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BOARD OF EQUALIZATION

STATE OF CALIFORNIA

In the Matter of the Appeal of:	**HEARING SUMMARY**[2]
	PERSONAL INCOME TAX APPEAL
SHELDON SHERMAN AND	
SANDRA COULLES[1]	Case No. 406056

Years[3]	Proposed Assessments[4] Tax	Penalties[5]
1998	$3,783.00	$ 920.88
1999	$1,653.00	$6,274.13
2000[6]	$ 377.00	$ 157.82

[1] Appellants reside in San Diego, California.

[2] Staff notes that the time involved in calendaring this appeal included time to allow for additional briefing and pursuant to four extensions granted to appellants for the filing of their briefs.

[3] At the hearing, respondent should be prepared to provide the current amount of accrued interest as of April 28, 2009, in light of the concessions respondent has made with respect to the proposed assessments, which are discussed herein.

[4] The amounts listed above are the amounts listed in the Notices of Action from which appellants filed this appeal. Appellants apparently do not contest the proposed assessments of additional tax for 1998, 1999, or 2000.

[5] The penalty amounts listed above include estimated post-amnesty and late filing penalties. For 1999, the above amount consists of a late filing penalty of $5,010.50 and an estimated post-amnesty penalty of $1,263.63. Respondent concedes that the 1999 late filing penalty should be reduced to $413.25 and the estimated post-amnesty penalty should be reduced to $401.39. Respondent indicates that it is willing to abate the 1999 late filing penalty of $413.25, which will reduce the estimated post-amnesty amount and interest.

[6] Respondent indicates it will withdraw the entire 2000 proposed assessment due to errors in the computation of the tax and penalties.

NOT TO BE CITED AS PRECEDENT - Document prepared for Board review. It does not represent the Board's decision or opinion.

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Representing the Parties:

For Appellant: John Milikowsky, TAAP[7]

For Franchise Tax Board: Greg W. Heninger, Staff Operation Specialist

QUESTIONS: (1) Whether the Board has jurisdiction to review the Franchise Tax Board's (FTB or respondent) failure to abate interest and, if so, whether the FTB abused its discretion in refusing to abate interest.

(2) Whether the Board has jurisdiction to review the FTB's proposed assessment of the post-amnesty penalties and, if so, whether respondent is estopped from imposing the post-amnesty penalties.

HEARING SUMMARY

Procedural Background

This appeal arises from respondent's action affirming its proposed assessment of tax, penalties, and interest for tax years 1998 and 1999. Appellants apparently do not contest the proposed additional taxes for tax years 1998 and 1999. Respondent has withdrawn the proposed assessment for tax year 2000 and has abated the late filing penalty for tax year 1999. Accordingly, staff has not included a discussion of the background, contentions, and law pertinent to the issuance of the 2000 Notice of Proposed Assessment (NPA) or the contentions and law regarding the imposition of the 1999 late filing penalty.

1998

On October 15, 1999, appellants filed a timely California return for tax year 1998, reporting taxable income of $60,618, estimated tax payments of $3,000, and a tax liability of $1,781. Appellants claimed a refund in the amount of $1,219 ($3,000 - $1,781). Respondent processed appellants' return, imposed an estimated tax penalty of $81.35, and offset appellants' claimed refund by $126 in order to pay a claim asserted by the City of San Diego. On November 15, 1999, respondent refunded $1,011.65 ($1,219.00 - $81.35 - $126.00) to appellants. (Resp. Opening Br., p. 2,

[7] Appellants submitted their own opening brief and John Milikowsky of the Tax Appeals Assistance Program (TAAP) submitted appellants' reply and supplemental briefs.

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fn.2.)

Respondent subsequently received information from the Internal Revenue Service (IRS) indicating that the IRS had audited appellants' federal return and made adjustments to appellants' 1998 account. (Resp. Opening Br., p. 2.) On June 26, 2006, respondent issued an NPA based on the federal information. The NPA increased appellants' taxable income by $41,620 by including unreported income of $42,175 and allowing a deduction of $555 for one-half of the self employment tax. The NPA proposes additional tax of $3,783.00 and imposes an estimated post-amnesty penalty of $920.88, plus accrued interest. (Apps.' Reply Br., Attachment.) In a letter dated July 13, 2006, appellants' protested the NPA, requesting penalty and interest abatement. (Resp.Opening Br., exhibit D.) Respondent sent appellants a letter dated March 8, 2007, which states that the proposed assessment is based on information provided by "a Federal Revenue Agent's report." (*Id.*, exhibit E.) Respondent issued a Notice of Action (NOA) dated May 14, 2007, affirming the NPA. (Apps.' Opening Br., Attachment.) This timely appeal followed.

1999

Appellants submitted extension payments of $11,000 and $2,500 effective April 15, 2000, and October 15, 2000, respectively, for tax year 1999, but they did not file a 1999 return by the extended due date of October 15, 2000. (Resp. Opening Br., p. 2.) On February 25, 2002, respondent sent a notice and demand letter to Mr. Sherman, informing him that it received information from the Employment Development Department indicating that he may be required to file a return for tax year 1999.[8] In the notice and demand letter, respondent requested that Mr. Sherman file the 1999 return, provide a copy of any filed return or explain why he was not required to file the return. (Resp. Opening Brief, exhibit A.)

Respondent did not receive a response from Mr. Sherman and issued an NPA on June 10, 2002. The NPA proposes a tax assessment of $5,739 less $72 of exemption credit for a total tax liability of $5,667. The NPA also proposes a late filing penalty of $1,416.75, a failure to file upon demand penalty of $0 [sic], and a filing enforcement fee of $0 [sic], plus applicable interest. (Resp.

[8] Due to the fact that Mr. Sherman held a California State Bar Association license to practice law, respondent estimated his income based on the 1999 industry average. (Resp. Opening Brief, p. 3, fn. 3.)

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Opening Br., Exhibit B.) Respondent does not state whether Mr. Sherman protested the NPA, whether the assessment became final, or whether it pursued collection action.

On October 15, 2003, appellants filed a late joint return for tax year 1999, reporting taxable income of $237,190, estimated tax payments of $13,500, and a tax liability of $4,889, plus an estimated tax penalty of $88. (*Id.*, exhibit C.) Appellants apparently did not remit any payment at the time they filed their late 1999 return. According to respondent, it processed appellants' late 1999 return and imposed a delinquent filing penalty of $1,847.25 and an estimated tax penalty of $89.26, plus applicable interest. (*Id.*, p. 3.) It subsequently commenced collection action, applied an overpayment of $495.24 from appellants' 2001 account to the 1999 account, and imposed a collection cost recovery fee of $101. (*Ibid.*)

On January 10, 2005, respondent sent an application for amnesty to appellants pursuant to California's amnesty program, because they had a balance due for the 1999 tax year. On March 29, 2005, respondent received appellants' application for amnesty for tax years 1999 and 2000. (App. Reply Br., Attachment.) Appellants remitted payments in the amounts of $6,375.38 and $34.39 on May 19, 2005, and May 31, 2005, respectively, in full satisfaction of the 1999 tax liability and interest. Respondent consequently abated the late filing penalty, the estimated tax penalty, and the collection cost recovery fee, plus accrued interest on the penalties. (*Ibid.;* Resp. Opening Br., p. 3.))

Respondent subsequently received information from the IRS showing that it had audited appellants' federal return for 1999 and made adjustments to appellants' 1999 account. (Resp. Opening Br., p. 3.) On June 26, 2006, respondent issued an NPA based on the federal information. The NPA increases appellants' taxable income by $16,997 by including unreported income of $17,204 and allowing a deduction of $207 for one-half of the self employment tax. The NPA proposes additional tax of $1,653.00 and imposes a late filing penalty of $5,010.50 and an estimated post-amnesty penalty of $1,263.63, plus accrued interest. (Apps.' Reply Br., Attachment.) In a letter dated July 13, 2006, appellants' protested the NPA. (Resp. Opening Br., exhibit D.) In a letter dated March 8, 2007, respondent informed appellants that the NPA was based on information received from "a Federal Revenue Agent's report." (*Id.*, exhibit E.) Respondent issued an NOA dated May 14, 2007, affirming the NPA. (Apps.' Opening Br., Attachment.) This timely appeal followed.

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Factual Background

In their reply brief, appellants state that on or about September 14, 2000, federal and Arizona state agents searched appellants' residence and Mr. Sherman's law office and seized all of Mr. Sherman's business and financial records, as well as his computers and electronic files. Appellants state that Mr. Sherman subsequently pled guilty to charges of violating Title 26, United States Code sections 6050I (failing to file returns relating to cash received in trade or business) and 7203 (willful failure to file, return, supply information, or pay tax). According to appellants, the court sentenced Mr. Sherman on May 14, 2003, to three years of probation and ordered him to meet with an IRS agent within 180 days in order to resolve appellants' federal income tax liabilities for tax years 1998, 1999 and 2000. Appellants state that the federal and Arizona state agents did not return the seized records, computers and electronic files to appellants until May 14, 2003, pursuant to a court order.

Appellants state that their assigned IRS agent failed to meet with Mr. Sherman until November 2003, due to the IRS agent's other commitments. At this meeting, the IRS agent allegedly was upset with Mr. Sherman for filing appellants' 1999 federal return in October 2003; the IRS agent allegedly instructed Mr. Sherman that he was to coordinate with him before filing any further returns. Appellants state that the IRS agent did not meet with Mr. Sherman again until September 2004 due to the IRS agent's other commitments. Appellants state that in December 2004, appellants and the IRS agent executed a final "Agreement as to Final Determination of Tax Liability" (Agreement) for tax years 1998, 1999, and 2000, a copy of which appellants submitted with their opening brief. Appellants state that the IRS manager did not approve the Agreement until April 25, 2005.

According to appellants, the IRS agent recommended the abatement of the federal late filing penalties for tax years 1999 and 2000 due to the unavailability of appellants' confiscated records until May 2003 as part of the Agreement. Appellants state that no late filing penalty was imposed for tax year 1998 because appellants timely filed a 1998 federal return. Appellants further state that the IRS agent prepared an "Interest Abatement Lead Sheet," a copy of which appellants submitted with their opening brief. According to appellants, the Interest Abatement Lead Sheet recommends interest abatement under IRC 6404 due to the late filing of the 1999 and 2000 federal returns, as well as the audit adjustments for all three years for the period December 12, 2003, through September 24, 2004,

due to the IRS agent's schedule conflicts.

Appellants state that they and the IRS executed a "Stipulation of Settled Issues" (stipulation) on May 19, 2008, concerning appellants' federal tax deficiencies for tax years 1998, 1999 and 2000. Subsequent to filing their supplemental brief, appellants submitted a copy of the stipulation. The stipulation provides that petitioners are not entitled to interest abatement for tax years 1998 or 1999, but are entitled to interest abatement for tax year 2000 for the period December 1, 2008, through September 24, 2004, in the amount of $350.

Appellants' Contentions

Appellants do not expressly dispute the amount of the proposed additional taxes for tax years 1998 and 1999. In their reply brief, appellants argue for the first time that they are entitled to abatement of interest under R&TC section 19104, subdivision (a)(3). Appellants contend that the IRS agent's delay in meeting with Mr. Sherman in order to prepare and file appellants' federal returns is the reason why appellants' were delayed in filing their California returns. Appellants contend that they could not file their California returns until their federal returns were prepared and approved by the IRS agent, because the federal and state returns must include identical information. Appellants contend that whenever they received Past Due Notices from respondent concerning their California tax deficiencies Mr. Sherman would explain the IRS situation to respondent and respondent would instruct him to call it every 60 to 90 days with a status report. Appellants contend that it was not until December 2004 that the IRS agent and appellants reached a consensus on the additional amount of federal taxes owed for tax years 1998, 1999 and 2000. Appellants further contend that this proposed agreement was not approved and finalized by an IRS manager until April 25, 2005, and appellants did not receive notification of the IRS manager's disposition until after May 2, 2005. (Apps. Reply Br., p. 2, exhibits C and D.)

Appellants concede that the stipulation provides that they are not entitled to any abatement of interest accrued on their 1998 and 1999 federal tax deficiencies. (Apps' Reply Br., p. 5.) They nonetheless argue that the justification for abating interest on the federal and California tax deficiencies are different. According to appellants, the IRS only abated interest accrued on appellants' 2000 federal tax deficiency because that is the only tax year affected by the IRS agent's delays in

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meeting with Mr. Sherman; appellants filed their 1999 federal return by October 2003. In contrast, appellants assert that they could not file their 1999 California returns until their "federal returns were first prepared and filed because the two returns had to have the identical information." For this reason, appellants contend that the IRS agent's delay in contacting Mr. Sherman in order to prepare and file his federal returns caused a delay in appellants' filing their state returns. (*Ibid.*)

Appellants also argue that they are entitled to abatement of the post-amnesty penalties.[9] Appellants contend that they satisfied the amnesty procedures when they filed a timely application for tax years 1998 and 1999 based on the tax liabilities that were determined as of the date of their application. Appellants contend that they were not able to seek amnesty for the additional proposed assessments based on the federal audit because they did not know those amounts until after the March 31, 2005, amnesty deadline. Appellants further contend that they had no reasonable basis to estimate their additional California tax liabilities until after the IRS made its final determination in April 2005. Alternatively, appellants contend that they satisfied the amnesty procedures because they made payments towards the additional taxes owed for 1998 and 1999 that relate back to the date of their original amnesty application.

Appellants contend that on January 11, 2005, Mr. Sherman went to respondent's office in San Diego in order to discuss the abatement of the late filing penalty and interest. According to appellants, Mr. Sherman and respondent's employee determined that it was better for appellants to file for amnesty. Appellants submitted with their opening brief a copy of some handwritten calculations that were allegedly made at the January 11, 2005, meeting at respondent's San Diego office. Appellants contend that Mr. Sherman informed respondent's employee at the January 11, 2005, meeting that there were probably going to be additional taxes assessed against appellants, although he was not able at that time to determine the amount. Appellants also contend that respondent's employee informed Mr. Sherman at that time that an amnesty request could not be filed on an undetermined taxable amount, but failed to explain to Mr. Sherman that there would be mandatory penalties for not submitting an additional amnesty amount for such undetermined amounts.

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[9] In their reply brief, appellants cite R&TC section 6592, which pertains to the post-amnesty penalties applicable to sales and use tax deficiencies. This provision does not apply to the present personal income tax appeal.

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Appellants contend that respondent's employee should have pointed out any alternative available instead of advising them to wait until they receive a proper assessment in the mail. Appellants further contend that they should not have to pay a penalty for not seeking amnesty on amounts not yet determined to be due until after the March 31, 2005, amnesty deadline. Appellants contend that they indicated on the amnesty application for tax year 1999 that they were also seeking amnesty for tax years 1998 and 2000, but they cannot find their copy of the amnesty application.[10]

Appellants also argue that the post-amnesty penalty violates the United States and California constitutions for the following reasons: (1) it violates appellants' substantive due process rights because it operates retroactively for an impermissible period of time; (2) it violates appellants' procedural due process rights by denying them a pre- or post-payment right of review other than for computational errors; (3) R&TC section 19777.5 is void for vagueness.

Respondent's Contentions

Respondent contends that the law does not allow for interest abatement here, where the interest accrued from a deficiency based on a final federal determination of tax, because the IRS did not abate interest on the 1998 or 1999 federal deficiencies under IRC section 6404(e). According to respondent, none of the federal documentation submitted by appellants or respondent show an abatement of interest for tax years 1998 or 1999 other than a nominal $2.36 in tax year 1998. (Resp. Opening Br., exhibits G and H.).

Respondent also argues that the Board does not have jurisdiction in this appeal to review the imposition of the post-amnesty penalty. Respondent further argues that the post-amnesty penalties are proper because appellants failed to participate in the amnesty program with respect to the additional taxes respondent assessed based on the federal audit for tax years 1998 and 1999. Respondent contends that appellants filed an amnesty application and participated in the amnesty program for tax years 1999 and 2000 based on their self-assessed unpaid tax liabilities and they did not include tax year 1998 in their amnesty application. According to respondent, there are procedures available to taxpayers when the federal adjustments are not finalized prior to the end of the amnesty

[10] Staff notes that appellants submitted a copy of their March 28, 2005, amnesty application with their reply brief. The submitted application indicates that appellants requested amnesty for tax years 1999 and 2000.

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period in order to avoid the potential imposition of any amnesty penalty. Specifically, respondent contends that taxpayers in such a situation may estimate their tax liabilities based on a pending federal audit, file the relevant state returns and pay the estimated tax liabilities. Respondent asserts that "various information concerning this procedure was available for taxpayers," such as respondent's website's Frequently Asked Questions (FAQs) regarding the amnesty procedures. (Resp. Supplemental Br., p. 2.)

Respondent indicates that the proposed late filing penalty for 1999 was originally overstated, as it should have been only for $413.25 (Resp. Opening Br., p. 1, fn. 1.), and it is now willing to abate it (Resp. Supplemental Br., p.1). Respondent also indicates that it is willing to withdraw the 2000 proposed assessment, but reserved the right to issue another NPA for tax year 2000 within the four-year statute of limitations. (Resp. Opening Br., p. 1, fn. 1.) According to respondent, the four-year statute of limitations commenced on March 29, 2005, when appellants filed their original 2000 return (and thus appears to have expired on March 29, 2009). (*Ibid.)*

Applicable Law

Burden of Proof

R&TC section 18622 provides that a taxpayer shall either concede the accuracy of a federal determination or state wherein it is erroneous. It is well-settled that a deficiency assessment based on a federal audit report is presumptively correct, and the taxpayer bears the burden of proving that the determination is erroneous. (*Appeal of Sheldon I. and Helen E. Brockett*, 86-SBE-109, June 18, 1986; *Todd v. McColgan* (1949) 89 Cal.App.2d 509.)

Interest Abatement

The imposition of interest is mandatory. (*Appeal of Amy M. Yamachi*, 77-SBE-095, June 28, 1977; *Appeal of Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.) If a taxpayer fails to pay tax by the due date, or if respondent assesses additional tax, the law imposes interest on the balance due. (Rev. & Tax. Code, § 19101.) Interest is not a penalty but is simply compensation for a taxpayer's use of money after the due date of the tax. (*Appeal of Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.) There is no reasonable cause exception to the imposition of interest. (*Id.*)

R&TC section 19104, subdivision (a)(3), provides that respondent may abate all or any

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part of any interest accruing from a deficiency based on a final federal determination for the same period that interest was abated on the related federal deficiency under IRC section 6404(e), where the error or delay occurred on or prior to the issuance of the final federal determination.[11] Subdivision (a)(3) of this section further provides that "[t]his subparagraph shall apply to any ministerial act for which the interest accrued after September 25, 1987, or for any managerial act applicable to a taxable year beginning on or after January 1, 1998, for which the Franchise Tax Board may propose an assessment or allow a claim for refund." (Rev. & Tax. Code, § 19104, subd. (a)(3).)[12]

In the *Appeal of Michael and Sonia Kishner*, 99-SBE-007, decided on September 29, 1999, the Board adopted the language from Treasury Regulation section 301.6404-2(b)(2), which defines a "ministerial act" as follows:

> [A] procedural or mechanical act that does not involve the exercise of judgment or discretion, and that occurs during the processing of a 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 law (or other federal or state law) is not a ministerial act.

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

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[11] Staff notes that R&TC section 19104, subdivision (a)(1), allows interest abatement for tax years beginning on or after January 1, 1998, when respondent commits an error or delay in the performance of a ministerial or managerial act. Because appellants base their claim to interest abatement entirely on allegations that the IRS committed errors and delays, but has not alleged any such error or delay on the part of respondent, staff will not discuss the application of R&TC section 19104, subdivision (a)(1).

[12] In 1999, the legislature added this subparagraph to R&TC section 19104 as subdivision (c)(1)(C). (Stats. 1999, ch. 203, § 3.) In 2000, the legislature renumbered this subparagraph as R&TC section 19104, subdivision (a)(3). (Stats. 2000, ch. 863, § 27.) Prior to an amendment in 2001, this subparagraph referred to "any managerial act applicable to a taxable *or income* year beginning on or after January 1, 1998, . . ." (emphasis added) (Stats. 2001, ch. 542, § 9.)

[13] Revenue and Taxation Code section 19104, subdivisions (a) and (b)(2)(B), are substantially identical to IRC section 6404 (e) and (h).

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> [A]n administrative act that occurs during the processing of a taxpayer's case involving the temporary or permanent loss of records of 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.

This Board has jurisdiction to consider the abatement of unpaid interest under two circumstances. First, the taxpayer may request interest abatement along with its protest of an underlying tax deficiency, or with its appeal from respondent's action on the protest. (Rev. & Tax. Code, § 19104, subd. (b)(4), as amended by ch. 863, stats. 2000).) Second, the taxpayer may file an independent request for interest abatement with respondent, then appeal from respondent's denial of that request within 30 days after respondent mails its notice of determination not to abate interest. (Rev. & Tax. Code, § 19104, subd. (b)(2)(A)(i).)

Respondent's determination not to abate interest is presumed correct, and the burden is on appellant to prove error. (*Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.) When respondent denies a request for interest abatement, the Board has jurisdiction to review respondent's denial for abuse of discretion. (Rev. & Tax. Code, § 19104, subd. (b)(2)(B); *Appeal of Ernest J. Teichert*, 99-SBE-006, Sept. 29, 1999.) In such cases, a taxpayer's burden of proof is to show by clear and convincing evidence that such abuse of discretion occurred. (See *Appeal of Royal Crown Cola Co*., 74-SBE-047, Nov. 12, 1974; *Appeal of Browning Manufacturing Co. et al.*, 72-SBE-026, Sept. 14, 1972.) To show an abuse of discretion, appellant must establish that in refusing to abate interest respondent exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law by refusing to abate interest. (*Woodral v. Commissioner* (1999) 112 T.C. 19, 23.) Interest abatement provisions are not intended to be routinely used to avoid the payment of interest, thus abatement should be ordered only "where failure to abate interest would be widely perceived as grossly unfair." (*Lee v. Commissioner* (1999) 113 T.C. 145, 149.) The mere passage of time does not establish error or delay that can be the basis of an abatement of interest. (*Id*. at p. 150.)

Post-Amnesty Penalties

R&TC section 19777.5 generally provides that, for each tax year for which amnesty could have been requested by the taxpayer, the post-amnesty penalty will be imposed in an amount equal to 50 percent of interest accrued on unpaid tax as of the last day of the amnesty period

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(March 31, 2005). The post-amnesty penalty is imposed in addition to any other applicable penalties.

The amnesty provisions give respondent no discretion to determine whether the post-amnesty penalty should be imposed. In addition, the amnesty provisions strictly limit the Board's ability to review respondent's imposition of the post-amnesty penalty. Among other things, subdivision (d) of R&TC section 19777.5 states, "Article 3 (commencing with Section 19031), (relating to deficiency assessments) shall not apply with respect to the assessment or collection of [the post-amnesty penalty]." Article 3 sets forth the procedure for a taxpayer to protest a proposed assessment. Thus, subdivision (d) of R&TC section 19777.5 provides that a taxpayer may not contest the assessment of the post-amnesty penalty by respondent under the protest procedures that are applicable to deficiency assessments. Because the protest provisions are not applicable to the post-amnesty penalty, there is no action by respondent for the Board to review under R&TC section 19045 when a taxpayer challenges the assessment of the post-amnesty penalty in a deficiency proceeding. Even if the Board did have the jurisdiction to review respondent's imposition of a post-amnesty penalty in a deficiency appeal, the amnesty provisions do not provide a reasonable cause exception or any similar exception to the imposition of the post-amnesty penalty.

Subdivision (e)(2) of R&TC 19777.5 only grants the Board jurisdiction to review respondent's imposition of the post-amnesty penalty in a single circumstance: where a taxpayer paid the post-amnesty penalty, filed a refund claim asserting that respondent failed to "properly compute" the amount of the penalty and respondent denied this refund claim.

Due Process

Appellants refer to the United States and California constitutions in their appeal and object to the manner in which respondent imposed estimated post-amnesty penalties. However, the Board is precluded from determining the constitutional validity of California statutes and has an established policy of declining to consider constitutional issues. (Cal. Const., art. III, § 3.5; *Appeal of Aimor Corp.*, 83-SBE-221, Oct. 26, 1983; *Appeals of Walter R. Bailey*, 92-SBE-001, Feb. 20, 1992 (*Bailey*).) This Board has interpreted R&TC sections 19045 and 19047 as providing appellants the right to appeal solely for the purpose of determining the correct amount of tax. In the *Appeals of Fred R. Dauberger, et al.* (82-SBE-082, March 31, 1982), this Board stated:

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> [T]he only power that this Board has is to determine the correct amount of an appellant's California personal income tax liability for the appeal years. We have no power to remedy any other real or imagined wrongs that taxpayers believe they may have suffered at the hands of the Franchise Tax Board.

Furthermore, this Board held in *Bailey, supra,* that constitutional "due process is satisfied with respect to tax matters so long as an opportunity is given to question the validity of a tax at some stage of the proceedings." The present hearing satisfies appellants' due process concerns. To the extent that appellants are making constitutional arguments, those arguments should be made in the appropriate court of law.

Equitable Estoppel

Appellants' contention that respondent's employee caused them to be subject to unnecessary post-amnesty penalties by failing to inform Mr. Sherman at their meeting on January 11, 2005, that there was a possibility of an additional penalty if appellants did not pay estimated assessments (not yet determined) prior to the amnesty deadline, sounds in the nature of an equitable estoppel argument. The following four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) the other party must rely upon the conduct to her injury. (*Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 725.) Equitable estoppel may be applied against the government in order to prevent a grave injustice, but the doctrine is inapplicable if it would result in the nullification of a strong rule of policy adopted for the benefit of the public. (*Ibid.*)

This Board has held that reliance on informal opinions of respondent's employees does not create estoppel against respondent. (*Appeal of Virgil E. and Izora Gamble*, 76-SBE-053, May 4, 1976; *Appeal of Mary M. Goforth*, 80-SBE-158, Dec. 9, 1980.) The Board has consistently refused to invoke the doctrine when taxpayers have understated their tax liability on tax returns in alleged reliance on erroneous information provided by FTB employees. *(Appeal of Richard R. and Diane K. Smith*, 91-SBE-005, Oct. 9, 1991; *Appeal of Harry H, and Alice P. Freer*, 84-SBE-127, Sept. 12, 1984. Further, this Board has refused to estop respondent when the estoppel claim arose from alleged

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reliance on statements made by employees of a different agency, such as the IRS. (*Appeal of E.J., Jr. and Dorothy Saal*, 83-SBE-038, Feb. 1, 1983.)

STAFF COMMENTS

Proposed Assessments

Staff notes that appellants do not appear to dispute, yet have not explicitly conceded, the accuracy of the federal determinations or the proposed assessments for tax years 1998 and 1999**.** Should appellants wish to contest the additional tax assessments for either or both years, then they should be prepared to discuss specifically how the proposed assessments are erroneous and provide supporting evidence.

Respondent should be prepared to confirm that it is withdrawing the proposed tax and penalties for tax year 2000, as well as abating the late filing penalty for tax year 1999. Staff notes that respondent contends that appellants filed their original 2000 return on March 29, 2005 (the date respondent received appellants' amnesty application for 1999), and therefore the four-year statute of limitations for mailing another NPA for tax year 2000 ended on March 29, 2009. (Rev. & Tax. Code, § 19057, subd. (a).) Respondent should be prepared to discuss at the scheduled hearing on April 28, 2009, whether it issued another NPA for tax year 2000 on or before March 29, 2009.

Interest Abatement

It appears that appellants have not yet presented any credible evidence to show that the IRS abated interest on the related federal deficiency amount for the same tax years. First, it appears that the IRS agent's interest abatement recommendation, as indicated in the "Interest Abatement Lead Sheet," may not be determinative for purposes of R&TC section 19104, subdivision (a)(3), since the recommendations appear to be subject to review and approval by an IRS manager. Moreover, the "Interest Abatement Lead Sheet" refers only to interest that accrued because of the late filing of the 2000 federal return and recommends interest abatement only from December 1, 2003, to September 24, 2004. Second, staff notes that the IMF MCC transcripts for appellants' federal accounts for tax years 1998 and 1999 indicate that the IRS did not abate any interest, except for $2.36 in 1998. (Resp. Opening Br., exhibits G and H.) The parties may want to be prepared to discuss the circumstances for the abatement of interest in the sum of $2.36 from appellants' federal 1998 account and whether that

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federal action qualifies appellants for abatement of interest for 1998 under R&TC section 19104, subdivision (a)(3). Lastly, the stipulation provides that the IRS did not abate any interest accrued on appellants' federal tax deficiencies for tax years 1998 and 1999. Appellants should be prepared to explain at the hearing the circumstances surrounding the May 19, 2008, stipulation and why they contend that they qualify for interest abatement under R&TC section 19104, subdivision (a)(3).

Staff notes that appellants argue that they qualify for interest abatement for tax years 1998 and 1999 under R&TC section 19104, subdivision (a)(3), even though they apparently concede that the IRS did not abate interest for tax years 1998 and 1999. Appellants assert that they could not file their California 1999 return until the IRS agent met with Mr. Sherman to prepare and file his federal returns because the federal and California returns must have identical information. Appellants also assert that there was no cause to abate interest on their federal 1999 account due to the IRS agent's delays because they already filed their 1999 federal return in October 2003. It thus appears that appellants had the information necessary to file their 1999 California return when they filed their 1999 federal return in October 2003. In fact, appellants filed a late 1999 California return on October 15, 2003, and timely filed their 1998 California return on October 15, 1999. Accordingly, it appears that the IRS agent's delays in meeting with Mr. Sherman did not cause any delay in the filing of appellants' 1998 or 1999 California return.

Post-Amnesty Penalties

There appears to be no statutory mechanism for the Board to review respondent's proposed assessment of the post-amnesty penalties at this time. If the post-amnesty penalties become final liabilities and are paid, then appellants could potentially file claims for refund if they assert that the penalties were not properly computed by respondent. (Rev. & Tax. Code, § 19777.5, subds. (e)(1) & (2).) For these reasons, it appears that appellants' contention that the post-amnesty penalties should not be imposed is premature and cannot be considered by the Board in this appeal.

To the extent that appellants are making, or wish to make, constitutional arguments with respect to the amnesty statutes, those arguments may be made in the appropriate court of law or to the California Legislature. The Board must interpret the law as it was enacted by the California Legislature, and it does not have the authority to change the law or to create new laws. (*See Appeal of*

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CRG Holdings, Inc., formerly Charles of the Ritz Group, Ltd., 97-SBE-009, May 8, 1997.) Furthermore, it appears that the Board is precluded from determining the constitutional validity of California statutes and it appears to have an established policy of declining to consider constitutional issues. (Cal. Const., art. III, § 3.5; *Appeal of Aimor Corp.*, 83-SBE-221, Oct. 26, 1983.)

Equitable Estoppel

Staff notes that appellants contend they detrimentally relied on an informal oral statement from respondent's employee on January 11, 2005, that appellants could not apply for amnesty without knowing the exact amount of the tax deficiency. Staff notes that appellants fail to explain why they could not estimate their current 1998 and 1999 California tax liabilities based on the December 16, 2004 Agreement for purposes of filing returns within the amnesty period, February 1, 2005, through March 31, 2005, notwithstanding the fact that the IRS manager did not approve and sign the Agreement until after the amnesty deadline. According to respondent, appellants filed their original 2000 California return on March 29, 2005 (prior to the amnesty deadline), even though they had not yet received the IRS manager's letter dated May 2, 2005, informing them that he had approved and signed the December 16, 2004 Agreement. (Resp. Opening Br., p. 1, fn. 1.) Moreover, staff notes that appellants were apparently aware of the fact that the IRS made a final determination with respect to their 1998 and 1999 federal deficiencies prior to May 30, 2005, the last day to comply with the tax amnesty program (Rev. & Tax. Code, § 19733, subdiv. (a)(3).) As it appears that the federal adjustments related to appellants unreported cash receipts of over $10,000 from appellant-husband's law firm (of which he appears to be a sole practitioner), appellants should be prepared to explain why they were unable to estimate their income for 1998 and 1999, by including the cash receipts in their tax calculation.

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