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BOARD OF EQUALIZATION

STATE OF CALIFORNIA

In the Matter of the Appeal of:	**HEARING SUMMARY**[2]
	PERSONAL INCOME TAX APPEAL
SHIRLEY A. TOLELA[1]	Case No. 522393

Year	Proposed Assessment[3]
2006	$1,305

Representing the Parties:

For Appellant: Shirley A. Tolela

For Franchise Tax Board: Greg W. Heninger, Program Specialist

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

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[1] Appellant resides in Los Angeles County, California.

[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 meeting, because appellant failed to respond to a hearing notice. Appellant subsequently contacted the Board Proceedings Division and requested an oral hearing before the Board. As a result, this matter was placed on the oral hearing calendar for 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. However, appellant requested a second postponement due to a scheduling conflict. The matter was then rescheduled for the April 24-26, 2012, Board meeting.

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

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Background

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

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

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

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

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

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after March 19, 2009, until 30 days after this appeal is final. The FTB also stated that interest has already been abated from March 19, 2009 to May 29, 2010, on the erroneously refunded amount of $318.76, and from May 27, 2010 to January 2, 2011, on the erroneously refunded amount of $1,523.41. The FTB further states that it will charge appellant interest only on the amount unpaid ($628.61)[4] from April 15, 2007 to May 11, 2007, and on the amount unpaid ($1,032.20)[5] from May 11, 2007 to March 19, 2009, pursuant to R&TC section 19104, subdivision (a). As a result, the FTB states that appellant will only owe interest of $155.06[6] plus the tax of $1,305.00, for a total of $1,460.06. The FTB also indicates that all payments appellant made have been refunded to her. The FTB states that all erroneous refunds made by the FTB have been returned by appellant except for the last one of $1,523.41. (FTB Addl. Info., p. 2.)

Appellant's February 2, 2012 Submission

On February 2, 2012, appellant provided an exhibit in which appellant details her personal background and further explains her interactions with the IRS. Specifically, appellant states that she was married in December 1969 to a professor from Zaire who passed away in 1983. Appellant supported their daughter as a single parent and also volunteered as a missionary for her church. Appellant indicates that she has over 30 consecutive years of service as a federal employee and is now retired. Appellant states that she was employed by the IRS in her last federal job and performed duties as a taxpayer service representative. (Appellant's Exhibit, p. 1.)

Appellant also states that, in December of 2005, she underwent major surgery due to an accident. She states that she suffered severe pain and was treated for acute pain. Appellant states that she is 68 years old and has suffered numerous medical challenges. She states that this unresolved tax

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

[5] This amount includes the refund of $400 made on May 11, 2007. Respondent explains that because this amount was refunded to appellant as part of the last erroneous refund of $1,523.41, it must be added back to the unpaid amount. The $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.

[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 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).

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issue has caused her much stress and frustration as she has a very limited knowledge of the complexities of California tax law. (Appellant's Exhibit, p. 1.)

Appellant further explains that, in 2006, she withdrew $27,640 from a pension account at Bank of America. She acknowledges that she mistakenly omitted that pension amount from her taxable income on her 2006 tax return. Appellant provides a copy of the Form 1099R from Bank of America indicating that Bank of America withheld $276.39 for state taxes and $2,763.97 for federal taxes. Appellant also provides a copy of a document detailing the federal changes to her 2006 tax return in which the IRS revised appellant's taxable income to $29,712 and that appellant owed additional federal tax. (Appellant's Exhibit, pp. 3-4, Attachments 1 & 2.)

Appellant contends that when she contacted respondent regarding the NPA in February 2009, respondent informed her that its review of her 2006 return included the withholding of $276 (related to the pension distribution) and a refund of her $400 estimated tax payment. Appellant contends, however, that respondent did not allow the withholding credit of the estimated tax payment. Appellant contends that the FTB's guidance states that, if there is a discrepancy between the FTB's data file and the return submitted by a taxpayer, a reconciliation of the data is required prior to processing the tax return. Accordingly, for purposes of interest computation, appellant asserts that the amount of tax on which interest applies should not exceed $629 and that, according to her calculation, the amount of interest due is $45.55. (Appellant's Exhibit, pp. 3-4.)

Contentions

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

As stated above, the FTB stated that no interest will be charged from March 19, 2009, to

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

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

Applicable Law

Interest

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

Section 19104 of the R&TC allows for the abatement of interest only when (1) the interest is attributable to an unreasonable error or delay committed by the FTB in the performance of a ministerial or managerial act, (2) no significant aspect of the error or delay is attributable to the taxpayer, and (3) the error or delay occurred after the FTB contacted the taxpayer in writing with respect to the deficiency. A "ministerial act" is defined for this purpose as "a procedural or mechanical act that does not involve the exercise of judgment or discretion, and that occurs during the processing of a

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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." (Treas. Reg. § 301.6404-2(b)(2); see also *Appeal of Michael and Sonia Kishner*, 99-SBE-007, Sept. 29, 1999.) For purposes of interest abatement, the term "managerial act" means "an 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. Further, a general administrative decision, such as the IRS's decision on how to organize the processing of tax returns or its delay in implementing an improved computer system, is not a managerial act for which interest can be abated. . . ." (Treas. Reg. § 301.6404-2(b)(1).)

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

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

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

Relief of Tax Assessment

In this appeal, the Board's jurisdiction is limited to determining the correct amount of appellant's California personal income tax liability. (*Appeal of Fred R. Dauberger, et. al.*, 82-SBE-082,

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Mar. 31, 1982.) The Board cannot adjust or relieve the proposed assessment and interest based on appellant's inability to pay due to financial hardship.

STAFF COMMENTS

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

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

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

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