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

10 In the Matter of the Appeal of:) **HEARING SUMMARY²**
11) **PERSONAL INCOME TAX APPEAL**
12 **SUZANNE WEBER¹**) Case No. 336613

	<u>Year</u>	<u>Claim For Refund</u>
	2002	\$594.09 ³

16 Representing the Parties:

17 For Appellant: Suzanne Weber
18 For Franchise Tax Board: Jane Perez, Tax Counsel

- 20 QUESTIONS: (1) Whether respondent properly determined not to abate interest for 2002.
21 (2) Whether respondent properly imposed the collection cost recovery fee for 2002.
22 (3) Whether this Board has jurisdiction over the Amnesty Penalty imposed for 2002.

24 ¹ Appellant resides in Dana Point, California.

25 ² This appeal was accepted by the Board in 2006. Subsequent to filing her appeal, appellant requested and was granted an
26 extension of time in which to file her brief from April 26, 2006 to December 20, 2006. The matter was originally scheduled
27 for oral hearing on October 2, 2007, but was deferred to allow for further briefing. The period of further briefing was also
28 extended at appellant's request. The matter was then postponed from the February 25, 2009 hearing, and rescheduled at
appellant's request to the next available Culver City hearing calendar.

³ This amount consists of a collection fee of \$101.00, a 50 percent interest based amnesty penalty of \$102.96, and accrued interest of \$390.13.

1 HEARING SUMMARY

2 Background

3 On April 25, 2003, appellant filed her 2002 California tax return and claimed a refund of
4 \$205. (FTB Br., exhibit A.) On May 28, 2003, the Franchise Tax Board (FTB or respondent) issued a
5 refund of \$5,138 to appellant in error. On January 21, 2004, respondent sent a letter to appellant
6 informing her of the erroneous refund. (FTB Br., exhibit B.) This letter requested that appellant send
7 payment for the difference of \$4,933 (\$5,138 refunded less the \$205 refund actually due appellant) and
8 informed her that failure to do so would result in the imposition of interest on the unpaid amount.

9 On February 26, 2004, appellant called respondent and received an explanation of the
10 erroneous refund. Respondent explains that the erroneous refund was issued because an extension
11 payment of \$4,933 was made on April 15, 2003, to the account of Joseph Weber, with whom appellant
12 had filed a joint return for 2001. The payment was posted to a joint suspense account for 2002 because
13 the payment voucher that was submitted with the payment included the appellant's social security
14 number. (Resp. Supp. Br., p. 2 and exhibit J.) Appellant filed her separate return on April 25, 2003.
15 Because there was a \$4,933 joint credit from the extension payment, respondent refunded the credit
16 amount together with her claimed overpayment of \$205. (*Id.* at pp. 2-3.) Apparently, appellant filed a
17 separate return for her deceased husband approximately seven months later and claimed the \$4,933 as a
18 credit. Respondent applied the amount as requested on the return as a credit to Joseph Weber's separate
19 liability generating an underpayment on appellant's individual account. (*Id.* at p. 3.) This gave rise to a
20 final balance due and the erroneous refund letter issued on January 21, 2004. (*Ibid.*)

21 On May 10, 2004, respondent sent an Income Tax Due Notice to appellant. (FTB Br.,
22 exhibit C.) On June 11, 2004, appellant apparently telephoned FTB, informed FTB that she was unable
23 to repay the erroneous refund, and stated she did not want to set up an installment agreement.
24 Respondent sent additional collection notices on June 15, 2004, and July 21, 2004. (FTB Br., exhibits H
25 and I.) On January 3, 2005, respondent sent appellant a letter informing her of the amnesty program and
26 inviting her to participate. (Resp. Sup. Br., p. 3.) On August 5, 2005, respondent sent a third collection
27 notice to appellant. On August 11, 2005, appellant apparently called respondent and requested that
28 interest be waived. Respondent apparently informed her that such a request must be made in writing.

1 On August 12, 2005, respondent issued an Earnings Withholding Order to appellant's employer.
2 Appellant apparently called respondent on that date to again request interest abatement and was
3 informed that such a request must be made in writing.

4 Respondent received payments of \$320.40 on September 1 and September 15, 2005. On
5 October 10, 2005, appellant sent a letter requesting a waiver of interest and collection fees. After
6 consideration of appellant's request, respondent issued a Notice of Determination Not to Abate Interest
7 on November 23, 2005. Respondent stated in its notice that appellant had not met the requirements of
8 Revenue and Taxation Code (R&TC) section 19104, subdivision (a). Appellant filed this timely appeal
9 and respondent received payment of \$4,884.73, which reduced appellant's balance to zero.

10 Contentions

11 Appellant requests a refund of penalties, late fees and interest that resulted from
12 respondent's erroneous refund. Appellant states she did not understand what the check for
13 "overpayment" from the "Franchise Tax Board" was for, thinking it was from her deceased husband's
14 employer or an insurance policy because he had worked for the State of California. Appellant asserts
15 she was the sole caregiver responsible for the care of her elderly mother, two aunts and her husband
16 during after he had been diagnosed with terminal cancer. Appellant states she could barely keep up with
17 the paperwork. Appellant states that she is now permanently disabled and experiencing financial
18 difficulty. Appellant has provided numerous documents in support of her claim for a refund including
19 her written request for waiver of interest, information regarding her spouse's medical condition, her
20 spouse's death certificate, her mother's death certificate, letters from appellant's doctors, appellant's
21 notes documenting conversations regarding this matter and a Christmas letter from 2001, when appellant
22 states many of these problems began.

23 In appellant's Supplemental Brief, appellant adds that she and her husband were victims
24 of identity theft totaling \$18,000 shortly before he died that took her approximately two years to resolve.
25 Appellant also states that her mailman was inefficient, regularly delivered mail to the wrong address,
26 and that 10 percent of her mail was never delivered to her house. Appellant asks the Board to consider
27 these extenuating circumstances in reaching its decision.

28 Respondent contends that appellant has not met the requirements for abatement of

1 interest under R&TC section 19104. Respondent argues that R&TC 19104, subdivision (c), applies to
2 the abatement of interest where, as in this appeal, an erroneous refund is issued. Respondent contends
3 that it more than exceeded the requirements of this section that interest be abated until 30 days following
4 the date it notified appellant of the erroneous refund because it did not begin charging interest in this
5 case until April 11, 2004, almost three months after it demanded repayment of the erroneous refund.⁴

6 Respondent contends interest may also be abated if appellant shows there was error or
7 delay in the performance of a ministerial or managerial act on the part of respondent that caused interest
8 to accrue; that such error or delay by respondent occurred after respondent contacted appellant regarding
9 the liability on January 21, 2004; and that no significant portion of the delay is attributable to appellant.
10 Respondent asserts that appellant has not alleged there was an error or delay in the performance of a
11 ministerial or managerial act and that she did not return the erroneous refund until January 11, 2006,
12 almost two years after she was notified of the error. Respondent states that although it is sympathetic to
13 appellant's personal and financial difficulties, there are no provisions in the R&TC that would allow
14 respondent to abate interest under the circumstances presented.

15 Respondent further contends the collection cost recovery fee was properly imposed.
16 Respondent argues that it sent three collection notices to appellant's last-known-address, which
17 indicated that continued failure to pay the amount due could result in additional collection action and the
18 imposition of the collection cost recovery fee.

19 Finally, respondent contends that this Board does not have jurisdiction to review the
20 imposition of the 50 percent interest based amnesty penalty because appellant has not filed a claim for
21 refund under the only permissible grounds, i.e., that the penalty was not properly computed by
22 respondent. Respondent argues that the penalty was imposed because appellant had a past-due tax
23 liability that qualified for amnesty, but appellant did not request amnesty.

24 In response to the Board's request for further briefing on the issue of whether imposition
25 of the amnesty penalty was consistent with the legislative intent when the liability at issue was the result
26 of an erroneous refund, respondent explains that a review of the legislative history makes it clear that the
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⁴ Respondent states that it was precluded from charging interest from May 28, 2003 to February 21, 2004 (30 days after the date of the refund letter).

1 penalty is appropriate here. (Resp. Supp. Br., p. 2.) Respondent explains that a key element of the tax
2 amnesty program was the strictly enforced amnesty penalty. Respondent asserts that as originally
3 enacted taxpayers were prohibited from claiming a refund for any amount paid in connection with the
4 amnesty penalty but that a narrow exception was added by AB 911 to allow a claim for refund only on
5 the grounds that the penalty was not properly computed by respondent. (*Ibid.*) Respondent notes that
6 other bills have proposed other avenues to abate the amnesty penalty on the basis of equity (AB 1614
7 and AB 561) but those bills have not yet been enacted. (*Ibid.*)

8 Applicable Law

9 Interest

10 The imposition of interest is mandatory and is compensation for a taxpayer's use of the
11 money after the due date of the tax. (*Appeal of Amy M. Yamachi*, 77-SBE-095, June 28, 1977; *Appeal of*
12 *Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.) Further, this Board has held interest is not a penalty but
13 is simply compensation for a taxpayer's use of money after the due date of the tax. (*Appeal of Audrey*
14 *C. Jaegle, supra.*) As such, there is no reasonable cause exception to the imposition of interest. (*Ibid.*)
15 The R&TC grants this Board jurisdiction to review for abuse of discretion respondent's refusal to abate
16 interest and to order interest abatement if it determines such an abuse occurred. (Rev. & Tax. Code, §
17 19104, subd. (b)(2)(B); *Appeal of Ernest J. Teichert*, 99-SBE-006, Sept. 29, 1999.)

18 As applicable to the facts of this appeal, respondent shall abate interest on any erroneous
19 refund until 30 days after the date demand for repayment is made. (Rev. & Tax. Code, § 19104, subd.
20 (c).) Respondent did not begin imposition of interest in this matter until almost three months after it
21 issued the demand for repayment.

22 Respondent may also abate interest accrued on a deficiency when the aggrieved taxpayer
23 identifies an unreasonable error or delay which (1) occurred after respondent contacted the taxpayer in
24 writing about the particular deficiency or overpayment underlying the disputed interest; (2) is not

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1 significantly attributable to the taxpayer; and (3) is attributable to a ministerial or managerial⁵ act
2 performed by respondent. (*Appeal of Michael and Sonia Kishner*, 99-SBE-007, Sept. 29, 1999; see also
3 Rev. & Tax. Code, § 19104, subds. (a)(1) & (b)(1).)

4 Respondent's determination not to abate interest is presumed correct, and the burden is
5 on appellant to prove error. (*Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.) In order to
6 show an abuse of discretion, appellant must establish that the FTB exercised its discretion arbitrarily,
7 capriciously, or without sound basis in fact or law by refusing to abate interest. (*Woodral v.*
8 *Commissioner* (1999) 112 T.C. 19, 23.)

9 Collection Cost Recovery Fee

10 R&TC section 19221 provides for the imposition of lien fees on the taxpayer. R&TC
11 section 19221, subdivision (a), provides that any amount due from a taxpayer shall become an
12 enforceable state tax lien if the taxpayer fails to pay the amount due at the time it becomes due and
13 payable. Government Code section 7174 allows respondent to collect the various fees associated with
14 recording and releasing the state tax lien. R&TC section 19221 does not contain a "reasonable cause"
15 exception, or any other provision, allowing for relief from the imposition of these fees.

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18 ⁵ In the *Appeal of Michael and Sonia Kishner* (99-SBE-007), decided September 29, 1999, this Board adopted the language
19 from Treasury Regulation section 301.6404-2 (b)(2), which defines a "ministerial act" as:

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

24 Further, it is well settled in California that when a state statute is patterned after federal legislation on the same subject, the
25 interpretation and effect given the federal provision by the federal courts and administrative bodies are relevant in
26 determining the proper construction of the California statute. (*Andrews v. Franchise Tax Board* (1969) 275 Cal.App.2d 653,
27 658; *Rihn v. Franchise Tax Board* (1955) 131 Cal.App.2d 356, 360.) As we did in the *Appeal of Michael and Sonia Kishner*,
28 we turn to Treasury Regulation section 301.6404-2 (b)(1) for the definition of a "managerial" act. The regulation defines a
managerial act as:

26 "[A]n administrative act that occurs during the processing of a taxpayer's case involving the temporary or
27 permanent loss of records or the exercise of judgment or discretion relating to management of personnel. A
28 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"

1 Amnesty Penalty

2 In 2004, the Legislature enacted Senate Bill 1100 (Stats. 2004. Ch. 226) R&TC sections
3 19730 through 19738, which set forth the provisions for the income tax amnesty program; taxpayers
4 who pay the tax and interest liabilities are granted relief from most penalties. The tax amnesty program
5 was conducted during a two-month period from February 1, 2005, through March 31, 2005. (Rev. &
6 Tax. Code, § 19731.) R&TC section 19733 provides, in part, that “[t]his chapter shall apply to any
7 taxpayer who, during the tax amnesty program period specified in section 19731: . . .(2) files a
8 completed amnesty application with the Franchise Tax Board, signed under penalty of perjury, electing
9 to participate in the tax amnesty program.”

10 If a taxpayer fails to meet the requirements for participation in amnesty, R&TC section
11 19777.5, subdivision (a), imposes the amnesty penalty (an additional penalty equal to 50 percent of the
12 interest payable) in addition to any other penalties already imposed. R&TC section 19777.5,
13 subdivision (d), states that the assessment and appeal procedures do not apply to the amnesty penalty,
14 while R&TC section 19777.5, subdivision (e), states that a taxpayer has no right to claim a refund of the
15 amnesty penalty on any grounds other than that it was not “properly computed.”

16 STAFF COMMENTS

17 It does not appear to staff that interest may be further abated under R&TC section 19104,
18 subdivision (c), because respondent is only required to abate interest on an erroneous refund for 30 days
19 after the demand for repayment is made. Respondent did not begin charging appellant interest until
20 almost three months after the demand for repayment was issued.

21 Although interest may also be abated where there has been a delay or error in
22 respondent’s performance of a ministerial or managerial act, it does not appear to staff that appellant is
23 asserting that such an error was made. Although respondent issued a \$4,933 refund in error, it did not
24 begin to impose interest until after it contacted appellant, informed her of the error, and provided
25 appellant time for her to return the erroneous refund without charging interest.⁶ Instead, it appears that
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28 ⁶ Staff notes it appears that the respondent’s first written contact with appellant regarding the erroneous refund was January 21, 2004. Therefore, should the Board decide to abate interest on the basis of an error or delay in the performance of a ministerial or managerial act, it appears interest abatement would not be available prior to the date of first written contact for 2002.

1 appellant is asserting that interest should be abated because of the difficult personal and financial
2 circumstances she experienced at the time she received the refund and which she continues to
3 experience to the present. Unfortunately, in spite of appellant's circumstances, it does not appear that
4 there is a basis here upon which to further abate interest.

5 With respect to the collection cost recovery fee, appellant has not yet made any specific
6 contentions as to why she believes the fee was improperly imposed. At the hearing appellant should be
7 prepared to address this point.

8 Finally, it does not appear to staff that this Board has jurisdiction to review whether
9 respondent properly imposed the amnesty interest penalty. At hearing both parties should be prepared to
10 discuss whether the Board has such jurisdiction. In addition, staff observes that appellant has not made
11 any specific contentions with respect to this penalty. At the hearing appellant should be prepared to
12 discuss whether she believes she participated in the amnesty program, if not, why and to further explain
13 why she believes this penalty should not apply.

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