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BOARD OF EQUALIZATION

STATE OF CALIFORNIA

In the Matter of the Appeal of:	**REHEARING SUMMARY**
	PERSONAL INCOME TAX APPEAL
JOE L. SANTOS[1]	Case No. 445970

Year	Proposed Assessment[2]
2003	$1,914, plus interest

Representing the Parties:

For Appellant: Jason Peart, Taxpayer Appeals Assistance Program (TAAP) Representative
For Franchise Tax Board: Janet Butler, Legal Analyst

QUESTION: Whether respondent abused its discretion in refusing to abate interest.

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[1] Appellant resides in Ventura County.

[2] The underlying appeal was presented at an oral hearing at the September 22, 2009, Board meeting on the issues of the proposed assessment and interest. The Board did not decide the appeal at that hearing. The appeal was decided by the Board's adoption of a summary decision issued on January 26, 2010, in which the Board sustained respondent's proposed assessment in the amount of $1,914 in tax, plus interest for 2003. Subsequently, appellant filed a petition for rehearing and on August 24, 2010, the Board concluded that the petition for rehearing should be granted specifically for the issue of whether appellant is entitled to interest abatement.

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HEARING SUMMARY

Background

Appellant filed a timely 2003 California income tax return. The Franchise Tax Board (FTB or respondent) subsequently received information regarding a federal audit of appellant's 2003 return. Respondent issued a Notice of Proposed Assessment (NPA) on December 13, 2006, which reflected the federal adjustments. (Respondent's Opening Brief (Resp. Op. Br.), Ex. C.) As a result, appellant's California taxable income was increased by $33,169 to $56,699 and additional tax of $1,914, plus interest, was assessed. (*Id.*)

By letter dated February 2, 2007, appellant protested the NPA which respondent apparently received on February 15, 2007. (Resp. Op. Br., Ex. D.) In that letter, appellant argued that he was unable to provide documentation during the federal audit because he was in the process of relocating his home, and therefore decided to submit an offer in compromise (OIC). (Resp. Op. Br., exhibit D.) Appellant submitted his federal OIC and indicated on the form that he was submitting his offer on the basis of both Doubt as to Liability (DATL) and Doubt as to Collectability (DATC). (Appellant's Appeal Letter, (App. Ltr.), exhibit D, p. 3.) Appellant indicated to respondent that the OIC was accepted. (App. Ltr., exhibit C, p. 2)

Respondent acknowledged its receipt of appellant"s protest on or about February 26, 2007.[3] (App. Ltr., Ex. A.) Due to "work constraints," respondent did not assign appellant's protest until September 27, 2007. (Resp. Op. Br., p. 6.) Respondent prepared a letter to be mailed to appellant on October 29, 2007. (Resp. Op. Br., Ex. E.) However, this letter was not mailed due to appellant's mailing address being located in a "fire zone."[4] (Resp. Op. Br., Ex. F.) Subsequently, the FTB issued

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[3] In the FTB's opening brief prior to the first hearing, respondent states that it sent an acknowledgement notification to appellant on or about February 23, 2007. According to Exhibit A attached to appellant's appeal letter, the date shown is February 26, 2007.

[4] The FTB issued a press release on October 29, 2007 indicating that it will match the Internal Revenue Service's (IRS) postponement periods, giving taxpayers affected by the Southern California fires automatic postponement for "tax returns, payments, and other time-sensitive obligations" due on or after October 21, 2007, through January 31, 2008. The FTB's press release refers readers to the IRS press release from October 29, 2007 (IR-2007-178), which states that the IRS will extend tax return filing and payment deadlines and abate interest and penalties, which would otherwise apply, during the period from October 21, 2007, through January 31, 2008. The IRS press release also indicates that no penalty or interest will be abated for taxpayers that do not have a filing, payment or deposit due date during this period. (Respondent's Opening Brief upon Rehearing (Resp. Op. Br. Rhg.), Exs. H and I.)

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the letter on January 8, 2008, which stated the FTB received appellant's protest and the information appellant provided indicates that appellant paid the IRS. (App. Ltr., exhibit B) Respondent also requested appellant provide a copy of the revised federal report if changes were made to the federal adjustments. (*Id.*) The letter also requested a response from appellant by February 11, 2008. (*Id.*) On February 8, 2008, respondent received a telephone call from appellant requesting additional time to respond. (Resp. Op. Br., Ex. F.) The FTB provided appellant an extension until February 29, 2008 to provide a reply. (*Id.*)

Appellant provided respondent with a second protest letter dated February 27, 2008 in which he argued that the IRS accepted his OIC on the basis of both DATL and DATC. (App. Ltr., Ex. C.) Additionally, appellant stated that he could not afford to pay respondent more than $210 because he had over $20,000 in medical bills to pay and he was unemployed. (App. Ltr.) Respondent subsequently issued a Notice of Action (NOA) on March 10, 2008, affirming respondent's position in the NPA. (App. Ltr., Ex. C, p. 1.)

Appellants filed a timely appeal to the Board with respect to the proposed assessment and interest. After the Board heard the matter on September 22, 2009, it was unable to reach a majority conclusion at that hearing. The appeal was decided by a summary decision issued on January 26, 2010, in which the Board upheld respondent's proposed assessment of $1,914, plus interest. Appellant subsequently filed and was granted a petition for rehearing as to the interest abatement issue. Accordingly, this matter is before the Board again with respect to interest abatement.

Contentions

Appellant

Appellant contends that pursuant to Revenue and Taxation Code (R&TC) section 19104, subdivision (a), interest should be abated for the eight months between February 15, 2007 and October 29, 2007. (Appellant's Opening Brief Upon Rehearing (App. Op. Br. Rhg), p. 1.) Appellant notes that respondent did not assign the case until September 27, 2007 due to "workload constraints," when it received appellant's protest letter on February 15, 2007. (*Id.*) Appellant also notes there was additional delay between October 29, 2007 and January 8, 2008, when respondent postponed mailing because appellant's address was located in a disaster area. (*Id.*)

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Appellant contends that the term, "workload constraints," has not been defined by respondent with precision. (App. Op. Br. Rhg, p.2.) Appellant contends that without a clear definition of "workload constraints," respondent is given too much discretion to decide what qualifies as unreasonable delay in the processing of a taxpayer's claim. (App. Op. Br. Rhg, pp. 3.) Appellant contends that respondent has an incentive to not process such claims in a timely manner because a taxpayer is liable for interest that accrues on his deficiency. (*Id.*)

Appellant also asserts that Treasury Regulation (Treas. Reg.) section 301.6404-2 (c), example 8, which respondent relies on, is distinguished from the present case because in the present case there was no prioritizing one particular case over another. (App. Op. Br. Rhg, pp. 2-3.) Rather, appellant contends that the present case is analogous to example 3 listed in the same Treas. Reg. section 301.6404-2(c), where interest may be abated when an unreasonable delay results from a supervisor's decision to not assign a case to an agent who can process it. (*Id.* at p. 3.) Appellant contends that in this case, respondent concedes appellant's protest went unassigned for eight months. (*Id.*) Appellant asserts that the time lapses between the receipt of appellant's protest and the decision to assign appellant's case is completely within respondent's control and no aspect of the error or delay was attributed to appellant. (*Id.*) Accordingly, appellant contends that it should not be liable for interest that accrues while a supervisor takes his time to decide which agent receives the case. (*Id.*)

With respect to respondent's contention that the delay due to workload constraints was not unreasonable delay in the performance of a ministerial or managerial act, appellant contends that respondent misinterprets *Leffert v. Commissioner* (2001) T.C. Memo 2001-23 (*Leffert*) and *Strang v. Commissioner* (2001) T.C. Memo 2001-104 (*Strang*), to reach that conclusion. (App. Addl. Br. Rhg, pp. 1-2.) Appellant contends in *Leffert*, the court held that a nine year delay partially caused by a technician's decision to prioritize other protests over appellant's protest did not qualify as the erroneous or dilatory performance of a ministerial act. (*Id.*) Appellant notes that the IRS technician in *Leffert* testified that much of the delay was due to the uncooperative nature of appellant's representatives, who failed to disclose necessary information. (*Id.*) Appellant contends that similarly in *Strang*, the technician had been assigned a protest, but chose to prioritize other matters over it. (*Id.*) Appellant argues, in contrast, the technician in the present case did not receive appellant's case for ten months

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because he needed to complete his workload of older protests before he could be assigned to appellant's protest. (*Id.* at p. 2.)

Respondent

Respondent initially contends that the Board made the correct determination when the Board sustained respondent's assessment of tax and interest. (Resp. Op. Br. Rhg., p.1.) Respondent argues appellant has not shown respondent abused its discretion in declining to abate interest on the proposed assessment. (*Id*. at p. 2.) Respondent alleges there was no unreasonable error or delay in the performance of a ministerial or managerial act by respondent's employees during the eleven month delay between the receipt of appellant's protest and respondent's issuance of the position letter. (*Id*.)

Respondent states that it received appellant's protest on February 15, 2007, and a position letter was not prepared to be sent to appellant until October 29, 2007 because of "workload constraints." (Resp. Op. Br. Rhg., p.2.) Moreover, because appellant's residence was located in a fire zone (disaster area), respondent postponed the mailing of the position letter until January 8, 2008. (*Id*.) Respondent notes that appellant's protest was assigned and reviewed within eight months of receiving appellant's protest letter. (Resp. Op. Br. Rhg., p.4.) Respondent asserts the workload constraints in this matter are consistent with the workload constraints for all protests processed during the same time. (*Id*.) Accordingly, respondent contends there were no irregularities or "unreasonable" delays during the passage of time that was attributable to "workload constraints." (*Id*.) Citing Treas. Reg., section 301.6404-2(b)(1) and example 8 in subsection (c), respondent contends that delays due to prioritizing and organizing workloads are not acts for which interest may be abated. (*Id*.)

With respect to appellant's contention that Example 3 of Treas. Reg. section 301.6404-2(c) applies to the present case, respondent contends that there was no decision made by respondent's supervisor to not assign appellant's protest. (Resp. Op. Br. Rhg., p. 3.) Instead, respondent contends that protests are assigned according to staff availability and the age of the protest.[5] (*Id*.) Thus, respondent contends the assignment of protests in the unit that considered appellant's protest was not a managerial act because there was no "temporary or permanent loss of records" or "exercise of judgment

[5] There are several factors that affect the timeframe for resolving a protest case: (1) number of resolution technicians available to close cases; (2) complexity of the cases; (3) whether a mailing address is located in a disaster area.

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or discretion relating to management of personnel" as defined by Treas. Reg. section 301.6404-2(b)(1). (*Id.*)

Respondent further cites *Leffert* and *Strang* for the proposition that delays by the IRS agents due to an evaluation of "caseload" and workload priorities do not constitute a delay for purposes of abating interest under Internal Revenue Code (IRC) section 6404.[6] (Resp. Op. Br. Rhg., p.4.) Respondent notes that in *Leffert*[7], the Court discussed the period of time from receiving the taxpayer's protest on September 20, 1988, to the IRS Appeals Officer hearing on March 12, 1990, and sent his initial position letter on March 13, 1990. (*Id.*) Respondent further notes that the *Leffert* court held that in consideration of the Appeal Officer's "caseload," in addition to the necessity for him to provide proper notice to all parties involved, the Appeal Officer acted expeditiously. (*Id.*) In addition, respondent notes that the *Leffert* court held that its review of the record indicated the Appeal Officer's decision to order his work affairs based on caseload priorities was not a ministerial act as defined in IRC section 6404. (*Id.*) Accordingly, respondent asserts that workload constraints were considered by the court and deemed to not be a basis for interest abatement. (*Id.*)

With respect to the perceived delay due to appellant's address being in a disaster area, respondent contends this is not a basis for interest abatement. (Resp. Op. Br. Rhg., p.5.) Respondent contends that, in response to the President of the United States declaring the area a presidentially declared federal disaster zone, respondent followed its normal procedures by delaying issuance of notices of any type to taxpayers residing in the disaster area. (*Id.*) Based on the presidential declaration, the IRS allowed an extension for tax return filing and payment deadlines for victims of the disaster. (*Id.*) The extension applied to items due on or after October 21, 2007, through January 31, 2008. (*Id.*) The IRS also indicated that no penalty or interest would be abated for taxpayers that did not have a filing, payment or deposit due date, including an extended filing or payment due date, during this period. (*Id.*) Accordingly, respondent issued a similar news release to advise taxpayers in the affected areas that respondent would match the IRS postponement period for taxpayers impacted by the disaster who had

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[6] IRC section 6404 is the federal counterpart to R&TC section 19104.

[7] The court in *Leffert* only discussed whether there was any error or delay by the IRS agent in performing a ministerial act. The court did not address whether there was any error or delay by the IRS agent in performing a managerial act.

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tax-related time sensitive acts due on or after October 21, 2007, through January 31, 2008. (Resp. Op. Br. Rhg., p.6.) Respondent contends that in this case, appellant did not have a due date during the disaster period. (*Id*.) Respondent asserts that the only effect of the disaster declaration was that respondent delayed sending its letter acknowledging appellant's protest. (*Id*.) Thus, respondent contends that the delay in sending the notice to appellant did not amount to an unreasonable error or delay in performance of a ministerial or managerial act to warrant abatement. (*Id*.)

Applicable Law

Interest Abatement

Interest is not a penalty but is merely compensation for the taxpayer's use of the money. (Rev. & Tax. Code, § 19101, subd. (a); *Appeal of Amy M. Yamachi*, 77-SBE-095, June 28, 1977; *Appeal of Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.)[8] To obtain interest abatement, appellant must qualify under one of the following three statutes: R&TC sections 19104, 19112 or 21012. R&TC section 21012 is not applicable because there has been no reliance on any written advice requested of respondent. Under R&TC section 19112, interest may be waived for any period for which respondent determines that an individual or fiduciary demonstrates inability to pay that interest solely because of extreme financial hardship caused by significant disability or other catastrophic circumstance. This section does not provide any authority for the Board to review the FTB's determination whether to abate interest for extreme financial hardship. Accordingly, appellant must show he qualifies under R&TC section 19104 for interest abatement.

Under R&TC section 19104, respondent may abate all or a part of any interest on a deficiency to the extent that interest is attributable in whole or in part to any unreasonable error or delay committed by respondent in the performance of a ministerial or managerial act. (Rev. & Tax. Code, § 19104, subd. (a)(1).) Furthermore, an error or delay can only be considered when no significant aspect of the error or delay is attributable to appellant and after respondent has contacted appellant in writing with respect to the deficiency or payment. (Rev. & Tax. Code, § 19104, subd. (b)(1).) There is no reasonable cause exception to the imposition of interest. (*Appeal of Audrey C. Jaegle, supra*.)

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[8] Board of Equalization cases may be viewed on the Board's website (www.boe.ca.gov).

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

> [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.

When a California statute is substantially identical to a federal statute (such as with the interest abatement statute in this case),[9] the Board may consider 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, Treas. Reg. section 301.6404-2(b)(1) defines a "managerial act" as:

> [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.

Generally, respondent's decisions relating to the organization and prioritizing of the processing of tax returns involve general administrative decisions, which do not provide a basis for interest abatement. For example:

> A taxpayer claims a loss on the taxpayer's income tax return and is notified that the IRS intends to examine the return. However, a decision is made not to commence the examination of the taxpayer's return until the processing of another return, for which the statute of limitations is about to expire, is completed. The decision on how to prioritize the processing of returns based on the expiration of the statute of limitations is a general administrative decision. Consequently, interest attributable to a delay caused by this decision cannot be abated under paragraph (a) of this section.

(Treas. Regs., § 301.6404-2(c), example 8.)

One example of a ministerial act that could provide a basis for interest abatement is the following:

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

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[9] R&TC section 19104, subdivisions (a) and (b)(2)(B) are substantially identical to IRC section 6404, subsections (e) and (h).

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(Treas. Regs., § 301.6404-2(c), example 11.) (See also, e.g., Treas. Regs., § 301.6404-2(c), examples 1 & 2.) Decisions regarding personnel and case assignments, in addition to the misplacing of files, can be considered managerial acts, which can also provide a basis for interest abatement. For example:

> A revenue agent is sent to a training course for an extended period of time, and the agent's supervisor decides not to reassign the agent's cases. During the training course, no work is done on the cases assigned to the agent. The decision to send the revenue agent to the training course and the decision not to reassign the agent's cases are not ministerial acts; however, both decisions are managerial acts.

(Treas. Regs., § 301.6404-2(c), example 3.) (See also, e.g., Treas. Regs., § 301.6404-2(c), examples 4, 5, 6, & 10.)

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

STAFF COMMENTS

The parties should be prepared at the hearing to address whether there was an unreasonable error or delay in a ministerial or managerial act performed by one of respondent's employees during the handling of appellant's protest. In this connection, respondent should be prepared to address whether or not the failure to assign appellant's case until September 27, 2007, was the result of a ministerial or managerial act. Respondent should be prepared to explain its general protest procedures during the period at issue and compare them to respondent's actions related to appellant's protest.

Appellant should be prepared to discuss whether the eight month delay in assigning the

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protest was unreasonable and whether it should be considered a managerial act or a general administrative decision relating to respondent's workload. Appellant should be prepared to discuss how respondent, in failing to abate interest, exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. Appellant should also be prepared to explain whether the "failure to abate interest would be widely perceived as grossly unfair." (*Lee v. Commissioner, supra*.)

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