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8 **BOARD OF EQUALIZATION**
9 **STATE OF CALIFORNIA**

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11 In the Matter of the Appeal of:) **HEARING SUMMARY**
12) **CORPORATION FRANCHISE TAX APPEAL**
13 **PRUDENTIAL COMMERCIAL LEASING,**) Case No. 468875
14 **INC.¹**)
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	<u>Years Ended</u>	<u>Proposed Assessments²</u>
	December 31, 1999	\$ 13,577.62
	December 31, 2000	\$ 5,617.82
	December 31, 2001	\$ 4,788.19

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20 Representing the Parties:

21 For Appellant: Ji Sung Kim
22 For Franchise Tax Board: Brian A. Van Slyke, Tax Counsel III
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24 **QUESTIONS:** (1) Whether the Franchise Tax Board (FTB or respondent) abused its discretion by
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26 ¹ Appellant was headquartered in Los Angeles County; the record indicates that appellant corporation dissolved in December
27 2002.

28 ² The only amounts at issue in this appeal are the interest on assessments for tax years 1999, 2000, and 2001. The accrued interest amounts as of March 23, 2009, are \$10,573.51, \$3,323.08, and \$2,172.85, respectively. At the hearing, respondent should provide the amounts of interest accrued up to the hearing date.

1 not abating interest on appellant's assessments for the years ended 1999, 2000,
2 and 2001.

3 (2) Whether this Board has jurisdiction to consider the penalties.

4 HEARING SUMMARY

5 Background

6 Respondent states appellant is a former C Corporation owned and operated by Ji Sung
7 Kim (Mr. Kim).³ Untimely California Corporation Income Tax Returns were filed on appellant's behalf
8 for the tax years ended 1999, 2000, and 2001, on September 15, 2000, September 15, 2001, and
9 September 15, 2002, respectively.⁴ The 1999 return indicated a tax due of \$998, the 2000 return
10 indicated a tax due of \$800, and the 2001 return indicated a tax due of \$800. Respondent claims that the
11 liabilities were not paid by March 15 of the subsequent tax year, therefore penalties were assessed and
12 interest continues to accrue on the assessments.

13 In 2006, appellant's 1999, 2000, and 2001 federal returns were audited by the Internal
14 Revenue Service (IRS). At that time, appellant allegedly entered into an agreement with the IRS, and
15 the IRS determined that additional tax was due and a fraud penalty applied for each tax year in question.
16 For 1999, \$38,747 of additional tax was assessed and a \$35,304 fraud penalty was imposed. For 2000,
17 \$12,052.00 of additional tax was assessed and a \$7,901.25 fraud penalty was imposed. For 2001,
18 \$9,039.00 of additional tax was assessed and a \$2,086.50 fraud penalty was imposed. It is not clear
19 from the record whether appellant made payments on any of the federal assessments.

20 Respondent states it was notified of the federal changes by the IRS on December 11,
21 2006. Subsequently, respondent issued Notices of Proposed Assessment (NPAs) for appellant's tax
22 years ended 1999, 2000, and 2001, based on information provided by the IRS. The NPAs assessed an

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26 ³ Appellant's 2002 federal return, Schedule E, lists Mr. Kim as 100% shareholder of the appellant corporation. The Request
27 for Tax Clearance Certificate – Corporations, indicates appellant corporation was formed on November 14, 1995 and
28 dissolved on December 31, 2002.

⁴ R&TC section 18601 states that "every taxpayer subject to the tax imposed by Part 11...shall, on or before the 15th day of
the third month following the close of its taxable year, transmit to the Franchise Tax Board a return..."

1 additional tax of \$12,579.62 for 1999, \$4,817.82 for 2000, and \$3,988.19 for 2001.⁵ Neither Mr. Kim
2 nor appellant protested the NPAs, therefore they became final and collectable. Respondent pursued
3 collection activities against appellant, including a Notice of Assumption of Tax Liability issued to Mr.
4 Kim in December of 2007. Respondent issued a Notice of State Tax Lien against both appellant and Mr.
5 Kim in July of 2008.

6 On August 5, 2008, Mr. Kim wrote a letter to respondent, requesting abatement of
7 interest and penalties on the assessments due for the 1999, 2000, and 2001 tax years. Mr. Kim did not
8 dispute the accuracy of the assessments, rather he asserted that his former Certified Public Accountant
9 (CPA) forged his signature on the Individual Assumption of Tax Liability form and the form was filed
10 without Mr. Kim's knowledge or consent. However, Mr. Kim indicated that, in order to resolve the
11 matter, he would nevertheless assume liability of appellant's tax liabilities for the appeal years if
12 respondent would waive the penalties and interest. On September 18, 2008, respondent issued a Notice
13 of Determination Not to Abate Interest, and informed appellant therein that in order to obtain review of
14 the penalties imposed, it would need to pay the penalties in full and file a claim for refund with
15 respondent. Appellant filed this timely appeal.

16 Contentions

17 Mr. Kim contends that appellant dissolved in 2002, at which time Mr. Kim's CPA
18 fraudulently filed an Individual Assumption of Tax Liability, naming Mr. Kim responsible for
19 appellant's tax liability. Mr. Kim contends his signature was forged and states that he provided
20 respondent with signature samples to show his signature was forged. Mr. Kim contends he cannot be
21 personally liable for appellant's obligations because he has not agreed to assume appellant's state tax
22 liability.

23 Additionally, Mr. Kim contends the IRS assessments were later corrected because the under-
24 reported income was attributable to expenses incurred as commissions paid to third parties. Mr. Kim
25 contends respondent should have corrected its assessment since the IRS corrected theirs. However, Mr.
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27 ⁵ It appears from respondent's analysis in its Notice of Determination Not to Abate Interest that respondent imposed late
28 filing penalties against appellant for each of the appeal years; no penalties appear to be set forth in the NPAs for the appeal
years.

1 Kim states, for his peace of mind, he will pay the assessments if respondent agrees to waive the interest
2 and penalties due. Furthermore, in the letter from Mr. Kim, dated August 5, 2008, Mr. Kim stated that
3 he has experienced extreme financial difficulty for the past couple of years and requests to pay the
4 assessments with an installment program.

5 Respondent contends the only issue in this appeal is interest abatement because appellant
6 cannot appeal the penalties to this Board unless the penalties were paid and a refund claim was filed by
7 appellant. Respondent states that there is no reasonable cause present here which would allow it to abate
8 interest. Additionally, respondent states that appellant has not provided any facts or argument which
9 would provide a basis for interest abatement under the law.

10 Respondent contends this Board does not have jurisdiction to consider the amnesty
11 penalty in this case. Respondent also contends that the issue of assumer liability is not before the board
12 in this case because appellant has not paid the final tax liabilities and filed a claim for refund. Further,
13 Mr. Kim has not provided evidence to support his argument that he is not personally liable for
14 appellant's state tax liability.

15 Applicable Law

16 Interest Abatement

17 Interest is not a penalty but is merely compensation for the taxpayer's use of the money.
18 (Rev. & Tax. Code, § 19101, subd. (a); *Appeal of Amy M. Yamachi*, 77-SBE-095, June 28, 1977; *Appeal*
19 *of Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.) In order to obtain interest abatement, appellant must
20 qualify under one of the following three statutes: R&TC sections 19104, 19112 or 21012. R&TC
21 section 21012 is not applicable because there has been no reliance on any written advice requested of
22 respondent. R&TC section 19112 requires a showing of extreme financial hardship caused by
23 significant disability or other catastrophic circumstance, which appellant has not alleged.⁶ However,
24 there is no provision in R&TC section 19112 or other law that gives the Board jurisdiction to determine
25 whether R&TC section 19112 applies in this instance. The Legislature provided the Board jurisdiction
26 over appeals of denied interest abatement requests under R&TC section 19104 as discussed below.

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⁶ Although Mr. Kim stated that he experienced extreme financial difficulty for the past couple of years, he has not provided evidence of this or made a clear argument for interest abatement on this theory.

1 Respondent may abate all or a part of any interest on a deficiency to the extent that
2 interest is attributable in whole or in part to any unreasonable error or delay committed by respondent in
3 the performance of a ministerial or managerial act. (Rev. & Tax. Code, § 19104, subd. (a)(1).) Further,
4 an error or delay can only be considered when no significant aspect of the error or delay is attributable to
5 appellant and after respondent has contacted appellant in writing with respect to the deficiency or
6 payment. (Rev. & Tax. Code, § 19104, subd. (b)(1).)

7 In the *Appeal of Michael and Sonia Kishner*, 99-SBE-007, decided on September 29,
8 1999, this Board adopted the language from Treasury Regulation section 301.6404-2(b)(2), defining a
9 “ministerial act” as:

10 [A] procedural or mechanical act that does not involve the exercise of judgment or
11 discretion, and that occurs during the processing of a taxpayer’s case after all
12 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.

13 This Board has not yet adopted a definition for the term “managerial act.” However,
14 when a California statute is substantially identical to a federal statute (such as with the interest
15 abatement statute in this case),⁷ we may consider federal law interpreting the federal statute as highly
16 persuasive. (*Appeal of Michael and Sonia Kishner, supra*, (citing *Douglas v. State of California* (1942)
17 48 Cal.App.2d 835.)) In this regard, Treasury Regulations section 301.6404-2(b)(1) defines a
18 “managerial act” as:

19 [A]n administrative act that occurs during the processing of a taxpayer’s case involving
20 the temporary or permanent loss of records or the exercise of judgment or discretion
21 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.

22 This Board’s jurisdiction in an interest abatement case is limited by statute to a review of
23 respondent’s determination for an abuse of discretion. (Rev. & Tax. Code, § 19104, subd. (b)(2)(B).)
24 To show an abuse of discretion, appellant must establish that, in refusing to abate interest, respondent
25 exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Woodral v.*
26 *Commissioner* (1999) 112 T.C. 19, 23.) Interest abatement provisions are not intended to be routinely
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28 ⁷ R&TC section 19104, subdivisions (a) and (b)(2)(B) are substantially identical to Internal Revenue Code section 6404 (e)
and (h).

1 used to avoid the payment of interest, thus abatement should be ordered only “where failure to abate
2 interest would be widely perceived as grossly unfair.” (*Lee v. Commissioner* (1999) 113 T.C. 145, 149.)
3 The mere passage of time does not establish error or delay that can be the basis of an abatement of
4 interest. (*Id.* at p. 150.)

5 Jurisdiction over Final Tax Liabilities (including penalties)

6 An administrative agency’s jurisdiction depends upon the provisions of the statutes
7 from which its powers are derived, and the agency cannot validly act in excess of the limits of that
8 jurisdiction. (*Flickenger v. Industrial Accident Commission* (1919) 181 Cal. 425; *Appeal of Nicholas*
9 *Schillace*, 95-SBE-005, Aug. 2, 1995.) The Board has jurisdiction to consider the correctness of a
10 deficiency assessment under two circumstances. First, a taxpayer may timely protest an unpaid
11 proposed assessment and then file a timely appeal to the Board from respondent’s action upon the
12 protest. (Rev. & Tax. Code, § 19041, 19045.) If a taxpayer fails to file a protest within 60 days after
13 the mailing of each NPA the amount of the proposed deficiency assessment becomes final. (Rev. &
14 Tax. Code, § 19042.) Second, if the deficiency assessment is paid, a taxpayer must file a timely
15 claim for refund with respondent and then file a timely appeal to the Board from respondent’s denial
16 of the claim. (Rev. & Tax. Code, §§ 19322, 19324.)

17 Thus the only mechanism for obtaining further review of a final assessment is for the
18 taxpayer to pay the outstanding liability in full and file a claim for refund with respondent. (Rev. &
19 Tax. Code, § 19322 et seq.) R&TC section 19306 provides that a taxpayer must file a claim for
20 refund within four years of the last date prescribed for filing the return (without regard to any
21 extension for filing the return), or within one year from the date of overpayment of the tax, whichever
22 period expires later. Generally, a taxpayer may not request a refund until after the full amount due is
23 paid. (See Rev. & Tax. Code, § 19322.1; *Shiseido Cosmetics (America), Ltd. v. FTB*, 235 Cal.
24 App.3d 478.)

25 Jurisdiction over Post-Amnesty Penalty

26 R&TC section 19730 provides that respondent shall administer a tax amnesty program
27 for taxpayers. R&TC section 19731 provides in pertinent part that the tax amnesty program shall be
28 conducted during a two-month period beginning February 1, 2005, and ending March 31, 2005,

1 inclusive, or during a timeframe ending no later than June 30, 2005, under section 19733. R&TC
2 section 19732, subdivision (a)(1), provides generally for a waiver of all unpaid penalties and fees for
3 each taxable year for which tax amnesty is allowed but only to the extent of the amount of any penalty
4 or fee that is owed as a result of previous nonreporting or underreporting of tax liabilities or prior
5 nonpayment of any taxes previously assessed or proposed to be assessed for that taxable year. R&TC
6 section 19733 defines the requirements for those taxpayers seeking tax amnesty. R&TC section
7 19777.5, subdivision (a)(2), states that, for amounts that are due and payable on the last day of the
8 amnesty period, there shall be added to the tax for each taxable year for which amnesty could have been,
9 but was not, requested an amount equal to 50 percent of the accrued interest beginning on the last date
10 prescribed by tax for payment of the tax and ending on the last day of the amnesty period specified in
11 section 19731. R&TC section 19777.5, subdivision (d), provides that provisions relating to deficiency
12 assessments shall not apply to the assessment or collection of the post-amnesty penalty. R&TC section
13 19777.5, subdivision (e)(1), provides generally that a taxpayer may not file a claim for refund for any
14 amount paid in connection with the post-amnesty penalty, except as provided in subdivision (2). R&TC
15 section 19777.5, subdivision (e)(2), provides that a taxpayer may file a claim for any amounts paid to
16 satisfy the post-amnesty penalty on the grounds that the amount of the penalty was not properly
17 computed by respondent.

18 STAFF COMMENTS

19 Staff notes that appellant has not yet alleged that respondent erred or delayed in the
20 performance of a ministerial or managerial act; appellant should therefore be prepared to discuss
21 whether respondent so erred or delayed at the oral hearing. There are no provisions in the R&TC for
22 abating interest on the basis of an offer to assume liability.

23 The underlying tax assessment, including penalties is not before the Board at this time,
24 because the assessment (the NPA) went final without protest. In addition, it appears that neither Mr.
25 Kim nor appellant has paid the amounts due and filed a claim for refund for appellant's tax liabilities for
26 the tax years ended 1999, 2000, or 2001. The proposed amnesty penalty is not yet final and not properly
27 before the Board unless and until appellant pays the penalty, files a claim for refund with respondent
28 alleging a calculation error, and appeals respondent's action on that claim to the Board. Additionally,

1 the issue of whether Mr. Kim assumed appellant's liabilities is not before the Board at this time. If in
2 the future respondent proposes to assess tax against Mr. Kim individually for appellant's tax liabilities,
3 this issue may come before this Board in the form of an appeal by Mr. Kim from respondent's proposed
4 assessment. Alternatively, should Mr. Kim pay appellant's liabilities and file a claim for refund with
5 respondent, Mr. Kim could appeal respondent's action on that claim to the Board.

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