

1 Tom Hudson
2 Tax Counsel III
3 Board of Equalization, Appeals Division
4 450 N Street, MIC:85
5 Post Office Box 942879
6 Sacramento California 95814
7 Tel: (916) 323-3169
8 Fax: (916) 324-2618

6 Attorney for the Appeals Division

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

10 In the Matter of the Appeal of:) **HEARING SUMMARY²**
11) **PERSONAL INCOME TAX APPEAL**
12 **SHIRLEY A. TOLELA¹**) Case No. 522393
13)

14 Year Proposed
15 2006 Assessment³
16 \$1,305

16 Representing the Parties:

17 For Appellant: Shirley A. Tolela
18 For Franchise Tax Board: Greg W. Heninger, Program Specialist

20 QUESTION: Whether appellant has shown that she is entitled to interest abatement in excess of that
21 already granted by the Franchise Tax Board (FTB or respondent).
22

23 ¹ Appellant resides in Los Angeles County, California.

24 ² This appeal was submitted on April 21, 2011 to be decided by the Board on the consent calendar at the July 26-28, 2011
25 meeting, because appellant failed to respond to a hearing notice. Appellant subsequently contacted the Board Proceedings
26 Division and requested an oral hearing before the Board. As a result, this matter was placed on the oral hearing calendar for
27 the Board of Equalization meeting in Culver City from October 25-28, 2011. Appellant then, however, requested a
postponement to allow for additional time to prepare for the hearing. The matter was then rescheduled for oral hearing at the
January 31/February 1-2, 2012 Culver City Board meeting.

28 ³ The tax amount does not appear to be in dispute, but the interest remains in dispute. According to the FTB's letter dated
October 6, 2011, the remaining amount of interest at issue is \$155.06.

1 HEARING SUMMARY

2 Background

3 Appellant filed a timely California income tax return for 2006. She reported adjusted
4 gross income of \$38,535 (for both federal and state purposes), itemized deductions of \$31,253, taxable
5 income of \$7,282, no tax liability, and an overpayment of estimated taxes of \$400. Appellant's return
6 did not report her state tax withholding of \$276.39. On May 17, 2007, the FTB refunded the \$400 in
7 estimated taxes.

8 Subsequently, the FTB received information from the Internal Revenue Service (IRS)
9 indicating that appellant failed to report pension income of \$27,369. By increasing her adjusted gross
10 income, this unreported income also resulted in a reduction in her allowable medical expense deduction
11 of \$2,073. Based on this federal information, the FTB issued a Notice of Proposed Assessment (NPA)
12 on January 13, 2009, for \$1,305 in additional state tax, plus applicable interest.

13 Appellant protested the NPA and submitted a copy of Form 1099-R showing the
14 unreported pension income of \$27,639.70 and state tax withholding of \$276.39. On or about April 17,
15 2009, the FTB issued an erroneous refund for this state tax withholding of \$276.39, plus interest of
16 \$42.37, for a total refund of \$318.76. On October 12, 2009, the FTB sent appellant a letter that
17 mentioned the refund of the estimated taxes and the refund of the state tax withholding, but did not
18 request repayment of those refunds. Appellant responded, but the FTB nevertheless affirmed the NPA
19 by issuing a Notice of Action (NOA) and this appeal followed.

20 On May 25, 2010, appellant made a payment of \$1,565.78 to the FTB, which included
21 the erroneous refund of \$318.76 plus \$1,247.02 for the remaining taxes and interest due for the 2006 tax
22 year. On May 27, 2010, an erroneous refund of \$1,523.41 was issued to appellant, while, according to
23 the FTB, the remaining \$42.37 was applied to the 2006 liability. On December 3, 2010, the FTB
24 discovered the erroneous refund of \$1,532.41 and requested repayment. Interest was abated from
25 May 27, 2010 to January 2, 2011.

26 On October 6, 2011, the FTB sent a letter to appellant that included a detailed interest
27 chart, showing the precise dates for which interest was charged, the interest rate for each period, and the
28 outstanding balance for each period. Specifically, the FTB indicated that no interest would be charged

1 after March 19, 2009, until 30 days after this appeal is final. The FTB also stated that interest has
2 already been abated from March 19, 2009 to May 29, 2010, on the erroneously refunded amount of
3 \$318.76, and from May 27, 2010 to January 2, 2011, on the erroneously refunded amount of \$1,523.41.
4 The FTB further states that it will charge appellant interest only on the amount unpaid (\$628.61)⁴ from
5 April 15, 2007 to May 11, 2007, and on the amount unpaid (\$1,032.20)⁵ from May 11, 2007 to
6 March 19, 2009, pursuant to R&TC section 19104, subdivision (a). As a result, the FTB states that
7 appellant will only owe interest of \$155.06⁶ plus the tax of \$1,305.00, for a total of \$1,460.06. The
8 FTB also indicates that all payments appellant made have been refunded to her. The FTB states that all
9 erroneous refunds made by the FTB have been returned by appellant except for the last one of
10 \$1,523.41. (FTB Addl. Info., p. 2.)

11 Contentions

12 Appellant agrees that she owes additional taxes on the unreported pension income, but
13 she disputes the interest and the methodology for calculating the interest. She believes that the FTB
14 interest charges did not take into account her state tax withholding of \$276.39. She also questions the
15 propriety of the interest charged between March 7, 2009 (when she contacted the FTB about the NPA)
16 and October 12, 2009 (when the FTB responded to her). She does not believe that she was given proper
17 credit for her estimated tax payment of \$400. Appellant asserts that she failed to include the pension
18 income on her tax return as the result of medical and memory problems. Appellant also requests that the
19 proposed assessment be dismissed on the basis of “extreme hardship.” (Appeal Letter.)

20 As stated above, the FTB stated that no interest will be charged from March 19, 2009, to
21 30 days after this appeal is final. (FTB Addl. Info., p. 2.) The FTB acknowledges the erroneous refunds
22

23 ⁴ This amount was calculated by subtracting the timely payments of \$400.00 and \$276.39 from the tax liability of \$1,305.00.

24 ⁵ This amount includes the refund of \$400 made on May 11, 2007. Respondent explains that because this amount was
25 refunded to appellant as part of the last erroneous refund of \$1,523.41, it must be added back to the unpaid amount. The
26 \$1,032.20 also includes the amount of interest that accrued on the unpaid amount of \$628.61 from April 15, 2007 to May 11,
2007.

27 ⁶ This amount consists of \$3.59 in interest accrued for the period of April 15, 2007 to May 11, 2007, and \$151.47 interest
28 accrued for the period of May 11, 2007 to March 19, 2009. The \$3.59 amount of interest is based on 26 days at an interest
rate of 8 percent. The \$151.47 amount of interest is based on 416 days at an interest rate of 8 percent (\$98.40), 184 days at
an interest rate of 7 percent (\$40.49), and 78 days at an interest rate of 5 percent (\$12.58).

1 and states that interest already has been abated for the applicable periods in accordance with Revenue
2 and Taxation Code (R&TC) section 19104, subdivision (c). Specifically, interest on the erroneous
3 refund of \$318.76 has been abated from March 19, 2009 to May 29, 2010 (30 days after the request for
4 repayment). The FTB has not treated the refund of the \$400 estimated tax payment as an erroneous
5 refund because appellant requested this refund on her tax return and, at the time the refund was issued,
6 there was no known tax liability for 2006 and the FTB was unaware of appellant's unreported pension
7 income. The second refund error occurred on May 27, 2010, when the FTB returned \$1,523.41 to
8 appellant. The interest on this amount has been abated from May 27, 2010 to January 2, 2011 (30 days
9 after the FTB's request for repayment on December 3, 2010). (FTB Opening Brief, pp. 4-6; FTB Reply
10 Brief, pp. 1-3.)

11 With regard to appellant's assertion of "extreme hardship," the FTB argues that no law
12 permits the withdrawal or abatement of a proposed tax assessment on the basis of hardship. R&TC
13 section 19112 gives the FTB discretion to abate interest (not tax) when a taxpayer demonstrates inability
14 to pay that interest solely because of extreme financial hardship caused by significant disability or other
15 catastrophic circumstance. The FTB argues that appellant has not demonstrated or provided evidence
16 that these circumstances exist. (FTB Opening Brief, pp. 7-8.)

17 Applicable Law

18 Interest

19 Interest is mandatory on unpaid taxes under section 19101, subdivision (a) of the R&TC.
20 Interest is not a penalty imposed on the taxpayer; it is merely compensation for the use of money after it
21 became due. (*Appeal of Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.)

22 Section 19104 of the R&TC allows for the abatement of interest only when (1) the
23 interest is attributable to an unreasonable error or delay committed by the FTB in the performance of a
24 ministerial or managerial act, (2) no significant aspect of the error or delay is attributable to the
25 taxpayer, and (3) the error or delay occurred after the FTB contacted the taxpayer in writing with respect
26 to the deficiency. A "ministerial act" is defined for this purpose as "a procedural or mechanical act that
27 does not involve the exercise of judgment or discretion, and that occurs during the processing of a
28 taxpayer's case after all prerequisites to the act, such as conferences and review by supervisors, have

1 taken place. A decision concerning the proper application of federal tax law (or other federal or state
2 law) is not a ministerial act.” (Treas. Reg. § 301.6404-2(b)(2); see also *Appeal of Michael and Sonia*
3 *Kishner*, 99-SBE-007, Sept. 29, 1999.) For purposes of interest abatement, the term “managerial act”
4 means “an administrative act that occurs during the processing of a taxpayer’s case involving the
5 temporary or permanent loss of records or the exercise of judgment or discretion relating to management
6 of personnel. A decision concerning the proper application of federal tax law (or other federal or state
7 law) is not a managerial act. Further, a general administrative decision, such as the IRS’s decision on
8 how to organize the processing of tax returns or its delay in implementing an improved computer
9 system, is not a managerial act for which interest can be abated. . . .” (Treas. Reg. § 301.6404-2(b)(1)).

10 When the FTB requests repayment of an erroneous refund, section 19104, subdivision (c)
11 of the R&TC requires interest abatement “until 30 days after the date demand for repayment is made,
12 unless the taxpayer (or a related party) has in any way caused that erroneous refund.”

13 When the FTB has denied a request to abate interest under R&TC section 19104, the
14 Board has jurisdiction to review the denial. In order to overturn the FTB’s decision not to abate interest,
15 the Board must find an “abuse of discretion.” (Rev. & Tax. Code, § 19104, subd. (b)(2)(B).) A public
16 agency abuses its discretion when its finding has no reasonable basis (*Rible v. Hughes* (1944) 24 Cal.2d
17 437, 445), is unsupported by the evidence (*McDonald’s Systems of California, Inc. v. Board of Permit*
18 *Appeals* (1975) 44 Cal.App.3d 525, 548), is contrary to uncontradicted evidence (*Naughton v.*
19 *Retirement Board of San Francisco* (1941) 43 Cal.App.2d 254, 260), or is otherwise arbitrary,
20 capricious, or fraudulent. (*McDonough v. Goodcell* (1939) 13 Cal.2d 741, 748-49.)

21 R&TC section 19112 gives the FTB discretion to abate interest when a taxpayer
22 demonstrates an inability to pay the interest solely because of extreme financial hardship caused by
23 significant disability or other catastrophic circumstance. California law does not authorize the Board to
24 review the FTB’s decisions involving this statute.

25 Relief of Tax Assessment

26 In this appeal, the Board’s jurisdiction is limited to determining the correct amount of
27 appellant’s California personal income tax liability. (*Appeal of Fred R. Dauberger, et. al.*, 82-SBE-082,
28 Mar. 31, 1982.) The Board cannot adjust or relieve the proposed assessment and interest based on

1 appellant's inability to pay due to financial hardship.

2 STAFF COMMENTS

3 At the hearing, appellant should be prepared to show that the FTB's computation of
4 interest in remaining periods of April 15, 2007 to May 11, 2007, and of May 11, 2007 to March 19,
5 2009, is incorrect. Ideally, appellant should show the correct interest amount and explain how she
6 calculated it. If that is not possible, she should at least show where the FTB committed an error that has
7 not already been corrected by the FTB.

8 The FTB should be prepared to explain and illustrate how interest was calculated. The
9 chart provided by the FTB in its letter to appellant dated October 6, 2011, serves this purpose as it shows
10 the precise dates for which interest was charged, the interest rate for each period, and the outstanding
11 balance for each period.

12 If appellant or the FTB wish to provide additional information and documentation, it
13 should be provided at least fourteen days prior to the hearing to:

14 Claudia Madrigal,
15 Board of Equalization
16 Board Proceedings Division
17 P. O. Box 942879 MIC: 80
18 Sacramento, California 94279-0080

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