**OFFICE OF TAX APPEALS**

**STATE OF CALIFORNIA**

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| In the Matter of the Appeal of: **STEPHEN J. EDEL** | OTA Case No. 18011253<br>Date Issued: March 20, 2019 |

## OPINION

Representing the Parties:

For Appellant: Krista Lister, Tax Appeals Assistance Program

For Respondent: Freddie Cauton, FTB Legal Analyst

J. MARGOLIS, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19045,[1] Stephen Edel (appellant) appeals an action by respondent Franchise Tax Board (FTB) proposing $504 of additional income tax, plus interest, for his 2012 tax year.[2]

Appellant waived his right to an oral hearing; therefore, this matter is being decided based on the written record.

## ISSUE

The only remaining disputed issue is whether some or all of the interest that has accrued on the agreed-upon deficiency amount should be abated.

## FACTUAL FINDINGS

1. Appellant filed joint income tax returns (both federal and California) with his wife, Kathleen Edel, for 2012.

[1] Unless otherwise indicated, all statutory references ("section" or "§") are to sections of the California Revenue and Taxation Code.

[2] As recounted below in the Factual Findings, the parties now agree that there is a deficiency in appellant's 2012 tax year in the amount of $432.

2. The Internal Revenue Service provided information to FTB showing that appellant and his wife had underreported their 2012 income by $6,313.[3]
3. Based on the information received from the IRS, on December 9, 2015, FTB issued a Notice of Proposed Assessment (NPA) to Appellant and his wife determining a $504 tax deficiency for 2012, plus interest of approximately $42. Appellant protested FTB's notice; his wife did not.
4. FTB denied appellant's protest of the NPA. On January 26, 2017, FTB issued a Notice of Action affirming the NPA in full. During the period appellant's protest was under consideration by FTB, the amount of interest due increased by approximately $19, to $60.98.
5. Appellant timely filed this appeal from FTB's Notice of Action. In his appeal, appellant claimed that the deficiency in his 2012 tax should be $368, not $504, and asked that the interest be reduced accordingly.
6. A law student working with the Tax Appeals Assistance Program (TAAP) filed a reply brief for appellant admitting that appellant is taxable on the unreported income in question, but alleging that appellant is entitled to an investment interest expense deduction of $2,910. The TAAP representative also asked for "penalty abatement." However, no penalties have been proposed or assessed by FTB.
7. FTB filed a reply brief stating that it would allow the investment interest expense (taking into account applicable statutory limitations) if appellant provided substantiation of the expense.
8. Appellant subsequently provided the requested substantiation. FTB then filed a memorandum brief with OTA indicating that FTB would allow the investment interest expense. In addition, FTB agreed to allow a $391 deduction for qualified education expenses (also subject to applicable statutory limitations). Based on these concessions, FTB agreed to reduce its proposed tax deficiency to $432.
9. On August 17, 2018, appellant's TAAP representative wrote to OTA stating that appellant agreed to accept the revised proposed deficiency of $432. In that letter, however, the representative requested that all interest due for 2012 should be abated by

[3] The underreported income was comprised of dividend income and income from securities transactions.

FTB.[4] Attached to the letter was an FTB Form 3701, Request for Abatement of Interest, executed by the representative, stating that:

> There was an unreasonable delay by the FTB in serving Mr. Edel with notice of additional proposed tax and in the processing of the appeal by the Department of Tax & Fee Administration (CDTFA) [sic]. Mr. Edel received a notice for the additional proposed tax dated 12/9/15 and promptly responded on 12/28/15. He did not receive a response to his disagreement with the additional proposed tax until one year and one month later when he received a Notice of Action dated 1/26/17, to which Mr. Edel promptly responded on 2/6/17. . . . The appeal was further unreasonably delayed when on 12/14/17 a timely reply brief was submitted to CDTFA Board Proceedings [sic] and was not acknowledged until three and a half months later on 03/30/18, resulting in further interest accruing. Mr. Edel . . . requests that interest be abated due to unreasonable delay and in the interest of justice and equity.

## 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. (Rev. & Tax. Code, § 19101(a).) Imposition of interest is mandatory and there is no reasonable cause exception to the imposition of interest. (*Appeal of Goodwin*, 97-SBE-003, Mar. 19, 1997; *Appeal of Yamachi*, 77-SBE-095, June 28, 1977.)[5] 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. (Rev. & Tax. Code, § 19104(a)(1), (b)(1); *Appeal of 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 may order an abatement. (Rev. & Tax. Code, §§ 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." (Rev. & Tax. Code, § 19104(a)(1).) Nevertheless, section 19104(a)(1), California's interest abatement provision for unreasonable

[4] We estimate that the interest amount at issue is about $50.

[5] Precedential opinions of the State Board of Equalization designated by "SBE" in their citation, may be viewed on its website: <www.boe.ca.gov/legal/legalopcont.htm>.

error or delay, applies the same standard and uses substantially identical language as Internal Revenue Code (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. (*Douglas v. State* (1948) 48 Cal.App.2d 835, 838; *Appeal of 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 p. 844 (1985), 1986–3 C.B. (Vol. 2) 1, 844; S. Rept. 99–313, at p. 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.)

Unreasonable error or delay due to a "ministerial or managerial act" may warrant the abatement of interest, but error or delay due to "general administrative decisions" will not. (Rev. & Tax. Code, § 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 section 6404(e), delays that 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; see also IRS Chief Counsel Advice 199931039, June 10, 1999.)

Appellant contends that interest should be abated for three periods. The first – and longest – period is from the date appellant's return was filed until the date FTB first contacted appellant. Appellant contends interest should be abated for this period because of FTB's unreasonable delay in issuing its NPA to appellant. However, the interest abatement statute expressly prohibits interest from being abated prior to the date of FTB's first contact with the taxpayer. (Rev. & Tax. Code, § 19104(b)(1).) The second period for which abatement is requested is the 13-month period during which FTB considered appellant's protest from the NPA. For this period, appellant has not shown that the amount of time FTB took to consider appellant's protest was unreasonably long. The third period at issue primarily is the period during which appellant's appeal was under consideration by OTA. Appellant contends that his appeal was unreasonably delayed after the filing of his reply brief on December 14, 2017. However, interest abatement is not available for delays caused by OTA's consideration of an appeal. Moreover, there was no unreasonable delay by OTA. After receiving appellant's reply brief, the parties' briefing was submitted to an OTA attorney who reviewed the briefs and requested, on May 17, 2018, that FTB submit additional briefing in response to the evidence appellant submitted with his reply brief.[6]

## HOLDING

Appellant has not established that he is entitled to interest abatement.

## DISPOSITION

FTB's deficiency determination for 2012 is sustained in the reduced amount agreed to by the parties of $432, plus applicable interest as required by law.

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Jeffrey I. Margolis
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Jeffrey I. Margolis
Administrative Law Judge

[6] In addition, we note that appellant agreed in his original appeal letter that he owed additional tax of (at least) $368. If appellant had wished to avoid the further accrual of interest on that uncontested deficiency amount, he could have submitted a payment to FTB at that time.

We concur:

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Michael F. Geary
Administrative Law Judge

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Tommy Leung
Administrative Law Judge