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

10 In the Matter of the Appeal of: ) **HEARING SUMMARY**  
11 ) **PERSONAL INCOME TAX APPEAL**  
12 **MAHNAZ JUDSON**<sup>1</sup> ) Case No. 424321  
13 \_\_\_\_\_ )

	<u>Years</u> <sup>2</sup>	<u>Interest</u> <sup>3</sup>
	1998	\$4,352.82
	1999	\$6,870.76

17 Representing the Parties:

18 For Appellant: Kent Westerberg, Attorney  
19 For Franchise Tax Board: Diane L. Ewing, Tax Counsel III  
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21 **QUESTIONS:** (1) Whether the Franchise Tax Board (respondent or FTB) issued the NPAs within  
22 the applicable statute of limitations period.  
23

24 <sup>1</sup> Appellant resides in Los Gatos, California.

25 <sup>2</sup> The length of time between the years at issue and the filing of this appeal is due to the fact that respondent issued Notices of  
26 Proposed Assessments (NPAs) for tax years 1998 and 1999 on August 14, 2006, based on information it received from the  
27 Internal Revenue Service (IRS) in April 2006. The NPAs went final without protest. In addition, appellants failed to inform  
respondent of the federal changes.

28 <sup>3</sup> These are the amounts of interest shown on the NPAs. However, interest continues to accrue on any unpaid amounts. At  
the hearing, respondent should be prepared to provide the current amount of accrued interest as of the hearing date for both  
tax years.

- 1 (2) Whether the Board has jurisdiction to consider whether the final tax assessments  
2 are correct, and, if so, whether appellant has demonstrated error in the underlying  
3 tax assessments.
- 4 (3) Whether the Board has jurisdiction to consider the propriety of the imposition of  
5 the late filing penalties and collection cost recovery fee, and, if so, whether  
6 appellant has shown reasonable cause to warrant abatement of the late filing  
7 penalties and correctly imposed the collection cost recovery fee after proper notice.
- 8 (4) Whether respondent abused its discretion in refusing to abate interest.
- 9 (5) Whether the Board has jurisdiction to review the FTB's proposed assessment of  
10 the post-amnesty penalties, and, if so, whether respondent is estopped from  
11 imposing the post-amnesty penalties.

## 12 HEARING SUMMARY

### 13 Background

14 This appeal arises from respondent's action denying appellant's request for abatement of  
15 interest (and unpaid, final penalties); thus the primary issue before the Board is whether respondent  
16 abused its discretion in refusing to abate interest. During the appeal, appellant raised other issues  
17 concerning the validity of the NPAs and respondent's imposition of penalties. Staff has accordingly  
18 included the background and law pertinent to the issuance of the 1998 and 1999 NPAs and the  
19 imposition of penalties.

### 20 1998

21 Appellant filed a timely California return for tax year 1998, reporting taxable income of  
22 -\$1,184. In April 2006, respondent received a federal report of Income Tax Examination Changes  
23 (RAR) dated November 21, 2001, showing that the IRS had audited appellant's return and made  
24 adjustments to appellant's 1998 account to account for unreported alimony income of \$81,977 and  
25 disallowed itemized deductions of \$6,196. (Resp. Supplemental Br., exhibit H.) The IRS assessed  
26 additional tax of \$16,801.00 and imposed a late filing penalty of \$3,823.00 and an accuracy-related  
27 penalty of \$3,360.20, plus interest. (*Id.*, p. 6.) The IRS Individual Master File (IMF) indicates that the  
28 federal determination for tax year 1998 became final on February 18, 2002. (*Id.*, exhibit J, p. 2.) The

1 IMF also indicates that payments against the 1998 federal deficiency were made beginning March 28,  
2 2002, and throughout 2002. (*Id.*, pp. 2-3.) Appellant failed to notify respondent of the federal  
3 changes.<sup>4</sup> (Resp. Opening Br., p.4.) On August 14, 2006, respondent issued an NPA for tax year 1998  
4 to appellant at her last known address on Sharon Court in Los Gatos, California. (*Id.*, exhibit A.)  
5 Respondent does not indicate whether or not the NPA was ever returned as undeliverable by the U.S.  
6 Post Office.

7           The NPA increased appellant's taxable income by \$88,173 by including the unreported  
8 alimony income of \$81,977 and disallowing \$6,196 of itemized deductions. The NPA proposes  
9 additional tax of \$5,502, which was reduced to a proposed liability of \$5,179 after the application of  
10 \$323 of exemption credits. In addition, the NPA imposes an accuracy related penalty of \$2,071.60 and  
11 an estimated post-amnesty penalty of \$1,764.98, plus interest. Appellant did not protest the NPA and it  
12 became final.

13           1999

14           On November 6, 2000, appellant filed a late California return for tax year 1999,  
15 reporting taxable income of \$35,427. The November 21, 2001, federal RAR also shows that the IRS  
16 had audited appellant's return and made adjustments to appellant's 1999 account to account for  
17 unreported alimony income of \$110,711, a disallowed standard deduction of \$6,350, and allowed  
18 itemized deductions of \$17,353. The IRS assessed additional tax of \$30,197 and imposed a late filing  
19 penalty of \$6,315.75 and an accuracy-related penalty of \$6,039.40, plus interest. (Resp.'s  
20 Supplemental Br., exhibit I.) The IMF indicates that the federal determination for tax year 1999 also  
21 became final on February 18, 2002; further, a payment of \$5,000 was made against the 1999 deficiency  
22 on March 28, 2002. (*Id.*, exhibit K, p. 2.) Appellant failed to notify respondent of the federal changes.  
23 (Resp.'s Opening Br., p.4.) On August 14, 2006, respondent issued an NPA to appellant for tax year  
24 1999 at her last known address on Sharon Court in Los Gatos, California. (*Id.*, exhibit B.) Respondent  
25 does not indicate whether or not the NPA was ever returned as undeliverable by the U.S. Post Office.

26           The NPA increased appellant's taxable income by \$98,031 by including the unreported  
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28 <sup>4</sup> Revenue and Taxation Code (R&TC) section 18622 requires taxpayers to report federal changes to respondent within six months of the federal determination, and either concede the accuracy of the determination or state wherein it is erroneous.

1 alimony income of \$110,711, disallowing \$5,422 of standard deductions, and allowing \$18,102 of  
2 itemized deductions. The NPA proposes tax of \$9,756, which was reduced to a proposed liability of  
3 \$8,880 after the application of \$299 of exemption credits and previously assessed tax of \$577. In  
4 addition, the NPA imposes a late filing penalty of \$1,747.75, an accuracy related penalty of \$3,552.00  
5 and an estimated post-amnesty penalty of \$2,688.96, plus interest. Appellant did not protest the NPA  
6 and it became final.

7           On May 10, 2007, appellant made a single payment of \$14,636, which, according to  
8 respondent's account summaries, was distributed to appellant's 1998 and 1999 accounts as follows:  
9 1) two payments in the amounts of \$5,201.40 and \$554.60 were applied to her 1998 balance due; and  
10 2) one payment of \$8,880 was applied to her 1999 balance due.<sup>5</sup> (Resp.'s Opening Br., exhibits E, F.)  
11 In a letter dated May 22, 2007, appellant requested that respondent waive/abate the penalties and  
12 interest and accept the May 10, 2007, payments in full and final satisfaction of the 1998 and 1999  
13 assessments. (App.'s Opening Br., exhibit D.) On August 28, 2007, respondent denied this request and  
14 issued a Notice of Determination Not to Abate Interest, in which it asserts that the payment of \$14,636  
15 was applied on May 10, 2007, resulting in an unpaid balance of \$0.00 for 1998 and an unpaid balance  
16 of \$24,889.87 for 1999. This timely appeal followed.

### 17           Appellant's Contentions

18           Appellant contends that respondent did not timely issue its NPAs within the four-year  
19 statute of limitations provided by Revenue & Taxation Code (R&TC) section 19057. Appellant  
20 asserts that respondent and the IRS are solely responsible for the delay involved in paying the state tax  
21 deficiencies, because they failed to communicate promptly with each other after the federal  
22 determinations became final in 2002. Appellant also asserts that she immediately paid the federal  
23 deficiencies in full and would have also paid the state tax deficiency at the time the federal  
24 determinations became final if respondent had informed her at that time of the proposed state  
25 assessments. Appellant further asserts that she believed that her payments of the federal deficiencies  
26 for tax years 1998 and 1999 satisfied all of her tax obligations, including California tax liabilities. For  
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<sup>5</sup> Appellant submitted a copy of a check from her checking account made payable to respondent for \$14,636, which appears to be dated May 14, 2006. (App.'s Opening Br., exhibit E.)

1 this reason, appellant claims that she did not report the federal changes to respondent and she “should  
2 not be punished for making payments she reasonably believed were satisfying all of her tax  
3 obligations for the years 1998 and 1999.” (App.’s Reply Br., pp. 2-3.)

4 Appellant also argues that she should be entitled to protest the NPAs, because she was  
5 unaware of any outstanding tax deficiencies until approximately October 18, 2006, when her husband  
6 took the then current mail, including the two NPAs, from appellant’s residence on Sharon Court in Los  
7 Gatos with him on a business trip and reviewed the two NPAs for the first time.<sup>6</sup> According to  
8 appellant, her husband then contacted their accountant concerning the two NPAs so that appellant  
9 could pay any unpaid tax. Appellant contends that she is entitled to abatement of all penalties and  
10 interest, as well as the collection cost recovery fee imposed for 1999. According to appellant, she is  
11 entitled to abatement of interest because respondent committed an error in communicating with her  
12 about the two NPAs; an employee of respondent informed her accountant in October or November  
13 2006 that respondent first learned of the federal determinations in October 2006, which is “simply  
14 inconceivable when the Franchise Tax Board sent out the Notices of Proposed Assessments dated  
15 August 14, 2006 to the appellant.” (App.’s Reply Br., p. 2.) Appellant also appears to contend for the  
16 first time in her reply brief that the additional taxes assessed for 1998 and 1999 are at issue in this  
17 appeal; she indicates she made the \$14,636 payment for the 1998 and 1999 additional tax due because  
18 “that is what she was informed was owing and she felt that by making this payment in good faith, that  
19 would resolve this matter.” Appellant further indicates she “makes no admission as to whether the  
20 additional taxes assessed were proper in the initial instance.” Appellant further contends that  
21 respondent has either waived its entitlement to claim the post-amnesty penalty or is estopped from  
22 asserting such a claim because an employee of respondent informed her on May 9, 2007, that he  
23 would recommend that the post-amnesty penalty be waived for both tax years.

24 Appellant also indicates she does not understand why she has a zero balance for 1998  
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26 <sup>6</sup> It appears that appellant is confused when she objects in her supplemental brief to respondent’s purported assertion that  
27 *she* first learned of the federal changes in April 2006. In its supplemental brief, respondent states, “Plainly, respondent  
28 ‘first learned’ of the federal actions in April 2006, not in October, as alleged by appellant.” In this context, “respondent”  
obviously refers to the FTB, rather than appellant. Respondent is thus asserting that it (not appellant) first learned of the  
federal actions in April 2006.

1 and a balance due of \$24,889.87 for 1999, following her payment of \$14,636, which was made  
2 directly to respondent's senior compliance representative to satisfy the 1998 and 1999 tax due.

### 3 Respondent's Contentions

4 Respondent contends that it timely mailed the NPAs to appellant's correct address  
5 within the four-year statute of limitations set forth in R&TC section 19060. Respondent notes that  
6 appellant does not dispute that the NPAs show the correct address and she actually received the NPAs  
7 at this address. Respondent argues that, since it properly mailed the NPAs to appellant's last known  
8 address, the NPAs are valid, even if appellant did not receive them until after the deadline for  
9 protesting the proposed assessments. Respondent further notes that appellant did not report the federal  
10 changes to respondent within six months of the final federal determinations, as required by R&TC  
11 section 18622. Respondent contends that the four-year statute of limitations only began to run in April  
12 2006, after the IRS informed it of the federal changes. Respondent notes that it issued the NPAs four  
13 months after it received notice from the IRS of the federal changes.

14 Respondent contends that interest cannot be abated because respondent did not  
15 unreasonably err or delay in the performance of any ministerial or managerial act. Respondent also  
16 contends that any delay that occurred was due to appellant's failure to report the federal action.  
17 Respondent argues that appellant did not immediately pay the federal deficiencies after they became  
18 final on February 18, 2002, but instead paid in installments for several months. According to  
19 respondent, these installment payments indicate a continued awareness on the part of appellant that  
20 additional taxes were due, which should have put her on notice that her California returns similarly  
21 underreported her alimony for 1998 and 1999.

22 Respondent contends that appellant failed to timely protest the proposed assessments  
23 before they became final. Because respondent did not issue an NOA (appellant failed to protest the  
24 NPA for either year, and they became final) respondent contends that the Board does not have  
25 jurisdiction to consider the 1998 or 1999 tax assessments, late-filing penalty or collection cost  
26 recovery fee.

27 Respondent argues that in order for the Board to have such jurisdiction, appellant  
28 would have to pay the entire balance due and file a claim for refund. In addition, respondent contends

1 that its proposed assessments based on federal changes are presumptively correct and appellant has  
2 failed to carry her burden of proving error in the assessments. Respondent also contends that appellant  
3 has failed to establish error, revision or revocation of the federal changes. Assuming the Board finds  
4 jurisdiction, respondent contends that appellant has not established reasonable cause for abatement of  
5 the late filing penalty for tax year 1999 and the collection cost recovery fee is mandated whenever it  
6 must take collection action to resolve a delinquent tax liability.

7 Finally, respondent argues that the Board does not have jurisdiction in this appeal to  
8 review the imposition of the post-amnesty penalty. Respondent further argues that any alleged oral  
9 representations made by one of its employees concerning the waiver of the post-amnesty penalties  
10 does not estop respondent from imposing them, because the relevant statute does not give it any  
11 discretion to waive the penalty. Respondent notes that it is abating the accuracy related penalties for  
12 both tax years.

### 13 Applicable Law

#### 14 Statute of Limitations on Assessments

15 The statute of limitations on respondent's issuance of a proposed assessment depends  
16 on when, or if, it is notified of federal changes. In general, regardless of any federal action,  
17 respondent must issue a proposed assessment within four years of the date the taxpayer filed his or her  
18 California return. (Rev. & Tax. Code, § 19057.) If there are federal changes, and the taxpayer or the  
19 IRS notifies respondent within six months of the date the federal changes became final, then  
20 respondent must issue a proposed assessment within two years of the date of notification, or within the  
21 general four-year period, whichever expires later. (Rev. & Tax. Code, § 19059.) If the taxpayer or the  
22 IRS notifies respondent later than six months from the date the federal changes became final, then  
23 respondent must issue a proposed assessment within four years of the date of notification. (Rev. &  
24 Tax. Code, § 19060, subd. (b).) Finally, if the taxpayer fails to notify respondent of the federal  
25 changes, then respondent may issue a proposed assessment at any time. (Rev. & Tax. Code, § 19060,  
26 subd. (a).) The California Supreme Court has clarified that the specific limitations periods set forth in  
27 section 19060 override the general limitations period set forth in section 19057. (*Ordlock v. Franchise*  
28 *Tax Board* (2006) 38 Cal.4th 897.) The "last-known address rule" protects the taxing agency from the

1 failure of a taxpayer to inform the agency of address changes, and generally holds that the taxing  
2 agency's mailing of a notice was adequate so long as it was sent to the taxpayer's last-known address.  
3 (See *Appeal of Jon W. and Antoinette O. Johnston*, 83-SBE-238, Oct. 26, 1983; *Appeal of W. L.*  
4 *Bryant*, 83-SBE-180, Aug. 17, 1983.)

#### 5 Jurisdiction

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

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

#### 24 Federal Assessment

25 When the IRS makes a correction to a taxpayer's account, state law requires that the  
26 taxpayer report the changes to the FTB and either concede the accuracy of the final federal  
27 determination or state wherein it is erroneous. (Rev. & Tax. Code, § 18622.) Additionally, a state  
28 deficiency assessment based on a federal audit report is presumptively correct and appellant bears the

1 burden of proving error. (*Appeal of Sheldon I. and Helen E. Brockett*, 86-SBE-109, June 18, 1986.)  
2 Absent uncontradicted, credible, competent and relevant evidence showing that the FTB's  
3 determinations are incorrect, they must be upheld. (*Appeal of Oscar D. and Agatha E. Seltzer*, 80-  
4 SBE-154, Nov. 18, 1980.)

#### 5 Late Filing Penalty

6 R&TC section 19131 imposes a penalty on any taxpayer failing to make and file a  
7 return on or before the due date of the return unless it is shown that the failure is due to reasonable  
8 cause and not due to willful neglect. Appellant bears the burden of proving the existence of  
9 reasonable cause, and no willful neglect, for the late-filing penalty. (*Appeal of M.B. and G.M. Scott*,  
10 82-SBE-249, Oct. 14, 1982.) In order to establish reasonable cause, appellant must show the late  
11 filing of the return occurred despite the exercise of ordinary business care and prudence.<sup>7</sup> (*Appeal of*  
12 *Howard G. and Mary Tons*, 79-SBE-027, Jan. 9, 1979.) In order to overcome the presumption of  
13 correctness afforded respondent's determinations of tax and penalties, appellant must provide credible  
14 and competent evidence to support the claim of reasonable cause; otherwise, the penalties will not be  
15 abated. (*Appeal of Winston R. Schwyhart*, 75-SBE-035, Apr. 22, 1975.)

#### 16 Collection Cost Recovery Fee

17 R&TC section 19254 provides that if a person fails to pay any amount of tax, penalty,  
18 addition to tax, interest, or other liability, respondent shall impose a "collection cost recovery fee" if it  
19 has mailed notice to that person for payment that advises that continued failure to pay the amount due  
20 may result in collection action, including the imposition of a collection cost recovery fee." (Rev. &  
21 Tax. Code, § 19254, subd. (a)(1).) The statute does not provide for a "reasonable cause" exception.  
22 (*Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.) The amount is determined annually to  
23 reflect actual costs. (*Ibid.* See also Rev. & Tax. Code, § 19254, subd. (b).) In order for the Board to  
24 consider the collection cost recovery fee, it must either be included in an NPA that is disputed,  
25 affirmed in a Notice of Action, and appealed to this Board (Rev. & Tax. Code, §§ 19044, 19045,  
26 19047, 19048) or the tax liability for the tax year must be paid in full and respondent's denial of a  
27

28 <sup>7</sup> The United States Supreme Court defined willful neglect as a "conscious, intentional failure or reckless indifference."  
(*United States v. Boyle* (1985) 469 U.S. 241, 245-246.)

1 claim for refund appealed to this Board (Rev. & Tax. Code, § 19322 et seq.).

2 Interest

3 The imposition of interest is mandatory. (*Appeal of Amy M. Yamachi*, 77-SBE-095,  
4 June 28, 1977; *Appeal of Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.) If a taxpayer fails to pay tax  
5 by the due date, or if respondent assesses additional tax, the law imposes interest on the balance due.  
6 (Rev. & Tax. Code, § 19101.) Interest is not a penalty but is simply compensation for a taxpayer's use  
7 of money after the due date of the tax. (*Appeal of Audrey C. Jaegle, supra.*) There is no reasonable  
8 cause exception to the imposition of interest. (*Ibid.*) Interest is also mandatory with respect to the  
9 imposition of a failure to file penalty, a failure to pay penalty, or an accuracy-related penalty pursuant  
10 to R&TC sections 19131, 19132, and 19164, respectively. (Rev. & Tax. Code, § 19101, subd.  
11 (c)(2)(B).)

12 In order to obtain interest abatement, appellant must qualify under one of the following  
13 three statutes: R&TC sections 19104, 19112 or 21012. R&TC section 21012 is not applicable here  
14 because there has been no reliance on any written advice requested of respondent. R&TC section  
15 19112 requires a showing of extreme financial hardship caused by significant disability or other  
16 catastrophic circumstance, which appellant has not alleged. Appellant's interest abatement request  
17 accordingly falls under the provisions of R&TC section 19104.

18 Respondent may abate all or a part of any interest on a deficiency to the extent that  
19 interest is attributable in whole or in part to any unreasonable error or delay committed by respondent  
20 in the performance of a ministerial or managerial act. (Rev. & Tax. Code, § 19104, subd. (a)(1).)<sup>8</sup>  
21 Further, an error or delay can only be considered when no significant aspect of the error or delay is  
22 attributable to appellant and after respondent has contacted appellant in writing with respect to the  
23 deficiency or payment. (Rev. & Tax. Code, § 19104, subd. (b)(1).)

24 In the *Appeal of Michael and Sonia Kishner*, 99-SBE-007, decided on September 29,  
25 1999, this Board adopted the language from Treasury Regulation section 301.6404-2(b)(2), defining a  
26

27 <sup>8</sup> Staff notes that interest abatement under R&TC section 19104, subdivision (a)(3), does not appear to apply here because  
28 it appears that the IRS did not abate interest on appellant's federal deficiencies for 1998 or 1999. None of the federal  
documentation (whether submitted by appellant or respondent) shows an abatement of interest for either tax year or a  
ministerial or managerial error on the part of the IRS.

1 “ministerial act” as:

2 [A] procedural or mechanical act that does not involve the exercise of judgment or  
3 discretion, and that occurs during the processing of a taxpayer’s case after all prerequisites  
4 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.

5 This Board has not yet adopted a definition for the term “managerial act.” However,  
6 when a California statute is substantially identical to a federal statute (such as with the interest  
7 abatement statute in this case),<sup>9</sup> we may consider federal law interpreting the federal statute as highly  
8 persuasive. (*Appeal of Michael and Sonia Kishner, supra*, (citing *Douglas v. State of California*  
9 (1942) 48 Cal.App.2d 835.)) In this regard, Treasury Regulation section 301.6404-2(b)(1) defines a  
10 “managerial act” as:

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

14 Appellant contends the interest should be abated because she did not receive any timely  
15 notices of additional tax due for either tax year. However, interest may only be abated if respondent  
16 caused some unreasonable error or delay while performing a ministerial or managerial act, which then  
17 prevented appellant from receiving the notices of tax due. The Board has found that respondent’s  
18 written notification need only go to taxpayer’s “last known address,” regardless of whether the  
19 taxpayer actually receives the notice. (*Appeal of Yvonne M. Goodwin*, 97-SBE-003, Mar. 19, 1997;  
20 *Appeal of Jon W. and Antoinette O. Johnston*, 83-SBE-238, Oct. 26, 1983.)

21 Respondent’s determination not to abate interest is presumed correct, and the burden is  
22 on appellant to prove error. (*Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.) When  
23 respondent denies a request for interest abatement, the Board has jurisdiction to review respondent’s  
24 denial for abuse of discretion. (Rev. & Tax. Code, § 19104, subd. (b)(2)(B); *Appeal of Ernest J.*  
25 *Teichert*, 99-SBE-006, Sept. 29, 1999.) In such cases, a taxpayer’s burden of proof is to show by clear  
26 and convincing evidence that such abuse of discretion occurred. (See *Appeal of Royal Crown Cola*  
27

28 <sup>9</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 Co., 74-SBE-047, Nov. 12, 1974; *Appeal of Browning Manufacturing Co. et al.*, 72-SBE-026, Sept.  
2 14, 1972.) To show an abuse of discretion, appellant must establish that in refusing to abate interest  
3 respondent exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law by  
4 refusing to abate interest. (*Woodral v. Commissioner* (1999) 112 T.C. 19, 23.) Interest abatement  
5 provisions are not intended to be routinely used to avoid the payment of interest, thus abatement  
6 should be ordered only “where failure to abate interest would be widely perceived as grossly unfair.”  
7 (*Lee v. Commissioner* (1999) 113 T.C. 145, 149.) The mere passage of time does not establish error or  
8 delay that can be the basis of an abatement of interest. (*Id.* at p. 150.)

#### 9 Post-amnesty Penalties

10 R&TC sections 19730 through 19738 set forth the tax amnesty program for taxpayers  
11 subject to the Personal Income Tax Law and the Corporation Tax Law. The amnesty program was  
12 conducted during the two-month period beginning February 1, 2005, and ending March 31, 2005, and  
13 applied to tax liabilities for taxable years beginning before January 1, 2003. If an eligible taxpayer  
14 fully paid the taxpayer’s unpaid tax obligations and met the other requirements of the amnesty  
15 program, respondent waived all unpaid penalties and fees imposed, and no criminal action would be  
16 brought against the taxpayer for years subject to the amnesty program. R&TC section 19777.5  
17 generally provides that, for each tax year for which amnesty could have been requested by the  
18 taxpayer, the post-amnesty penalty will be imposed in an amount equal to 50 percent of interest  
19 accrued on unpaid tax as of the last day of the amnesty period (March 31, 2005). The post-amnesty  
20 penalty is imposed in addition to any other applicable penalties.

21 The amnesty provisions give respondent no discretion to determine whether the post-  
22 amnesty penalty should be imposed and provide no exceptions for taxpayers who may have acted in  
23 good faith or had reasonable cause for failing to participate in the amnesty program. In addition, the  
24 amnesty provisions strictly limit the Board’s ability to review respondent’s imposition of the amnesty  
25 penalty. Subdivision (d) of R&TC section 19777.5 states, “Article 3 (commencing with Section  
26 19031), (relating to deficiency assessments) shall not apply with respect to the assessment or  
27 collection of [the post-amnesty penalty].” Article 3 sets forth the procedure for a taxpayer to protest a  
28 proposed assessment. Thus, subdivision (d) of R&TC section 19777.5 provides that a taxpayer may

1 not contest the assessment of the amnesty penalty by respondent under the protest procedures that are  
2 applicable to deficiency assessments. Because the protest provisions are not applicable to the post-  
3 amnesty penalty, there is no action by respondent for the Board to review under R&TC section 19045  
4 when a taxpayer challenges the assessment of the post-amnesty penalty in a deficiency proceeding.  
5 Even if the Board did have jurisdiction to review respondent's imposition of an amnesty penalty in a  
6 deficiency appeal, the amnesty provisions do not provide a reasonable cause exception or any similar  
7 exception to the imposition of the post-amnesty penalty.

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

#### 12           Equitable Estoppel

13           The following four elements must be present in order to apply the doctrine of equitable  
14 estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct  
15 shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so  
16 intended; (3) the other party must be ignorant of the true state of facts; and (4) the other party must  
17 rely upon the conduct to her injury. (*Strong v. County of Santa Cruz* (1975) 15 Cal. 3d 720, 725.)  
18 Equitable estoppel may be applied against the government in order to prevent a grave injustice, but the  
19 doctrine is inapplicable if it would result in the nullification of a strong rule of policy adopted for the  
20 benefit of the public. (*Ibid.*)

21           The Board has held that reliance on informal opinions of respondent's employees does  
22 not create estoppel against respondent. (*Appeal of Virgil E. and Izora Gamble*, 76-SBE-053, May 4,  
23 1976; *Appeal of Mary M. Goforth*, 80-SBE-158, Dec. 9, 1980.) The Board has consistently refused to  
24 invoke the doctrine when taxpayers have understated their tax liability on tax returns in alleged  
25 reliance on erroneous information provided by FTB employees. (*Appeal of Richard R. and Diane K.*  
26 *Smith*, 91-SBE-005, Oct. 9, 1991; *Appeal of Harry H. and Alice P. Freer*, 84-SBE-127, Sept. 12,  
27 1984. Further, this Board has refused to estop respondent when the estoppel claim arose from alleged  
28 reliance on statements made by employees of a different agency, such as the IRS. (*Appeal of E.J., Jr.*

1 *and Dorothy Saal*, 83-SBE-038, Feb. 1, 1983.)

2 STAFF COMMENTS

3 Respondent should be prepared to discuss at the hearing how it applied appellant's  
4 payment of \$14,636 with respect to 1998 and 1999, whether it honored appellant's apparent request  
5 that the payment be applied first and foremost to the tax deficiencies for both years, and the  
6 calculation of interest on any unpaid portions of the 1998 and 1999 tax liabilities up to the date of the  
7 oral hearing on January 21, 2009. Respondent may wish to discuss the authorities and its written  
8 policies concerning the order in which it applies payments to balances due. For example, under  
9 section 799.030 of the Board's Compliance Policy and Procedure Manual, the first standard rule for  
10 application of payment is that payments should be applied "as directed by taxpayer at the time of  
11 voluntary payment" and, in the absence of taxpayer direction, payments generally should be applied  
12 first to tax (the most delinquent first), then to interest, and lastly to penalties. (Compliance Policy and  
13 Procedure Manual, § 799.030.)

14 Statute of Limitations on Assessments

15 It appears to staff that the NPAs were timely issued within four years of respondent  
16 receiving notification of the federal changes by the IRS. Appellant was aware of the federal changes  
17 as demonstrated by her payments made against the additional tax in 2002, yet appellant did not inform  
18 respondent of the federal changes within six months as required by R&TC section 18622. The  
19 Supreme Court's decision in *Ordlock, supra*, appears to conclusively resolve the statute of limitations  
20 issue in respondent's favor. It further appears to staff that the NPAs are valid, since they were mailed  
21 to appellant's correct address. In this regard, it is undisputed that respondent correctly issued the two  
22 NPAs to appellant's last known address on Sharon Court in Los Gatos, and appellant received them at  
23 that address. Respondent should be prepared to discuss at oral hearing how it determined that this was  
24 appellant's last known address; staff notes that appellant's 1998 and 1999 IMFs list the address on  
25 Sharon Court in Los Gatos. Respondent may also wish to discuss the procedure involved in issuing  
26 and mailing NPAs, and whether there are ordinarily any time delays between the issuance date and  
27 mailing date. Appellant has alleged that respondent failed to timely contact her with regard to any tax  
28 liability for 1998 or 1999, since the federal determinations became final on February 18, 2002, and she

1 did not receive the two NPAs until it was past the deadline for filing a protest. At the hearing,  
2 respondent may wish to confirm that neither of the NPAs was ever returned as undeliverable by the  
3 U.S. Post Office prior to appellant allegedly receiving them in mid-October 2006.

#### 4 Jurisdiction

5 It does not appear that the Board has jurisdiction to consider the underlying tax  
6 assessments for 1998 and 1999 or the late filing penalty or collection cost recovery fee for 1999.  
7 Appellant did not timely protest either NPA, and therefore each NPA became final without issuance of  
8 a Notice of Action. (Rev. & Tax. Code, §§ 19041, 19042.) In addition, it does not appear that  
9 appellant has paid all of the amounts due and filed a claim for refund for either 1998 or 1999 with  
10 respondent. (Rev. & Tax. Code, §§ 19322, 19324.) Appellant has only timely appealed from the  
11 Notice of Determination Not to Abate Interest, which appears to limit the Board's inquiry at this time  
12 to the interest imposed by the FTB. At the hearing, appellant should be prepared to discuss the basis  
13 for the Board's jurisdiction to consider the underlying assessments, penalties and fee in light of the  
14 fact that appellant did not timely protest the NPAs and has not paid the full amount of the outstanding  
15 tax and penalties and filed a claim for refund with respondent.

#### 16 Proposed Assessments

17 With respect to the proposed assessments themselves, appellant has not yet shown error  
18 in the proposed assessments or the federal determinations on which they are based, or discussed  
19 whether she had reasonable cause to file her 1999 return late. Should the Board conclude it has  
20 jurisdiction to consider the 1998 and/or 1999 tax assessments, appellant should be prepared to clarify  
21 at the oral hearing whether in fact she is contesting the additional tax assessments for both years, as  
22 suggested by her reply brief. If so, then she should be prepared to discuss specifically how the  
23 proposed assessments are erroneous (and provide evidence of this) and demonstrate reasonable cause  
24 for the late filing of her 1999 return.

#### 25 Interest Abatement

26 It appears that appellant has not yet presented evidence to show that the FTB abused its  
27 discretion by refusing to abate interest. Staff notes that respondent timely issued both NPAs  
28 approximately four months after receiving notification of the federal changes from the IRS. Appellant

1 should be prepared to discuss at the oral hearing why she failed to inform respondent of the federal  
2 changes within six months after the date they became final in 2002. In this regard, appellant may wish  
3 to discuss whether the delay in issuance of the two NPAs was in any way attributable to her. Staff  
4 notes that appellant had the use of the unpaid additional tax for tax years 1998 and 1999 for more than  
5 six years. Appellant suggests that the IRS and respondent caused any delay in her payment of the  
6 proper tax liability; however, appellant could have paid the amount due on the unreported alimony  
7 income she received in 1998 and 1999 at any time and thereby stopped the accrual of additional  
8 interest. Staff notes that it appears appellant was aware by 2002 she had failed to report her alimony  
9 income, as evident by her payments to the IRS on her federal 1998 and 1999 deficiencies. Appellant  
10 should be prepared to specify at oral hearing how respondent's issuance of the two NPAs on  
11 August 14, 2006, within four months of being notified by the IRS of the federal determination  
12 constitutes an unreasonable error in the performance of a ministerial or managerial act warranting  
13 abatement of interest.

14 Staff notes that it appears that respondent's first written contact with appellant for the  
15 1998 and 1999 deficiencies was the two NPAs, which were both issued on August 14, 2006; thus,  
16 interest abatement would not be available prior to August 14, 2006.

#### 17 Post Amnesty Penalties

18 Finally, there appears to be no statutory mechanism for the Board to review  
19 respondent's proposed assessment of the post-amnesty penalties at this time. (See Rev. & Tax. Code,  
20 § 19777.5.) Although respondent has indicated that it may impose post-amnesty penalties, the post-  
21 amnesty penalties are not part of the tax deficiencies in this appeal and will not be calculated and  
22 imposed unless and until the proposed deficiency assessments become final and the final deficiency  
23 amounts exceed any prepayments made before the end of the amnesty period. If the post-amnesty  
24 penalties become final liabilities and are paid, then appellant could potentially file claims for refund if  
25 she asserts that the penalties were not properly computed by respondent. (Rev. & Tax. Code,  
26 § 19777.5, subds. (e)(1) & (2).) For these reasons, it appears that appellant's contention that the post-  
27 amnesty penalties should not be imposed is premature and cannot be considered by the Board in this  
28 appeal.

1                    Equitable Estoppel

2                    Staff notes that appellant contends she relied on an informal oral statement from  
3 respondent’s employee on May 9, 2007, that he “would recommend” the post amnesty penalties be  
4 waived, and that this statement induced her to pay the taxes she owed for 1998 and 1999. Appellant  
5 appears to contend the payment of her taxes constitutes “detrimental reliance.” Staff notes that  
6 payment of tax owed is not detrimental to a taxpayer; to the contrary, appellant’s payment reduced the  
7 accrual of interest. Further the Board has held that such informal advice by respondent’s employees  
8 does not create estoppel against respondent. Finally, staff notes that respondent’s employee  
9 apparently stated that he “would recommend” the post amnesty penalties be waived, not that they  
10 would be waived. Appellant may want to discuss how she could have relied on a statement by an  
11 employee that he would “recommend” the penalties waived; how payment of her taxes owed was  
12 detrimental to her (in light of the fact that payment reduced the accrual of interest), and the Board’s  
13 decisions in this area concluding that informal advice of respondent’s employees does not create  
14 estoppel against respondent.

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