

1 Katherine MacDonald  
2 Tax Counsel III  
3 Board of Equalization, Appeals Division  
4 450 N Street, MIC:85  
5 PO Box 942879  
6 Sacramento CA 95814  
7 Tel: (916) 445-2641  
8 Fax: (916) 324-2618

9 Attorney for the Appeals Division

10 **BOARD OF EQUALIZATION**  
11 **STATE OF CALIFORNIA**

12 In the Matter of the Appeal of: ) **HEARING SUMMARY<sup>1</sup>**  
13 ) **PERSONAL INCOME TAX APPEAL**  
14 **LOREN ZELMER** ) Case No. 426246  
15 )

<u>Year</u>	<u>Claim For Refund</u>
2005	\$543.18 <sup>2</sup>

16 Representing the Parties:

17 For Appellant: Jaclyn Appleby, Tax Appeals Assistance Program  
18 For Franchise Tax Board: Kenneth A. Davis, Tax Counsel III

19 **QUESTIONS:** (1) Whether respondent abused its discretion in its determination not to abate and  
20 refund paid interest of \$84.90.  
21 (2) Whether the collection cost recovery fee (\$126.00) can be abated and refunded.

22 ///

23 ///

24 \_\_\_\_\_  
25  
26  
27 <sup>1</sup> At the hearing, respondent should be prepared to provide the current amount of accrued interest as of the hearing date.

28 <sup>2</sup> This amount is comprised of a late payment penalty of \$332.28, a collection cost recovery fee of \$126.00, and paid interest of \$84.90. As explained herein, it appears that appellant is no longer disputing the imposition of the late payment penalty.

1 HEARING SUMMARY

2 Background

3 Appellant filed his 2005 California nonresident income tax return on July 10, 2006.  
4 (Resp. Opening Br., p. 1.) On his return, appellant reported taxable income of \$144,719 and California  
5 adjusted gross income of \$67,023. Appellant imposed a self-assessed tax of \$11,125, which was  
6 reduced to \$5,112 after determining appellant's California taxable income and subtracting the California  
7 prorated exemption credit of \$38. (Resp. Opening Br., exhibit A.) Appellant paid the tax liability late  
8 on July 10, 2006, with his return.

9 On July 18, 2006, respondent issued a Return Information Notice (RIN) to appellant  
10 advising him that respondent was assessing a late payment penalty of \$332.28 plus interest because  
11 appellant had not paid his tax liability by the original due date. (Resp. Opening Br., p. 1 & exhibit B.)  
12 Respondent's computer records indicate that respondent mailed the RIN to appellant's last-known  
13 address, the address appellant used on his 2005 return (540NR), in Pinion Hills.<sup>3</sup> (Resp. Opening Br., p.  
14 2.)

15 Respondent began collection proceedings because appellant failed to pay the balance due.  
16 Respondent issued an Income Tax Due Notice (NTD) on September 5, 2006, to appellant's last-known  
17 address. (Resp. Opening Br., exhibit C.) On November 28, 2006, respondent issued a Final Notice  
18 because appellant failed to contact respondent or pay the balance due. (Resp. Opening Br., exhibit D.)  
19 The Final Notice also advised appellant of potential collection action including the imposition of a  
20 collection cost recovery fee of \$126. The Final Notice was also sent to appellant's last-known address.  
21 On February 28, 2007, respondent issued an Order to Withhold Personal Income Taxes (OTW) to  
22 Washington Mutual Bank for \$543.18. (Resp. Opening Br., exhibit E.) Washington Mutual levied that  
23 amount on appellant's account and forwarded the funds to respondent. (Resp. Opening Br., p. 2.)

24 On May 11, 2007, appellant filed a claim for refund. (App. Opening Br., attachment.) In  
25 his claim for refund, appellant states he discovered the levy when reviewing his account transaction  
26 history. Appellant also states that he paid his taxes in full but did not know what the penalty was at the  
27

28 <sup>3</sup> Respondent provided the entire address, however we will not include that information in an effort to protect confidential taxpayer information.

1 time he filed his return. Appellant explained that he assumed no additional amounts were due to the  
2 State because no one contacted him. Finally, appellant stated in his refund claim that he never received  
3 respondent's notices even though he had a forwarding order in place for his Pinion Hills address through  
4 August 2006 to his new address in Santa Cruz. (*Ibid.*)

5 On June 25, 2007, respondent notified appellant it was denying his claim for refund of  
6 the amount paid in interest. (App. Opening Br., attachment.) Respondent explained it also could not  
7 waive the late payment penalty absent reasonable cause. Appellant filed this timely appeal of the denial  
8 of his claim for refund of the late payment penalty, interest, and collection fee.

### 9 Contentions

10 Appellant indicates in his reply brief that he is not disputing the imposition of the late  
11 payment penalty.<sup>4</sup> (App. Reply Br., pp. 2 & 6.) However, appellant contends that he is entitled to a  
12 refund of the collection cost recovery fee and interest accrued on the late payment penalty from July 18,  
13 2006 to February 28, 2007. Appellant asserts he submitted a timely extension and paid the full amount  
14 of the tax liability. Appellant maintains that he would have paid the penalty immediately had  
15 respondent notified him of the penalty amount.

16 Appellant does not dispute the last-known address rule, but instead argues that he notified  
17 respondent of a change of address when he filed a forwarding order with the United States Postal  
18 Service (USPS). Appellant asserts that his forwarding order was effective until August 4, 2006.<sup>5</sup>  
19 Appellant contends that the filing of a forwarding order is a clear indication of the address to which  
20 appellant wanted his documents sent. Appellant argues the use of a forwarding order succeeded in  
21 meeting this intention with respect to correspondence from the IRS. Appellant states that he was  
22 informed by respondent that its notices indicate that they are not to be forwarded, but rather are to be  
23 returned to respondent. Appellant argues this practice is in direct opposition to the ruling that the  
24 address the taxing agency uses must be the one to which the agency reasonably believed the taxpayer  
25

---

26 <sup>4</sup> In light of the fact that appellant is not disputing imposition of the late payment penalty, we will not address that penalty in  
27 detail in this hearing summary.

28 <sup>5</sup> Appellant states that he received correspondence from the IRS that was forwarded from his Pinion Hills address to his Santa  
Cruz address.

1 wanted the document to be sent in light of all the surrounding facts and circumstances. (Citing *Taylor v.*  
2 *Commissioner* (1990) T.C. Memo. 1990-559; *Monge v. Commissioner* (1989) 93 T.C. 22, 27-28.)  
3 Appellant argues that he acted as a responsible taxpayer by filing a forwarding order with the USPS to  
4 indicate where he wanted to receive mail until he filed his next tax return.

5 Appellant argues that respondent's failure to have mail forwarded to a taxpayer is a delay  
6 or error in the performance of a ministerial act by respondent. Appellant also complains that respondent  
7 denied him due process by simply taking the money from his bank account. Appellant contends that he  
8 requested information regarding how the amounts were calculated, but respondent has only provided a  
9 cursory statement.

10 Respondent argues that appellant has not shown any basis upon which interest may be  
11 abated. Respondent contends that there was no error or delay of a ministerial or managerial act by  
12 respondent. Respondent asserts that it immediately informed appellant of the late payment penalty plus  
13 interest.

14 Respondent argues that its notices were properly mailed to appellant's last-known  
15 address, which as in this case, was the address that appeared on appellant's most recently filed return.  
16 Respondent maintains that appellant failed to notify respondent of any change of mailing address after  
17 filing of the 2005 return and prior to the issuance of the legal notices. Finally, respondent argues that it  
18 properly imposed the collection cost recovery fee because appellant failed to respond to the assessment  
19 and billing notices in any way. Respondent maintains that the collection notices sent to appellant's last-  
20 known address are adequate notices regardless of whether he received such notices. Respondent  
21 contends that there is no reasonable cause exception to the imposition of the collection cost recovery fee.

## 22 Applicable Law

### 23 Interest

24 The imposition of interest is mandatory. (*Appeal of Amy M. Yamachi*, 77-SBE-095,  
25 June 28, 1977; *Appeal of Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.) If a taxpayer fails to pay  
26 tax by the due date, or if respondent assesses additional tax, the law imposes interest on the balance  
27 due. (Rev. & Tax. Code, § 19101.) Interest is not a penalty but is simply compensation for a  
28 taxpayer's use of money after the due date of the tax. (*Appeal of Audrey C. Jaegle, supra.*) There is

1 no reasonable cause exception to the imposition of interest. (*Ibid.*) Interest is also mandatory with  
2 respect to the imposition of a failure to file penalty, a failure to pay penalty, or an accuracy-related  
3 penalty pursuant to R&TC sections 19131, 19132, and 19164, respectively. (Rev. & Tax. Code,  
4 § 19101, subd. (c)(2)(B).)

5 In order to obtain interest abatement, appellant must qualify under one of the  
6 following three statutes: R&TC sections 19104, 19112 or 21012. R&TC section 21012 is not  
7 applicable here because there has been no reliance on any written advice requested of respondent.  
8 R&TC section 19112 requires a showing of extreme financial hardship caused by significant  
9 disability or other catastrophic circumstance, which appellant has not alleged. Appellant's interest  
10 abatement request accordingly falls under the provisions of R&TC section 19104.

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

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

20 [A] procedural or mechanical act that does not involve the exercise of judgment or  
21 discretion, and that occurs during the processing of a taxpayer's case after all  
22 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.

23 This Board has not yet adopted a definition for the term "managerial act." However,  
24 when a California statute is substantially identical to a federal statute (such as with the interest  
25 abatement statute in this case),<sup>6</sup> we may consider federal law interpreting the federal statute as highly  
26 persuasive. (*Appeal of Michael and Sonia Kishner, supra*, (citing *Douglas v. State of California*  
27

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

1 (1942) 48 Cal.App.2d 835.)) In this regard, Treasury Regulation section 301.6404-2(b)(1) defines a  
2 “managerial act” as:

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

7 Appellant contends the interest should be abated because he did not receive any timely  
8 notices of the late filing penalty or collection action. However, interest may only be abated if  
9 respondent caused some unreasonable error or delay while performing a ministerial or managerial act,  
10 which then prevented appellant from receiving the notices of tax due. The Board has found that  
11 respondent’s written notification need only go to taxpayer’s “last known address,” regardless of  
12 whether the taxpayer actually receives the notice. (*Appeal of Yvonne M. Goodwin*, 97-SBE-003, Mar.  
13 19, 1997; *Appeal of Jon W. and Antoinette O. Johnston*, 83-SBE-238, Oct. 26, 1983.)

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

#### 28 Collection Cost Recovery Fee

R&TC section 19254 provides that if a person fails to pay any amount of tax, penalty,  
addition to tax, interest, or other liability, respondent shall impose a “collection cost recovery fee” if

1 it has mailed notice to that person for payment that advises that continued failure to pay the amount  
2 due may result in collection action, including the imposition of a collection cost recovery fee.” (Rev.  
3 & Tax. Code, § 19254, subd. (a)(1).) The statute does not provide for a “reasonable cause”  
4 exception. (*Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.) The amount is determined  
5 annually to reflect actual costs. (*Ibid.*; see also Rev. & Tax. Code, § 19254, subd. (b).)

#### 6 STAFF COMMENTS

7 Staff notes that when asked to determine the sufficiency of respondent’s mailing of a  
8 statutory notice, the Board has long recognized a presumption in favor of respondent arising from the  
9 “last-known address rule.” Under this rule, the Board presumes respondent’s mailing of a statutory  
10 notice to a taxpayer provides notice to the taxpayer of the tax due, so long as respondent mailed the  
11 notice to the taxpayer’s last-known address, even if the taxpayer did not actually receive the notice.  
12 (*Appeal of Yvonne M. Goodwin*, 97-SBE-003, Mar. 19, 1997; *Appeal of Jon W. and Antoinette O.*  
13 *Johnston*, 83-SBE-238, Oct. 26, 1983.) The taxpayer’s last-known address is the address shown on the  
14 taxpayer’s most recently filed return, unless respondent is given clear and concise notice of a different  
15 address. (*King v. Commissioner* (9th Cir. 1988) 857 F.2d 676, 679; *Wallin v. Commissioner* (9th Cir.  
16 1984) 744 F.2d 674, 676.) The purpose of this rule is to protect the taxing agency and the statutory  
17 scheme of assessment and appeal from a failure by the taxpayer to inform the taxing agency of a change  
18 in address. (*Delman v. Commissioner* (3rd Cir. 1967) 384 F.2d 929, 933.) The presumption in the last  
19 known address rule in favor of respondent is not absolute. An appellant may overcome the presumption  
20 by proving by a preponderance of the evidence that respondent failed to send the required notices to  
21 appellant’s last known address. (See Cal. Code Regs., tit. 18, § 5080; *Appeal of Saga Corporation*, 82-  
22 SBE-102, June 29, 1982.) Respondent mailed its notices to appellant at the address given on his 2005,  
23 most recent, return.

24 Staff notes that it appears that respondent’s first written contact with appellant regarding  
25 imposition of the late payment penalty for 2005 was on July 18, 2006, when it issued the RIN.  
26 Accordingly interest may not be abated prior to that date (and appellant is requesting interest abatement  
27 starting on July 18, 2006 through February 28, 2007, the payment date).

1           At the hearing, both parties should be prepared to discuss whether or not filing a  
2 forwarding order with the USPS is sufficient to give clear and concise notice of appellant’s new address  
3 to respondent. Respondent should be prepared to discuss whether or not its notices direct the USPS to  
4 return undeliverable correspondence to it and what information respondent gets from the returned mail.  
5 In other words, if respondent is directing the USPS to return its notices so that it learns a taxpayer has  
6 moved does respondent get better address information at that time. If the Board determines that the  
7 forwarding order was insufficient to notify respondent of appellant’s new address, then respondent’s  
8 action mailing the notices to the address used on appellant’s 2005 tax return would appear to be  
9 sufficient.

10           Staff is not aware of any basis upon which the filing enforcement cost recovery fee may  
11 be relieved. As stated above, R&TC section 19254 authorizes imposition of a filing enforcement cost  
12 recovery fee when respondent mailed notice to a taxpayer that the continued failure to file a return may  
13 result in imposition of the fee. Once the fee is properly imposed, there is no language in the statute that  
14 would excuse the fee under any circumstances, including for reasonable cause. (See *Michael E. Myers*,  
15 *supra.*) If the Board determines that respondent mailed its notices to appellant’s last-known address,  
16 then it appears that the fee would be properly imposed. The parties should be prepared to address  
17 whether respondent “mailed notice” to the taxpayer if the Board determines respondent was “notified”  
18 of appellant’s new address by the forwarding order.

19 ///

20 ///

21 ///

22 Zelmer\_km

23

24

25

26

27

28