OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 18010762
	)	
ERIC J. AND QUENDWA S. QUIGLEY	)	Date Issued: November 5, 2018
	)	
	)	
	)	

OPINION

Representing the Parties:

For Appellants: Quendwa S. Quigley
Eric J. Quigley

For Respondent: Freddie C. Cauton, Legal Assistant

KWEE, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19045,[1] Eric J. Quigley and Quendwa S. Quigley (appellants) appeal an action by the Franchise Tax Board (FTB or respondent) in denying appellants' request for abatement of $63.20 in interest on a proposed tax assessment for the 2012 tax year. This matter is being decided based on the written record because appellants waived their right to an oral hearing.

ISSUE

Whether appellants established that FTB abused its discretion in failing to abate interest.

FACTUAL FINDINGS

1. On or around April 11, 2013, appellants timely filed a joint California Resident Income Tax Return (Form 540A), reporting federal adjusted gross income (AGI) of $101,278, and no California adjustments to income. Appellants' reported federal AGI included wages of $95,317, interest income of $408, and a taxable distribution of $5,588[2] reported

[1] All section references are to the Revenue and Taxation Code unless otherwise indicated.

[2] The data that FTB obtained from the Internal Revenue Service (IRS) reported this amount as $5,587.

on Form 1099-R by Central Coast FCU, less a tuition and fees deduction of $35. The income reported on appellants' federal return was consistent with their California return.

2. Appellants also received $37,581 in distributions from Western & Southern Financial Group, Inc. (Payor) in settlement of a claim appellant-wife filed on an annuity with Western-Southern Life Assurance Company. Of this amount, Payor reported $11,515 as taxable to appellant-wife on Form 1099-R. Appellants did not report any of this income on their federal or state tax returns.

3. On November 14, 2014, the IRS made two corrections to appellants' federal AGI. First, the IRS increased appellants' AGI by $11,515 to reflect the unreported taxable distributions reported on Form 1099-R. Second, the IRS disallowed a deduction in the amount of $35, for claimed qualified tuition expenses. Appellants did not dispute the federal action, and it is final.

4. On January 28, 2016, FTB issued a Notice of Proposed Assessment (NPA), notifying appellants that FTB was making the same corrections to appellants' state return that the IRS made to their federal return.

5. On March 10, 2016, appellants protested the NPA on the basis that while the federal government still has a "terrible" death tax, California does not have a death tax. In support, appellants attached a printout from the State Controller's website, and asked FTB to take notice of the following statement: "Effective January 1, 2005, the state death tax credit has been eliminated."[3] FTB acknowledged the protest on April 14, 2016, and informed appellants that it may take several months to resolve the protest, and interest will continue to accrue.

6. On March 30, 2017, FTB issued a Notice of Action (NOA) which erroneously reduced the proposed assessment by $516 in tax,[4] but otherwise denied the protest.

[3] This refers to a bill passed by Congress in 2001, which, on and after January 1, 2005, eliminates a federal credit that certain taxpayers were previously able to claim. (H.R. No. 1836, 107th Congress, § 531 (2001).)

[4] Appellants reported a taxable distribution of $5,587 from Central Coast FCU on their original return. In computing appellants' tax liability in the NOA, FTB erroneously treated this amount ($5,587) as nontaxable, and reduced appellants' tax liability accordingly. FTB admits that was an error by FTB, but asserts that the error was in appellants' favor, reducing their tax liability by $516 in tax, plus interest thereon.

7. On April 24, 2017, appellants paid a deposit in the full amount of the proposed assessment, as revised by the NOA, consisting of $502 in tax, and $63.20 in interest.[5] Of the total interest paid, $43.09 accrued for the period April 15, 2013, through January 12, 2016; and $20.11 accrued for the period February 12, 2016, through March 30, 2017.

8. On April 24, 2017, appellants filed the instant appeal, contending that FTB was erroneously assessing a death tax on appellants. Appellants also requested abatement of the $63.20 in accrued interest due to the excessive amount of time that FTB took to resolve their case, and because FTB allegedly ignored appellants' request to meet and discuss the case during the protest.

9. FTB responded by letter dated October 3, 2017, stating that the tax being asserted was an income tax owed by appellants. FTB also explained that the NOA erroneously reduced the proposed assessment by $516 in tax, and attached a copy of a California income tax return that FTB completed for appellants, to show how FTB contends the return should have been completed.

10. By letter dated May 22, 2018, appellants conceded that they owe the income tax as shown in the NOA, and stated that the only remaining item in dispute is interest abatement. Appellants also asserted that it took many years to finally get a response from FTB, and requested that we admonish FTB for refusing to meet with them to resolve this matter. Appellants also asked that FTB explain why appellant-wife's siblings were not taxed on their distributions from Payor.[6]

DISCUSSION

If any amount of tax is not paid by the due date, interest is required to be imposed from the due date until the date the taxes are paid. (§ 19101(a).) Interest also accrues as provided above on any unpaid penalty amount if the penalty is not paid within 15 days of any notice and demand for payment. (§ 19101(c)(2)(A).) Imposition of interest is mandatory and there is no

[5] California generally conforms to the federal tax deposit provisions in Internal Revenue Code (IRC) section 6603. (§ 19041.5.) Under IRC section 6603, a payment made to stop interest from accruing on a proposed deficiency assessment that has not become final is regarded as a "tax deposit." (IRC, § 6603(b).) The deposit converts to a payment under certain circumstances which are not relevant here. (See § 19041.5(a).)

[6] OTA is separate and independent from FTB, and our record only contains information provided by the parties relative to the dispute before us. We have no information, nor access to information, regarding whether and how FTB may have taxed appellant-wife's siblings on any distributions made by Payor.

reasonable cause exception to imposition of interest. (*Appeal of Yvonne M. Goodwin*, 97-SBE-003, Mar. 19, 1997; *Appeal of Amy M. Yamachi*, 77-SBE-095, June 28, 1977.)[7] FTB may abate interest related to a proposed deficiency to the extent the interest is attributable in whole or in part to: (1) an unreasonable error or delay (2) by an officer or employee of FTB (3) in performing a ministerial or managerial act (4) which occurred after FTB contacted the taxpayer in writing regarding the proposed assessment, and provided no significant aspect of that error or delay is attributable to the taxpayer. (§ 19104(a)(1), (b)(1); *Appeal of Michael and Sonia Kishner*, 99-SBE-007, Sept. 29, 1999.) OTA has jurisdiction to determine whether a failure by FTB to abate interest was an abuse of discretion, and OTA has the authority to abate interest in such cases. (§§ 20(b), 19104(b)(2)(B).)

The Revenue and Taxation Code does not define what is meant by an "unreasonable error or delay," or "a ministerial or managerial act." (§ 19104(a)(1).) Additionally, we are not aware of any precedential decisions of the board which have specifically opined on the issue of whether a delay due to FTB's workload limitations results from the performance of "a ministerial or managerial act."[8] Nevertheless, section 19104(a)(1), California's interest abatement provision for unreasonable error or delay, applies the same standard and uses substantially identical language as IRC section 6404(e), which is the comparable federal statute authorizing interest abatement for unreasonable error or delay. Therefore, it is appropriate to look to federal authority for guidance.[9] (*Douglas v. State* (1948) 48 Cal.App.2d 835, 838; *Appeal of Michael and Sophia Kishner*, *supra*.)

Congress only intended abatement of interest in circumstances where the failure to do so would be widely perceived as grossly unfair. (*Franklin v. Commissioner* (2008) T.C. Memo. 2008-13 [citing H. Rept. 99–426, at 844 (1985), 1986–3 C.B. (Vol. 2) 1, 844; S. Rept. 99–313, at

[7] Precedential opinions of the Board of Equalization (BOE or board) may be cited as precedential authority to the Office of Tax Appeals unless a panel removes, in whole or in part, the precedential status of the opinion. The board's precedential opinions are viewable on their website: <www.boe.ca.gov/legal/legalopcont.htm>.

[8] For tax years beginning on or after January 1, 1998, section 19104 was amended to allow for interest abatement due to managerial acts; previously, abatement under section 19104 was limited to ministerial acts. (See Assembly Bill No. 713 (Stats. 1997, Ch. 600); see *Appeal of Ernest J. Teichert*, 99-SBE-006, Sept. 29, 1999.) The board did not define managerial act in a precedential decision.

[9] As relevant, IRC section 6406 was amended effective July 30, 1996, to allow for interest abatement due to managerial acts (previously, abatement under section 6404 was limited to ministerial acts). (Pub. L. No. 104-168 (July 30, 1996) 110 Stat. 1452 [amendments applicable to taxable years beginning after July 30, 1996]; see *Conner v. Commissioner* (2005) T.C. Summ. Op. 2005-27.)

208 (1986), 1986–3 C.B. (Vol. 3) 1, 208].) Thus, the mere passage of time does not establish an unreasonable error or delay. (*Ibrahim v. Commissioner* (2011) T.C. Memo. 2011-215.) Further, to show that the interest accrual is attributable to the tax agency, the taxpayer must show that the tax liability would have been paid earlier but for the error or delay. (*Hull v. Commissioner* (2014) T.C. Memo. 2014-36; *Paneque v. Commissioner*, T.C. Memo. 2013–48.)

Unreasonable error or delay due to a ministerial or managerial act may be eligible for interest abatement, whereas error or delay due to general administrative decisions are not eligible for interest abatement. (§ 19104; IRC, § 6404(e).) Treasury Regulation section 301.6406-2(b) defines these terms as follows:

> (1) Managerial act means an administrative act that occurs during the processing of a taxpayer's case involving 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 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 under paragraph (a) of this section.
>
> (2) Ministerial act means a procedural or mechanical act that does not involve the exercise of judgment or discretion, and that occurs during the processing of a taxpayer's case after all prerequisites to the act, such as conferences and review by supervisors, have taken place. A decision concerning the proper application of federal tax law (or other federal or state law) is not a ministerial act.

(Treas. Reg. § 301.6404-2(b)(1), (b)(2).) Under IRC 6404(e), delays which are due to specified types of workload limitations are viewed as resulting from general administrative decisions and, as such, do not qualify for interest abatement. (Treas. Reg. § 301.6404-2(a)(1), (b)(1)-(2), (c)(8); *Leffert v. Commissioner* (2001) T.C. Memo. 2001-23; *Strang v. Commissioner* (2001) T.C. Memo. 2001-104.) Similarly, a decision to examine returns based on the date the applicable statute of limitations expires is a general administrative decision, and interest attributable to such a delay cannot be abated. (Treas. Reg. § 301.6404-2(c)(8).) Based on the above authorities, the IRS has concluded that decisions on the manner in which to allocate available personnel that result in delays in IRS divisions with staff shortages, are general administrative decisions. (IRS Chief Counsel Advice 199931039, June 10, 1999.)

FTB first contacted appellants in writing about the proposed assessment on January 28, 2016; therefore, there is no statutory authority to abate the $43.09 in interest that accrued prior to this date. Appellants protested the NPA on March 10, 2016, and approximately $20 in interest accrued from this date through the date of payment on April 24, 2017 (approximately one month after FTB resolved the protest). Appellants contend there was an unreasonable delay in resolving their protest, beyond the several months indicated in FTB's acknowledgement letter. Thus, the issue we must decide is whether FTB abused its discretion in failing to abate a portion of the approximately $20 in interest accruing from the date of the protest, March 10, 2016, until the date FTB resolved the protest; March 30, 2017.

When FTB acknowledged the protest on April 14, 2016, it indicated there may be a delay in resolving appellants' protest due to workload limitations. FTB does not dispute that the delay in this case was due to FTB's workload limitations. To the contrary, FTB contends that sometimes these delays cannot be avoided due to the high volume of tax returns filed with FTB. Thus, we understand FTB's delay in processing and assigning appellants' appeal to staff was due to FTB's decision on how to allocate available personnel relative to the total amount of work that needed to be handled. We adopt the reasoning of the federal authorities interpreting IRC section 6404(e), and conclude that section 19104, in limiting interest abatement to an error or delay involving a ministerial or managerial act, does not authorize interest abatement solely on account of workload limitations due to staff shortages. Thus, we find that general decisions on how to allocate available personnel and process work, as reflected in FTB's April 14, 2016 acknowledgement, are general administrative decisions.

Additionally, there is no evidence that FTB exercised any discretion in appellants' case, such as by selecting appellants' appeal for different or separate treatment outside of the general process. Although it took FTB approximately one year to resolve the protest, we do not find this total amount of time to be unreasonable or grossly unfair in light of the circumstances of the case (which required obtaining and verifying information reported to the IRS) and FTB's workload limitations.[10] In conclusion, we find that FTB did not abuse its discretion in failing to abate interest.

[10] While we are sympathetic to appellants' contention that FTB was unwilling to meet with them to discuss and potentially resolve this appeal sooner, we have no authority to abate interest on this basis.

HOLDING

FTB did not abuse its discretion in failing to abate interest.

DISPOSITION

Respondent's action is sustained.

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Andrew J. Kwee
Administrative Law Judge

We concur:

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Tommy Leung
Administrative Law Judge

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Michael F. Geary
Administrative Law Judge