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

10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **MARNA M. SKAAR**) Case No. 520443

	<u>Year</u>	<u>Claim for Refund</u>
	2006	\$1,585.01

17 Representing the Parties:

18 For Appellant:	Melinda C. Skaar
19 For Franchise Tax Board:	Jaclyn N. Appleby, Tax Counsel Eric A. Yadao, Administrator I

21 **QUESTION:** Whether appellant has shown that she is entitled to abatement of interest.

22 **HEARING SUMMARY**

23 Background

24 Appellant, a physician, filed a timely California resident tax return for 2006 that was
25 dated April 17, 2007. On her 2006 return, appellant reported California wages of \$100,000, federal
26 adjusted gross income (AGI) of \$263,184, "California adjustments-subtractions" of \$164,148, California
27 AGI of \$99,036, California itemized deductions of \$64,795, taxable income of \$34,241, exemption
28 credits of \$586, and tax of \$22. After taking into account California withheld income of \$7,454 and

1 California estimated tax of \$15,668, appellant claimed a refund of \$13,100. The category “California
2 adjustments-subtractions” consisted of a taxable refund of \$20,276 and an adjustment of \$143,872,
3 which apparently consisted in part of income to appellant of \$140,229 from a Subchapter S medical
4 corporation.

5 After reviewing appellant’s return, respondent requested appellant in an audit letter dated
6 June 11, 2009, to furnish a narrative and schedule (plus copies of her California and federal K-1’s if
7 there was a relevant difference between the two K-1’s) explaining why she was entitled to an adjustment
8 of \$143,872. Respondent stated in the letter that if appellant did not provided the requested information
9 by June 30, 2009, it would issue a Notice of Proposed Assessment (NPA) disallowing the adjustment of
10 \$143,872 for lack of substantiation and that such a disallowance would ultimately result in additional tax
11 of approximately \$12,616 plus interest. On June 30, 2009, appellant made a payment to respondent of
12 \$12,600.

13 In a letter dated July 1, 2009, appellant acknowledged that the adjustment in the amount
14 of \$140,229 was in error and explained that the error was caused in some manner by the TurboTax
15 software that appellant used in preparing her 2006 California return. However, appellant took the
16 position that the remaining adjustment of \$3,643 was not in error but offered no supporting explanation.
17 She also questioned how the estimated amount of interest for 2006 that respondent apparently provided
18 appellant was calculated, stated that appellant was an outstanding citizen who promptly honored her tax
19 obligations and sometimes overpaid them, and requested a waiver of any interest for 2006. On July 7,
20 2009, respondent issued an NPA disallowing the adjustment of \$143,872 for lack of substantiation and
21 proposing the assessment of additional tax in the amount of \$12,616.00 and interest of \$1,569.01. The
22 NPA acknowledged the payment by appellant of \$12,600 but stated that amount had not yet been
23 applied to her account. The NPA further stated that interest would be charged on that amount only until
24 June 30, 2009, the date of payment, but that interest would be charged on any unpaid amount of
25 appellant’s tax liability until payment was made. On July 24, 2009, appellant made a payment to
26 respondent in the amount of \$1,585.01 that completely satisfied her tax liability for 2006.

27 In a protest letter dated September 8, 2009, appellant essentially agrees that respondent
28 properly disallowed the adjustment of \$140,229 but takes the position, without further explanation, that

1 the amount of \$3,643 should not have been disallowed and respondent's error in that regard
2 acknowledged. Appellant expresses concern that (1) there was an unnecessarily long delay by
3 respondent in acknowledging its alleged error in disallowing the amount of \$3,643, (2) the interest rate
4 of eight percent being charged was excessive, and (3) the NPA does not reflect her corrections or other
5 previous communications between her and respondent. Appellant also criticizes respondent for the
6 allegedly "repeated neglect and inefficiency of the FTB in properly handling and addressing this matter
7 both initially and more recently which compounds the interest problem." (Resp. Op. Br., Exhibit E, p.
8 1.) Appellant concludes her protest letter by referring to her favorable tax compliance record and
9 requesting respondent either to waive or to reduce substantially the interest assessed against her.¹

10 In a subsequent telephone conversation with appellant, one of respondent's employees
11 informed appellant that respondent's proposed assessment was correct. Respondent states that appellant
12 told the employee in that conversation that she was not liable for additional tax or interest and she would
13 pursue payment of those amounts from TurboTax. (Resp. Op. Br., p. 2 and Exhibit F.) In a letter dated
14 September 30, 2009, which replied to respondent's confirming letter regarding her telephone
15 conversation with its employee, appellant states that TurboTax informed her that (1) its software
16 incorporated accurately respondent's own instructions regarding how to complete a return, (2) the
17 position taken on her return regarding the total amount of \$143,872 was correct as filed, and (3) she had
18 no liability for additional tax, penalties, or interest for 2006. Appellant further states that TurboTax
19 offered to engage in a conference call with her and respondent regarding respondent's instructions.
20 Appellant concludes her letter by stating that she would request the assistance of respondent's Taxpayer
21 Advocate if she could not otherwise resolve the matter favorably. (Resp. Op. Br., Exhibit G.)

22 Respondent alleges that, on October 6, 2009, one of its employees informed appellant in
23 a telephone conversation that (1) its NPA was correct, (2) it would not engage in a conference call with
24 TurboTax, and (3) appellant could file an appeal with the Board if she was dissatisfied with the
25 assessment against her. Respondent also alleges that the employee provided appellant with the
26 telephone number of the Taxpayer Advocate. In a Notice of Action (NOA) dated November 30, 2009,
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¹ Although appellant does not explicitly claim a refund of \$1,585.01 in her protest letter, respondent apparently treated her protest letter at some point as a refund claim in view of her payment of that amount before her protest letter was filed.

1 respondent affirmed its NPA. On December 30, 2009, appellant timely appealed the NOA. Respondent
2 states that its records indicate that, subsequent to filing her appeal, appellant engaged in communications
3 with respondent's Taxpayer Advocate in which she "acknowledged the error in her return and the fact
4 that the deduction should not have been taken." (Resp. Op. Br., p. 3.)

5 Contentions

6 Appellant contends in her appeal letter that the interest assessed against her should be
7 abated or at least reduced. In support of her contention, she alleges that her consultations with various
8 divisions of respondent, such as the consumer help line, the audit department, and the Taxpayer
9 Advocate, (as well as with the staff of TurboTax) resulted in conflicting information about how
10 respondent's instructions should be interpreted and, therefore, how her tax should be calculated. She
11 appears to attribute this confusion to unspecified defects in the instructions themselves. Appellant also
12 argues in support of her contention that her matter should have been addressed in a more timely manner
13 by respondent's audit department and the staff of that department should have been more cooperative
14 when they did address the matter. Appellant seems to take the position in her appeal letter that the
15 underlying tax assessed against her is no longer in dispute.

16 Respondent contends in its opening brief that appellant has not shown that she is entitled
17 to the abatement or reduction of the interest at issue. Respondent states that it appears that appellant is
18 still contesting the underlying tax, but has not explained why her federal income was subject to different
19 treatment in California other than asserting that it was computed by Turbo Tax, that respondent has not
20 shown its basis for the proposed assessment, and that respondent's representatives have provided
21 conflicting information about the K-1 instructions. Respondent asserts that its instructions are correct,
22 and suggests that an error on a worksheet attached to her return may account for the error on the return.
23 With regard to the interest at issue, respondent argues that appellant is not entitled to relief under R&TC
24 section 19104. R&TC section 19104, subdivision (a)(1), provides, in pertinent part, that respondent may
25 abate all or part of any interest on a deficiency to the extent that interest is attributable in whole or in
26 part to any unreasonable error or delay by an officer or employee of respondent (acting in his or her
27 official capacity) in performing a ministerial or managerial act. Relying upon *Denny's Auto Sales v.*
28 *Commissioner* (2002) T.C. Memo 2002-266, respondent argues that general allegations, such as the

1 allegation that respondent's auditors failed to address her matter in a timely manner, are insufficient to
2 justify abatement of interest and that appellant has failed to identify a ministerial or managerial act by
3 respondent that would justify an abatement of interest under R&TC section 19104. Respondent also
4 indicates that, under Treasury Regulation section (Regulation) 301.6404-2(b)(1) and (2), decisions
5 concerning the proper application of federal tax law (or other federal or state law) is neither a
6 managerial nor a ministerial act. (See Resp. Op. Br., Exhibit N, sections 1-2.)

7 In addition, respondent relies upon R&TC section 19104, subdivision (b)(1). That
8 section provides, in pertinent part, that an error or delay shall be taken into account only if no significant
9 part of that error or delay can be attributed to the taxpayer involved and after respondent has contacted
10 the taxpayer in writing with respect to the deficiency. Respondent points out that its first written contact
11 with appellant was its audit letter of June 11, 2009, and argues that the Board may not abate any interest
12 accrued before that date. Respondent also alleges that the period between its audit letter on June 11,
13 2009, and the issuance of its NOA on November 30, 2009, represented a relatively expeditious audit. In
14 addition, respondent states that the foregoing period itself included portions of a period (October 16,
15 2008, to July 22, 2009) for which respondent suspended interest for statutory reasons² and that no
16 interest accrued after appellant's final payment on July 24, 2009, with the result that interest of only
17 \$0.43 accrued during the protest period. Finally, respondent states that appellant has provided no
18 specific instances in which respondent's employees did not cooperate with appellant and points that the
19 particular rate of interest on appellant's deficiency was statutorily mandated.

20 Respondent also addresses what it characterizes as appellant's argument regarding the
21 doctrine of equitable estoppel. The elements of the doctrine of equitable estoppel are that (1) the party
22 to be estopped [respondent] must be apprised of the true facts; (2) that party must intend that its conduct
23 shall be acted upon or act in such a manner that the party asserting the estoppel [appellant] has the right
24 to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true facts; and
25 (4) the party asserting the estoppel must rely upon that conduct to her injury. (*Strong v. County of Santa*
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27 _____
28 ² R&TC section 19116 provides generally for the suspension of the accrual of interest on a deficiency if respondent does not
notify a taxpayer of his liability and the reasons for it within 18 months from the later of the due date of his return without
regard to extensions or the date on which the taxpayer filed his return.

1 *Cruz (Strong)* (1975) 15 Cal.3d 720, 725.) Respondent relies upon such cases as the *Appeal of Mary M.*
2 *Goforth (Goforth)* (80-SBE-158), decided by the Board on December 9, 1980, and the *Appeal of*
3 *Raymond E. and Joy Lecompte (Lecompte)* (89-SBE-025), decided by the Board on September 26, 1989,
4 to support its argument that informal opinions by its employees on questions of taxability are
5 insufficient to create an estoppel against respondent. (See Resp. Op. Br., Exhibit O, section 5.) In
6 addition, respondent states its records do not indicate that any of its employees provided information to
7 appellant regarding the instructions that she used to complete her return for 2006 or how her revised
8 taxable income should be calculated.

9 In her reply brief, appellant states that she used corrected TurboTax software and worked
10 with the staff of TurboTax to calculate the correct amount of her tax liability for 2006. In accordance
11 with the calculations that are embodied in an amended California return for 2006 and associated
12 documents (see App. Reply Br., Exhibits 3-7), appellant now takes the position that her additional tax
13 liability for 2006 should be reduced from \$12,616 to \$12,267 and she should receive a refund of \$349
14 (\$12,616 paid to respondent- \$12,267) in tax and \$1,585 in interest. Appellant also argues that, in any
15 event, the interest at issue here should be reduced at least to correspond with the reduction in her
16 additional tax liability.

17 With regard to her requested abatement of interest under R&TC section 19104, appellant
18 alleges that after requesting assistance from respondent's staff in calculating her true additional tax
19 liability for 2006 rather than the amount of \$12,616 assessed by respondent, she not only did not receive
20 adequate assistance from respondent's staff but also was met with hostility from portions of the staff.
21 Appellant essentially argues that the failure of respondent's staff to assist her adequately over a period of
22 two years in calculating her true additional tax for 2006 amounted to an unreasonable error or delay in
23 performing a ministerial or managerial act for purposes of R&TC section 19104 and, for that reason, she
24 is entitled to abatement of interest under that section. In that regard, appellant also states that she had no
25 warning from TurboTax or the press of any deficiency in TurboTax's software.

26 With regard to her position that respondent should be estopped from assessing interest
27 against her, appellant argues that all four of the elements of estoppel have been satisfied. In support of
28 her argument, appellant alleges (in order of the elements listed in *Strong*) that (1) respondent was aware

1 generally of problems taxpayers are having with making K-1 adjustments and may possibly have been
2 aware of the particular TurboTax problem under consideration here; (2) respondent failed to fulfill its
3 duty to “conduct basic systematic reviews” of return filings and to identify “irregularities” and to report
4 them to the taxpayers for correction; (3) appellant was unaware of a “glitch” with the TurboTax software
5 which caused “zeroes” to be transferred to the California K-1 adjustment worksheet; and (4) appellant
6 relied to her financial detriment (represented by the accrued interest) on the accuracy of the TurboTax
7 software and, alternatively, on respondent’s ability to identify a problem resulting from any inaccuracy
8 in such software and to report the problem promptly to appellant for correction.

9 In its reply brief, respondent indicates that it is prepared to accept the correctness of
10 appellant’s calculation that her additional tax liability for 2006 was \$12,267 plus interest.³ However,
11 respondent denies that appellant has shown all of the elements of equitable estoppel. In particular,
12 respondent denies that appellant relied upon any alleged errors or ambiguities in its instructions to her
13 detriment. Respondent argues that appellant has not shown any specific errors or ambiguities in its
14 instructions or how they may have resulted in imperfections in the TurboTax software that she used.
15 Respondent also argues that even if there were errors or ambiguities in its instructions, appellant is not
16 entitled to rely upon the doctrine of equitable estoppel here because, when respondent’s instructions are
17 unclear, a taxpayer is required to rely upon the relevant statutes rather upon the instructions.

18 In her supplemental brief, appellant notes that respondent does not address in its reply
19 brief the issue about abatement of interest under R&TC section 19104, essentially repeats her earlier
20 arguments regarding abatement of interest under that statute, and requests that she prevail on that issue.
21 With regard to the issue of equitable estoppel, she reiterates her criticism of the alleged unhelpfulness of
22 respondent’s staff, restates in a more emphatic way that there were errors or ambiguities in respondent’s
23 instructions and that pertinent imperfections in the TurboTax software that she used resulted from them,
24 and requests that she prevail on that issue as well.

25 Law

26 R&TC section 19104, subdivision (a)(1), provides, in pertinent part, that respondent may
27

28 ³ Respondent suggests but does not explicitly state, that it will refund to appellant \$349, (\$12,616 assessed by respondent less \$12,217) plus interest. Respondent should be prepared to clarify at the hearing its position regarding the suggested refund.

1 abate all or part of any interest on a deficiency to the extent that interest is attributable in whole or in
2 part to any unreasonable error or delay by an officer or employee of respondent (acting in his or her
3 official capacity) in performing a ministerial or managerial act. R&TC section 19104, subdivision
4 (b)(1), provides, in pertinent part, that an error or delay shall be taken into account only if no significant
5 part of that error or delay can be attributed to the taxpayer involved and after respondent has contacted
6 the taxpayer in writing with respect to the deficiency. R&TC section 19104, subdivision (b)(2)(B),
7 provides that the Board shall have jurisdiction over an appeal to determine whether respondent's failure
8 to abate interest under section 19104 was an abuse of discretion and may order an abatement.

9 Regulation 301.6404-2(b)(1) provides that a decision concerning the proper application
10 of federal tax law (or other federal or state law) is not a managerial act for purposes of R&TC section
11 19104. Regulation 301.6404-2(b)(2) provides that such decisions are also not ministerial act for
12 purposes of that section.

13 R&TC section 19116 provides generally for the suspension of the accrual of interest on a
14 deficiency if respondent does not notify a taxpayer of his liability and the reasons for it within 18
15 months from the later of the due date of his return without regard to extensions or the date on which the
16 taxpayer filed his return. In this case, the due date of appellant's return was April 15, 2007 and the NPA
17 dated July 7, 2009, reflects that interest accrued from that date until October 15, 2008, a period of 18
18 months, when it was suspended.

19 The doctrine of equitable estoppel is comprised of the following four elements: (1) the
20 party to be estopped must be apprised of the true facts; (2) that party must intend that its conduct shall be
21 acted upon or act in such a manner that the party asserting the estoppel has the right to believe it was so
22 intended; (3) the party asserting the estoppel must be ignorant of the true facts; and (4) the party
23 asserting the estoppel must rely upon that conduct to her injury. (*Strong, supra.*) As a general rule,
24 estoppel will be invoked against a government agency only in rare and unusual circumstances when
25 grave injustice would otherwise result. (*Appeal of Mary M. Goforth, supra.*) This Board has refused to
26 invoke the doctrine of estoppel in situations where taxpayers have understated their tax liability in
27 alleged reliance on the erroneous statements of respondent's representatives. (*Appeal of Harry H. and*
28 *Alice P. Freer, 84-SBE-127, Sept. 12, 1984.*) In addition, a taxpayer should not regard such informal

1 publications as instruction pamphlets as sources of authoritative law that give rise to equitable estoppel
2 when those publications contain misleading information. (*Appeal of Priscilla L. Campbell*, 79-SBE-
3 035, Feb. 8, 1979.)

4 STAFF COMMENTS

5 Here, respondent first contacted appellant in writing with respect to the deficiency on
6 June 11, 2009 and, thus, pursuant to R&TC section 19104, subdivision (b)(1), appellant is entitled to
7 abatement of interest attributable to respondent's unreasonable error or delay only for periods after that
8 date. Thus, appellant should be prepared to identify and describe the ministerial or managerial act or
9 acts performed by respondent after June 11, 2009 that caused an unreasonable error or delay. In
10 addition, the parties should be prepared to discuss at the hearing appellant's argument that respondent's
11 staff should have been more cooperative.

12 With respect to appellant's equitable estoppel argument, appellant should be prepared to
13 identify at the hearing what are the exact errors or ambiguities in respondent's instructions regarding the
14 preparation of a California K-1. Appellant should also be prepared to identify the exact mistake made
15 by the TurboTax software in connection with the preparation of her return and clarify how the errors or
16 ambiguities in respondent's instructions caused the mistake made by the TurboTax software. In
17 addition, appellant should be prepared to clarify whether she is seeking abatement of interest because of
18 the errors or ambiguities in respondent's instructions, the alleged failure by respondent's staff to assist
19 her in rectifying those errors in a timely manner, or both. Similarly, the parties should be prepared to
20 discuss whether appellant's alleged reliance, for purposes of the doctrine of equitable estoppel, on
21 respondent's alleged duty to assist her is consistent with the positions taken by the Board in such cases
22 as *Goforth* and *Lecompte* regarding the effect under that doctrine of informal statements by respondent's
23 staff regarding issues of taxability.

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27 Skaar_cdd

28 Appeal of Marna M. Skaar

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