

1 John O. Johnson
2 Tax Counsel
3 Board of Equalization, Appeals Division
4 450 N Street, MIC: 85
5 PO Box 942879
6 Sacramento CA 95814
7 Tel: (916) 319-9118
8 Fax: (916) 324-2618

6 Attorney for the Appeals Division

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

10 In the Matter of the Appeal of:) **HEARING SUMMARY**
11) **PERSONAL INCOME TAX APPEAL**
12 **ANDREW BENJAMIN AAMES¹**) Case No. 414599

	<u>Year</u>	<u>Proposed Assessment²</u>
	2005	\$1,463

17 Representing the Parties:

18 For Appellant: John Milikowsky, TAAP
19 For Franchise Tax Board: Dee Garcia, Legal Analyst

21 **QUESTIONS:** (1) Whether appellant has shown error in respondent's proposed assessment.
22 (2) Whether the transfer of appellant's payment of the proposed assessment amount
23 to partially satisfy appellant's debt with another agency affects the Franchise Tax
24 Board's claim to the proposed assessment amount.

25 ///

27 ¹ Appellant resides in Riverside, Riverside County, California.

28 ² Respondent should be prepared to provide the amount of interest accrued as of the date of the oral hearing.

1 HEARING SUMMARY

2 Background

3 Appellant timely filed a 2005 California income tax return (form 540A), on which he
4 claimed head of household filing status. (Resp. Reply Br., exhibit A.) Appellant reported a federal
5 adjusted gross income (AGI) of \$82,014.48, claimed the standard deduction of \$6,508.00, reported a
6 taxable income of \$75,506.48, and calculated a total tax of \$1,995.00. After applying California income
7 tax withheld of \$3,413.28, appellant claimed an overpayment of \$1,418.28. (*Ibid.*)

8 The Franchise Tax Board (respondent or FTB) disallowed a \$120.00 renter's credit,
9 decreasing appellant's overpayment to \$1,298.28, and applied the overpayment to appellant's 2006
10 estimated tax payments per his request. (Resp. Reply Br., p. 1.) Respondent subsequently determined
11 that appellant was not entitled to head of household status and issued a Notice of Proposed Assessment
12 (NPA) on November 9, 2006, to correct this error. (Resp. Reply Br., exhibit B.) The NPA revised
13 appellant's filing status from head of household to married filing separate. As a result, appellant's
14 standard deduction was decreased to \$3,254, his taxable income was increased to \$78,760, and the NPA
15 proposed an additional tax of \$1,463, plus interest. (*Id.*)

16 Appellant protested the NPA in a letter dated December 12, 2006. (Resp. Reply Br.,
17 exhibit C.) With this letter, appellant submitted full payment of the proposed assessment and accrued
18 interest in the amount of \$1,519.37, as shown on the NPA, stating that he wished to avoid future interest
19 and penalties. (Resp. Reply Br., p. 1 & exhibit C; App. Appeal Letter, p. 1; App. Reply Br., p. 1.)
20 Respondent indicates that after reviewing the protest, it sent a letter to appellant informing him that he
21 did not qualify for head of household status and that he could file an amended return revising his filing
22 status. (Resp. Reply Br., p. 2.) Respondent issued a Notice of Action (NOA) affirming the NPA on
23 June 20, 2007. (Resp. Reply Br., exhibit D.)

24 The record indicates that the payment submitted by appellant with his appeal for the full
25 NPA amount was not applied to his 2005 tax year, and was instead sent to the Department of Child
26 Support Services on January 3, 2007, in response to an interagency intercept request.³ (Resp. Reply Br.,
27

28 ³ As discussed below, respondent has agreed to partially waive interest as a result of this mistake. (Resp. Reply Br., p. 3.)

1 pp. 2, 3 & exhibit E; App. Reply Br., p. 1.) Respondent states that it attempted to retrieve the money on
2 July 13, 2007, but it was unable to retrieve \$1,510.12 of the funds from Los Angeles County because the
3 funds were already transmitted to the custodial parent. (Resp. Reply Br., p. 2.) Respondent notes that
4 \$9.25 was retrieved from Riverside County. (*Id.*)

5 Contentions

6 Appellant contends that his income tax obligations for the 2005 tax year have been met.
7 (App. Appeal Letter.) In support of this claim, appellant states that he sent a check for the full amount
8 of the NPA with his protest letter. Therefore, even if he owes the NPA amount, it has been paid in full
9 already. (*Ibid.*) Appellant claims that he is not responsible for respondent's mistake of sending the
10 payment to another agency, and should not have the undue burden of paying his taxes twice. (App.
11 Reply Br., p. 2.) Appellant further contends that the amount represented on the NPA is incorrect, as it
12 does not represent his married filing jointly status. (App. Reply Br., p. 2.) Appellant has not supplied
13 an amended return to show how much tax is due under the married filing jointly status.

14 Respondent contends that appellant has not shown error in the NOA amount, and has not
15 provided an amended return as it suggested in the NPA. (Resp. Reply Br., p. 3 & exhibit B, p. 2.)
16 Respondent concedes that payment of the NPA amount was made with the protest letter and that it
17 mistakenly forwarded the payment to the Department of Child Support Services as the result of an
18 interagency intercept action. (Resp. Reply Br., p. 2.) However, respondent contends that the amount is
19 still due, and has agreed to waive all interest from the date of the original payment (December 11, 2006)
20 to a date 30 days after it filed its reply brief requesting repayment (January 3, 2008). (Resp. Reply Br.,
21 p. 3.) Respondent asserts that the amount forwarded as a result of the interagency intercept action still
22 benefited appellant since it paid debt he owed to another agency. (*Id.*) In its reply brief, respondent
23 contends that appellant's check was received without any documentation or indication that it was to be
24 applied to the 2005 tax year, and since the proposed assessment was still pending, there was no
25 assessment to apply the payment toward and it was treated as a refund.⁴ (Resp. Reply Br., p. 2 & fn. 1.)

26 ///

27 _____
28 ⁴ This contention by respondent seems to be contradictory to other statements made in the respondent's reply brief, as further explained in staff's comments below.

1 Applicable Law

2 Assessment

3 The FTB's initial burden is to show why its assessment is reasonable and rational. (*Todd*
4 *v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.)
5 Thereafter, the FTB's determination of an assessment is presumed correct, and appellant has the burden
6 of proving it to be wrong. (*Todd v. McColgan, supra*; *Appeal of Michael E. Myers, supra*.)
7 Unsupported assertions are not sufficient to satisfy appellant's burden of proof. (*Appeal of Aaron and*
8 *Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.) In the absence of uncontradicted, credible, competent,
9 and relevant evidence showing error in the FTB's determination, it must be upheld. (*Appeal of Oscar D.*
10 *and Agatha E. Seltzer*, 80-SBE-154, Nov. 18, 1980.) Appellant's failure to produce evidence that is
11 within his control gives rise to a presumption that such evidence is unfavorable to his case. (*Appeal of*
12 *Don A. Cookston*, 83-SBE-048, Jan. 3, 1983.) Respondent has indicated that appellant may file an
13 amended return to adjust his filing status. (Resp. Reply Br., exhibit B, p. 2.)

14 Interagency Intercept Request

15 An interagency intercept request is a request from an outside agency to the State
16 Controller's Office to have a taxpayer's tax refunds or lottery winnings be redirected and applied as
17 payment for an established debt with the requesting agency rather than distributed to the taxpayer.
18 (Gov. Code, §§ 12419.2, 12419.3, 12419.4, 12419.5, 12419.7 and 12419.8.) If FTB finds that there has
19 been an overpayment of any liability imposed under the pertinent revenue and taxation laws, the amount
20 of the overpayment may be credited against any amount then due from the taxpayer. (Rev. & Tax.
21 Code, § 19301.) FTB transfers overpayments to cover established debt in accordance with the
22 interagency intercept request prescriptions.

23 The Government Code provides that "[p]roperty held or deposited with any state agency
24 for a particular purpose, such as security for payment of taxes, shall not be applied to any other
25 purpose... until the property or amount is no longer needed for the particular purpose." (Gov. Code, §
26 12419.4.)

27 ///

28 ///

1 STAFF COMMENTS

2 Assessment

3 In this instance, appellant seems to concur with respondent that he is not entitled to head
4 of household filing status, but argues that he is entitled to married filing jointly status rather than married
5 filing separately. (App. Reply Br., p. 2.) Appellant contends that switching his filing status will
6 alleviate some, if not all, of the proposed assessment. (*Id.*) Respondent indicated in the NPA that
7 appellant should file an amended return (form 540X) if he wished to change his filing status. (Resp.
8 Reply Br., exhibit B, p. 2.) Appellant should be prepared to explain why he has not filed an amended
9 return. Respondent should be prepared to indicate the full amount due, showing abatement of interest
10 from the period of December 11, 2006, to January 3, 2008, and discuss how the \$9.25 retrieved from
11 Riverside County affects the amount due.

12 Interagency Intercept Request

13 Both parties appear to agree that appellant paid the full NPA amount with his protest
14 letter. Respondent states in its reply brief that it was required to forward the funds to Child Support
15 Services, but then states that it mistakenly sent the payment to Child Support Services. (Resp. Reply
16 Br., p. 2.) Respondent claims that the check was not properly accompanied by documents or a notation
17 indicating it was to be applied toward the 2005 proposed assessment, but both parties appear to agree
18 that the check was submitted with appellant's protest to the NPA issued for the 2005 tax year. (Resp.
19 Reply Br., p. 1 & exhibit C.) In addition, the protest letter mentions that payment was attached for the
20 proposed assessment to stop interest accrual, the copy of the check provided by appellant shows that
21 "2005 tax year" was written on the subject line of the check, and the check amount matched the NPA
22 amount. (Resp. Reply Br., exhibit C; App. Reply Br., exhibit B.)

23 Respondent appears to concede that its diverting of the payment to the Department of
24 Child Support Services was a mistake under these circumstances, and (Resp. Reply Br., p. 2.) has agreed
25 to waive all interest from the date of the payment to 30 days after the filing of its brief in this appeal.
26 R&TC section 19104 states generally that interest can be abated when it is attributable in whole or in
27 part to any unreasonable error by an officer or employee of FTB in performing a ministerial or
28 managerial act. (Rev. & Tax. Code, § 19104, subd. (a)(1).) Respondent should be prepared to specify

1 what the mistake that it made was pursuant to authority and explain how the 2005 payment should have
2 been applied.

3 Both parties should be prepared to discuss whether a tax liability must be final in order to
4 determine whether a liability exists and how the payment should have been treated. Both parties should
5 be prepared to discuss any relevant authority addressing whether appellant can avoid paying his tax
6 liability where he has received the benefit of payment of his child support obligation. The parties should
7 discuss whether avoiding his tax liability as proposed by appellant provides a windfall to appellant based
8 on an administrative error.

9 Government Code section 12419.4 removes all liability from a state agency that properly
10 transfers a refund or overpayment to another agency per an interagency intercept request. However, a
11 state agency is not allowed to transfer such property until it is no longer needed for its purpose. In this
12 instance, it appears as though the alleged overpayment was submitted by the taxpayer as security for
13 payment of taxes. In conjunction with the previous paragraph, both parties should discuss, in light of
14 Government Code sections 12419.4, 12419.5, and 12419.8, whether the transfer of funds to the other
15 state agency was proper, and whether respondent is relieved and discharged of any and all liability.

16 ///

17 ///

18 ///

19 Aames_jj

20

21

22

23

24

25

26

27

28