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

11 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
12 ) **PERSONAL INCOME TAX APPEAL**  
13 **JOE L. SANTOS**<sup>1</sup> ) Case No. 445970  
14 )

	<u>Year</u>	<u>Proposed Assessment</u> <sup>2</sup>
	2003	\$1,914, plus interest

18 Representing the Parties:

19 For Appellant: David Choi, Tax Appeals Assistance Program (TAAP)<sup>3</sup>  
20 For Franchise Tax Board: Dee Garcia, Legal Analyst

22 **QUESTIONS:** (1) Whether appellant has shown error in the Franchise Tax Board's proposed  
23 assessment, which is based on a federal adjustment.

25 <sup>1</sup> Appellant resides in Ventura County.

26 <sup>2</sup> As of the Notice of Action (NOA), issued on March 10, 2008, the accrued interest was \$509.09.

27 <sup>3</sup> Appellant had two different TAAP representatives during this appeal. The original TAAP representative, Daniel Kwok,  
28 filed appellant's Reply Brief. The case was subsequently taken over by TAAP representative, David Choi, who filed  
appellant's Supplemental Brief.

1 (2) Whether the Franchise Tax Board abused its discretion in denying abatement of  
2 interest on the proposed assessment.

3 HEARING SUMMARY

4 Background

5 Appellant filed a timely 2003 California income tax return which reported the following:  
6 federal adjusted gross income (AGI) of \$36,895; California adjustments of \$7,225; California AGI of  
7 \$29,670; a standard deduction of \$6,140; taxable income of \$23,530; tax liability of \$12; California  
8 withholding of \$914; and an overpayment of \$902. The Franchise Tax Board (FTB or respondent)  
9 issued a refund of \$902 to appellant on May 7, 2004. Respondent subsequently received information  
10 regarding a federal audit of appellant's 2003 return. The Internal Revenue Service (IRS) notified  
11 respondent that it made the following federal adjustments to appellant's income: interest income of \$4;  
12 pension/annuity income of \$224; securities income of \$32,941; and unemployment income of \$2,590.  
13 Respondent issued a Notice of Proposed Assessment (NPA) on December 13, 2006, which reflected the  
14 federal adjustments. As a result, appellant's California taxable income was increased to \$56,699 and  
15 additional tax of \$1,914, plus interest, was assessed.<sup>4</sup>

16 In appellant's initial protest of the NPA, appellant argued that he was unable to provide  
17 documentation during the federal audit because he was in the process of relocating his home, and  
18 therefore decided to submit an OIC instead. (Resp. Op.Br., exhibit D) Appellant submitted his federal  
19 OIC and indicated on the form that he was submitting his offer on the bases of both Doubt as to Liability  
20 (DATL) and Doubt as to Collectability (DATC). (Appeal Ltr., exhibit D, p. 3) Appellant indicated to  
21 respondent that the OIC was accepted. (Appeal Ltr., exhibit C, p. 2) Respondent replied with a letter  
22 stating that the NPA was based on information that the IRS made adjustments to appellant's 2003 return  
23 for underreporting federal income. (Appeal Ltr., exhibit B) The letter also indicated that appellant  
24 should provide evidence if the IRS adjustment was in error. Appellant responded with a second protest  
25 letter in which he argued that the IRS accepted his OIC on the basis of both DATL and DATC. (Appeal  
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28 <sup>4</sup> Unemployment compensation is not taxable income in California; therefore the NPA did not include the amount of \$2,590. R&TC section 17083 provides an adjustment to federal AGI when calculating California AGI by excluding unemployment compensation.

1 Ltr., exhibit A) Additionally, appellant stated that he could not afford to pay respondent more than \$210  
2 because he had over \$20,000 in medical bills to pay and he was unemployed. Respondent issued a  
3 Notice of Action (NOA) on March 10, 2008, affirming respondent's position in the NPA. Thereafter  
4 appellant filed this timely appeal.

5 Contentions

6 Appellant contends that respondent's proposed assessment is in error and therefore the  
7 NPA is incorrect. Appellant also contends that respondent failed to consider the impact of the OIC that  
8 was accepted by the IRS. Appellant argues that the OIC was accepted by the IRS because of DATL.  
9 Respondent contends that the IRS' decision to accept an OIC does not indicate that the federal  
10 adjustment was in error. Respondent contends that an OIC accepted for DATC does not show error in  
11 its determination; further appellant has not met his burden of proof to show that the IRS made a change  
12 to the federal adjustment. Specifically, respondent contends that appellant has provided no evidence  
13 supporting that the IRS reviewed any of the adjustments and found them to be erroneous. Additionally,  
14 respondent contends that the federal OIC process is separate from the state OIC process. Once a final  
15 determination is made, respondent contends that appellant may submit an OIC with the state, request to  
16 make payments on the final amount due, or make an argument for abatement of interest due to financial  
17 hardship.

18 Appellant contends that he has been trying to resolve this issue since February 2007,  
19 when he filed his initial protest letter, but he did not hear back from respondent until January 2008.  
20 Appellant contends that he has acted in good faith and therefore respondent should abate the interest  
21 amount of \$509.09. Respondent contends appellant has not shown that respondent abused its discretion  
22 in declining to abate interest on the proposed assessment. Respondent alleges that there was no  
23 unreasonable error or delay in the performance of a ministerial or managerial act by respondent's  
24 employees. Respondent alleges that although it received appellant's initial protest in February 2007, due  
25 to workload constraints, it could not respond until October 2007. Respondent contends that it attempted  
26 to send a response to appellant's initial protest letter in October 2007, however it was unable to because

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1 appellant's address was in a "fire zone."<sup>5</sup> Therefore respondent was unable to respond to appellant's  
2 initial protest letter until January 2008. Respondent argues that workload constraints are not considered  
3 to be an unreasonable error or delay as required for respondent to abate interest, citing Treas. Regs., §  
4 301.6404-2(b)(1) and example 8 in subsection (c); *Leffert v. Commissioner* (2001) T.C. Memo 2001-23;  
5 and *Strang v. Commissioner* (2001) T.C. Memo 2001-104.

6 Finally, appellant also contends that he is experiencing financial hardship. Appellant  
7 alleges that he has been unemployed since May 2007, and he last received unemployment compensation  
8 in December 2007. Appellant alleges that he was rear-ended in his automobile on November 13, 2007,  
9 and has accrued over \$20,000 in medical expenses as a result. Appellant alleges that these medical  
10 expenses are still increasing and he is currently unable to pay his credit card bills as well. Appellant has  
11 offered to pay respondent \$210 in lieu of the proposed assessment plus interest.

## 12 Applicable Law

### 13 Federal Assessment

14 When the IRS makes a correction to a taxpayer's account, the taxpayer is required to  
15 report the changes to the FTB and either concede the accuracy of the final federal determination or state  
16 wherein it is erroneous. (Rev. & Tax. Code, § 18622.) Additionally, a proposed assessment based on a  
17 federal audit report is presumptively correct and appellant bears the burden of proving error. (*Appeal of*  
18 *Sheldon I. and Helen E. Brockett*, 86-SBE-109, June 18, 1986.) Absent uncontradicted, credible,  
19 competent and relevant evidence showing that the FTB's determinations are incorrect, they must be  
20 upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.) Failure to produce  
21 evidence that is within appellant's control gives rise to a presumption that such evidence is unfavorable  
22 to their case. (*Appeal of Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.) Unsupported assertions will not  
23 satisfy taxpayer's burden of proof with respect to an assessment based on federal action. (*Appeal of*  
24 *Aaron and Eloise Magidow, supra.*)

### 25 Interest Abatement

26 Interest is not a penalty but is merely compensation for the taxpayer's use of the money.  
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<sup>5</sup> Respondent may want to explain further at the oral hearing what a "fire zone" is and the procedure for following up with  
correspondence to taxpayers affected by a fire zone.

1 (Rev. & Tax. Code, § 19101, subd. (a); *Appeal of Amy M. Yamachi*, 77-SBE-095, June 28, 1977; *Appeal*  
2 *of Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.) Interest is also mandatory with respect to the  
3 imposition of a failure to file penalty, a failure to pay penalty, or an accuracy-related penalty pursuant to  
4 R&TC sections 19131, 19132, and 19164, respectively. (Rev. & Tax. Code, § 19101, subd. (c)(2)(B).)  
5 In order to obtain interest abatement, appellant must qualify under one of the following three statutes:  
6 R&TC sections 19104, 19112 or 21012. R&TC section 21012 is not applicable because there has been  
7 no reliance on any written advice requested of respondent. R&TC section 19112 requires a showing of  
8 extreme financial hardship caused by significant disability or other catastrophic circumstance.

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

16           In the *Appeal of Michael and Sonia Kishner*, 99-SBE-007, decided on September 29,  
17 1999, this Board adopted the language from Treasury Regulation section 301.6404-2(b)(2), defining a  
18 “ministerial act” as:

19           [A] procedural or mechanical act that does not involve the exercise of judgment or  
20 discretion, and that occurs during the processing of a taxpayer’s case after all  
21 prerequisites to the act, such as conferences and review by supervisors, have taken place.  
22 A decision concerning the proper application of federal tax law (or other federal or state  
23 law) is not a ministerial act.

24           This Board has not yet adopted a definition for the term “managerial act.” However,  
25 when a California statute is substantially identical to a federal statute (such as with the interest  
26 abatement statute in this case),<sup>6</sup> we may consider federal law interpreting the federal statute as highly  
27 persuasive. (*Appeal of Michael and Sonia Kishner, supra*, (citing *Douglas v. State of California* (1942)  
28 48 Cal.App.2d 835.)) In this regard, Treasury Regulations section 301.6404-2(b)(1) defines a

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<sup>6</sup> Revenue and Taxation Code section 19104, subdivisions (a) and (b)(2)(B) are substantially identical to Internal Revenue Code section 6404 (e) and (h).

1 “managerial act” as:

2 [A]n administrative act that occurs during the processing of a taxpayer’s case involving  
3 the temporary or permanent loss of records or the exercise of judgment or discretion  
4 relating to management of personnel. A decision concerning the proper application of  
5 federal tax law (or other federal or state law) is not a managerial act.

6 It is generally true that respondent’s decisions relating to the organization and prioritizing  
7 of the processing of tax returns involve general administrative decisions, which do not provide a basis  
8 for interest abatement. (See Treas. Regs., § 301.6404-2(c), examples 7 & 8.) However, there are a  
9 number of possible ministerial acts that could provide a basis for interest abatement. For example:

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

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

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

23 (Treas. Regs., § 301.6404-2(c), example 3.) See also Treas. Regs., § 301.6404-2(c), examples 4, 5, 6, &  
24 10.) Respondent’s determination not to abate interest is presumed correct, and the burden is on appellant  
25 to prove error. (*Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.)

26 Under R&TC section 19112, interest may be waived for any period for which respondent  
27 determines that an individual or fiduciary demonstrates inability to pay that interest solely because of  
28 extreme financial hardship caused by significant disability or other catastrophic circumstance. This  
section does nor provide any authority for the Board to review the FTB’s determination whether to abate  
interest for extreme financial hardship.

This 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

1 exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Woodral v.*  
2 *Commissioner* (1999) 112 T.C. 19, 23.) Interest abatement provisions are not intended to be routinely  
3 used to avoid the payment of interest, thus abatement should be ordered only “where failure to abate  
4 interest would be widely perceived as grossly unfair.” (*Lee v. Commissioner* (1999) 113 T.C. 145, 149.)  
5 The mere passage of time does not establish error or delay that can be the basis of an abatement of  
6 interest. (*Id.* at p. 150.)

7 STAFF COMMENTS

8 Appellant should be prepared at the hearing to offer reliable evidence of error in the  
9 federal determination. Although appellant has argued that one of the bases for the federal OIC was a  
10 DATL, appellant has yet to provide any evidence as to why he believes the federal adjustment is  
11 incorrect. Although appellant provided a copy of the OIC, he does not indicate on this form why the  
12 adjustment is incorrect; rather he discusses reasons for his inability to pay. Respondent verified that the  
13 OIC was granted on the basis of both DATL and DATC, however this does not negate appellant’s  
14 burden of proof to show why the federal adjustment was incorrect. Additionally, while the IRS accepted  
15 the OIC on the grounds of DATL and DATC, in the absence of any detail this alone does not  
16 demonstrate that the proposed assessment is in error. The federal adjustment involved four different  
17 types of income. The question raised is which, if any, of the 2003 adjustments were conceded by the  
18 IRS as being in error? At the hearing the parties should be prepared to discuss any additional  
19 information regarding the accuracy of the federal assessment and whether, in accepting the OIC on both  
20 grounds, the IRS revised its federal determination. Staff notes that appellant chose the bases for  
21 submitting his offer, and the IRS apparently confirmed to FTB without any detail that it accepted the  
22 offer on both grounds. Without more information from appellant demonstrating whether the IRS  
23 conceded all or some of the 2003 federal adjustment because it was in error (and the specific  
24 concessions made), it is not clear that the proposed assessment is likewise in error.

25 The parties should be prepared at the hearing to address whether there was an  
26 unreasonable error or delay in a ministerial or managerial act performed by one of respondent’s  
27 employees. Respondent should also be prepared to address whether or not the failure to assign  
28 appellant’s case until September 27, 2007, was the result of a ministerial or managerial act. Although

1 respondent indicated that it could not send its response in October 2007 because appellant's address was  
2 in a "fire zone," respondent should be prepared to discuss why it could not attempt to send its response  
3 again until January 2008.

4           Lastly, appellant should be prepared at the hearing to address whether or not he is making  
5 an argument for abatement of interest based on extreme financial hardship. Appellant discusses his  
6 financial hardship in his appeal letter; however it is not clear if appellant is contending that interest  
7 should be abated on this ground. Both parties should be prepared to discuss whether the Board has  
8 jurisdiction to consider respondent's determination whether to grant interest abatement for extreme  
9 financial hardship pursuant to R&TC section 19112.

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