpayer’s use of the money.
12 (Rev. & Tax. Code, § 19101, subd. (a); *Appeal of Amy M. Yamachi*, 77-SBE-095, June 28, 1977;
13 *Appeal of Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.) To obtain interest abatement, an appellant
14 must qualify under one of the following three statutes: R&TC sections 19104, 19112, or 21012.
15 R&TC section 21012 does not appear applicable here because there has been no reliance on any written
16 advice requested of respondent. Under R&TC section 19112, interest may be waived for any period for
17 which respondent determines that an individual or fiduciary demonstrates an inability to pay that
18 interest solely because of extreme financial hardship caused by a significant disability or other
19 catastrophic circumstance. This statute does not provide any authority for the Board to review the
20 FTB’s determination whether to abate interest for extreme financial hardship.

21 Under R&TC section 19104, respondent may abate all or a part of any interest on a
22 deficiency to the extent that interest is attributable in whole or in part to any unreasonable error or delay

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1 committed by respondent in the performance of a ministerial or managerial act.⁸ (Rev. & Tax. Code,
2 § 19104, subd. (a)(1).) An error or delay can only be considered when no significant aspect of the error
3 or delay is attributable to the appellant and after respondent has contacted the appellant in writing with
4 respect to the deficiency or payment. (Rev. & Tax. Code, § 19104, subd. (b)(1).) There is no
5 reasonable cause exception to the imposition of interest. (*Appeal of Audrey C. Jaegle, supra.*)

6 The Board's jurisdiction in an interest abatement case is limited by statute to a review of
7 respondent's determination for an abuse of discretion. (Rev. & Tax. Code, § 19104, subd. (b)(2)(B).)
8 To show an abuse of discretion, the appellant must establish that, in refusing to abate interest,
9 respondent exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law.
10 (*Woodral v. Commissioner* (1999) 112 T.C. 19, 23.) Interest abatement provisions are not intended to
11 be routinely used to avoid the payment of interest, thus an abatement should be ordered only "where
12 failure to abate interest would be widely perceived as grossly unfair." (*Lee v. Commissioner* (1999) 113
13 T.C. 145, 149.) The mere passage of time does not establish error or delay that can be the basis of an
14 abatement of interest. (*Id.* at p. 150.)

15 Erroneous Levy

16 R&TC section 21018 provides that a taxpayer may file a claim with the FTB for a
17 reimbursement of charges or fees imposed on the person by an unrelated business entity as the direct
18 result of an erroneous levy, an erroneous processing action, or an erroneous collection action by the
19 FTB. Charges that may be reimbursed include an unrelated business entity's usual and customary
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21 ⁸ In the *Appeal of Michael and Sonia Kishner*, 99-SBE-007, decided on September 29, 1999, the Board adopted the
22 language from Treasury Regulation section 301.6404-2(b)(2), defining a "ministerial act" as:

23 [A] procedural or mechanical act that does not involve the exercise of judgment or discretion, and that
24 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.

25 The Board has not yet adopted a definition for the term "managerial act." However, when a California statute is
26 substantially identical to a federal statute (such as with the interest abatement statute in this case), the Board may consider
27 federal law interpreting the federal statute as highly persuasive. (*Appeal of Michael and Sonia Kishner, supra*, (citing
Douglas v. State of California (1942) 48 Cal.App.2d 835.)) In this regard, Treasury Regulation section 301.6404-2(b)(1)
defines a "managerial act" as:

28 [A]n 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 of personnel. A
decision concerning the proper application of federal tax law (or other federal or state law) is not a
managerial act.

1 charge for complying with the levy instructions and reasonable charges for overdrafts that are a direct
2 consequence of the erroneous levy, an erroneous processing action, or an erroneous collection action
3 and are paid by the taxpayer and not waived by the unrelated business entity or otherwise reimbursed.
4 (Rev. & Tax. Code, § 21018, subd. (a).) Claims must be filed within 90 days from the date of the
5 erroneous levy, erroneous processing action, or erroneous collection action. (Rev. & Tax. Code,
6 § 21018, subd. (b).)

7 For the FTB to grant the claim, the following conditions must be satisfied: (1) the
8 erroneous levy, erroneous processing action, or erroneous collection action was caused by an error
9 made by the FTB; (2) prior to the erroneous levy, erroneous processing action, or erroneous collection
10 action, the taxpayer responded to all contacts by the FTB and provided the FTB with any requested
11 information or documentation sufficient to establish the taxpayer's position;⁹ and, (3) the charge or fee
12 has not been waived by the unrelated business entity or otherwise reimbursed. (Rev. & Tax. Code,
13 § 21018, subd. (a).)

14 STAFF COMMENTS

15 It appears that appellant indicated in its appeal letter that the only amount it should pay
16 is the late payment penalty. However, if appellant disputes the late payment penalty, appellant should
17 be prepared to discuss the circumstances that resulted in the late payment and provide evidence
18 demonstrating reasonable cause to abate the late payment penalty.

19 With regard to the underpayment of the estimated tax penalty, it appears that the
20 imposition of the estimated tax penalty is mandatory. (Rev. & Tax. Code, § 19042; *Appeal of George S.*
21 *and Jean D. McEwen, supra.*) Furthermore, the Board has held that relief from the penalty for the
22 underpayment of the estimated tax is not available upon a showing of "extenuating circumstances,
23 "reasonable cause", or "a lack of willful neglect." (*Appeal of Weaver Company, supra.*) Appellant
24 should be prepared to provide legal authority to support its position that the underpayment of the
25 estimated tax penalty can be waived in this matter.

26 It appears that appellant does not provide any specific contentions regarding interest
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⁹ This provision may be waived by the FTB for reasonable cause. (Rev. & Tax. Code, § 21018, subd. (a).)

