

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18073427  
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**JEFFREY C. MOY AND NANCY B. MOY** ) Date Issued: March 18, 2019  
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**OPINION**

Representing the Parties:

For Appellants: Jacquellyn I. Martin, CPA

For Respondent: Greg W. Heninger, Program Specialist II

T. STANLEY, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19324, Jeffrey C. Moy and Nancy B. Moy (appellants), appeal an action by respondent, Franchise Tax Board (FTB), denying appellants’ claim for refund of \$4,375.88 of interest paid for the 2015 taxable year.<sup>1</sup>

Appellants waived their right to an oral hearing; therefore, we decide this matter based on the written record.

**ISSUE**

Have appellants shown they are entitled to abatement or waiver of interest?

**FACTUAL FINDINGS**

1. Appellants jointly filed a 2015 California Resident Income Tax Return on June 13, 2016. They reported a tax balance due of \$877,294, and paid in full the same day.
2. FTB issued a Notice of State Income Tax Due dated September 19, 2016, reflecting late-payment and underpayment of estimated tax penalties due from appellants totaling \$72,785.19, together with accrued interest of \$4,341.62.

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<sup>1</sup> Appellants’ representative (Ms. Martin) provided an email confirming payment of \$4,394.78 on May 31, 2017. A document FTB submitted with its opening brief shows payments of \$4,375.88 and \$18.90, effective on May 31, 2017 (total \$4,394.78). Appellants claimed a refund of \$4,375.88 in interest, and that was the amount acknowledged for purposes of this appeal.

3. On January 24, 2017, appellant's representative (Ms. Martin) contacted FTB to request abatement of all penalties and interest, because Ms. Martin had been diagnosed with a serious illness at the end of 2015, and was therefore "not mentally or physically equipped to give [appellants] advice on how much to pay for estimate payments before [the tax] filing date."
4. FTB advised Ms. Martin that it would abate the penalties based on appellants' reliance on the advice of a tax professional while she was unable to give them adequate advice.
5. On May 30, 2017, Ms. Martin again contacted FTB to inquire why appellants were still receiving notices about a balance owed. FTB advised Ms. Martin that the amount owing was for interest, and totaled \$4,375.88 as of June 5, 2017. FTB agreed to cancel the collection fee that had been assessed, and provided instructions for paying the interest.
6. On May 31, 2017, appellants paid \$4,394.78.
7. In a letter dated June 6, 2017, Ms. Martin, on appellants' behalf, requested waiver of the interest paid. Ms. Martin conceded that there is no reasonable cause exception allowing for abatement of interest. Instead she requested a waiver of interest based on financial hardship. She further explained that payment of interest did not create a financial hardship for her clients, but did result in a financial hardship to her.<sup>2</sup>
8. On May 10, 2018, FTB issued a Notice of Action denying the request for waiver of interest.
9. Appellants timely appealed.

### DISCUSSION

Interest must be assessed from the date a tax payment is due through the date that it is paid. (R&TC, § 19101.) Imposition of interest is mandatory; it is not a penalty, but it is compensation for appellant's use of money after it should have been paid to the state. (*Appeal of Yamachi*, 77-SBE-095, June 28, 1977.)<sup>3</sup> In this case, appellants paid \$877,294 on June 13, 2016. Because that payment was late, interest was properly assessed.

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<sup>2</sup> Ms. Martin stated that she cannot "morally" allow her clients to pay the interest, and that she "will be forced to reimburse them."

<sup>3</sup> Precedential decisions of the State Board of Equalization (BOE) may be found on the BOE website at: <<http://www.boe.ca.gov/legal/legalopcont.htm>>.

As conceded by Ms. Martin, there is no reasonable cause exception to the imposition of interest. (*Appeal of Goodwin*, 97-SBE-003, Mar. 19, 1997.) To obtain relief from interest, a taxpayer must qualify under the waiver provisions of R&TC sections 19104, 19112, or 21012. (*Appeal of Balch*, 2018-OTA-159P, Oct. 9, 2018.) The relief of interest under R&TC section 21012 is not relevant here, because FTB did not provide appellants with any written advice. Under R&TC section 19104, FTB is authorized to abate or refund interest if there has been an unreasonable error or delay in the performance of a ministerial or managerial act by an employee of FTB. Here, appellant has not alleged, and the record does not reflect, any such errors or delays.

FTB may grant a waiver of interest when it “determines that an individual or fiduciary demonstrates inability to pay that interest solely because of extreme financial hardship caused by significant disability or other catastrophic circumstance.” (R&TC, § 19112.) Ms. Martin asks that we overturn the FTB’s determination that appellant has not made the requisite showing required by R&TC section 19112. However, the relevant statute gives FTB the discretion to determine when a waiver of interest is warranted upon a showing of extreme financial hardship. Thus, before addressing the merits of appellants’ contention, we must first address whether we have the jurisdiction to decide whether FTB abused its discretion in denying appellants’ interest abatement request.

An administrative agency’s authority to act is of limited jurisdiction and it “has no powers except such as the law of its creation has given it.” (*Ferdig v. State Personnel Board* (1969) 71 Cal.2d 96, 105, quoting *Conover v. Board of Equalization* (1941) 44 Cal.App.2d 283, 287.) A statute may provide for review of FTB’s decision on interest abatement requests, as does R&TC section 19104(b)(2) (abatement of interest based on FTB’s error or delay may be reviewed for abuse of discretion). There is no similar provision in R&TC section 19112 which would allow the Office of Tax Appeals (OTA) to review respondent’s interest determinations based on a claim of financial hardship.

Prior to adoption of R&TC section 19104, effective January 1, 1994, BOE<sup>4</sup> did not have jurisdiction to review FTB’s denial of abatement of unpaid interest. (*Appeal of Murieta Sales*

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<sup>4</sup> With certain exceptions not relevant to this appeal, OTA “is the successor to, and is vested with, all of the duties, powers, and responsibilities of the State Board of Equalization necessary or appropriate to conduct appeals hearings.” (Gov. Code, § 15672(a).) R&TC section 20 provides that statutory references to “board” generally mean “OTA” with respect to appeals for which authority has been transferred to OTA.

*Corp.*, 93-SBE-011, June 24, 1993; *Appeal of Snell*, 92-SBE-023, July 30, 1992.) In making that determination, BOE reviewed federal decisions considering whether the Internal Revenue Service’s (IRS) discretionary refusal to abate interest under the then-applicable version of Internal Revenue Code (IRC) section 6404(e), was subject to judicial review.<sup>5</sup> The earlier version of that statute did not expressly grant the right to judicial review. The courts generally concluded that when the legislature did not provide courts with review authority, discretionary interest abatement decisions were not subject to review. (See, e.g., *Horton Homes, Inc. v. United States* (11th Cir. 1991) 936 F.2d 548 [holding that the general language and legislative history of IRC section 6404 emphasize the discretion of the IRS, barring review]; *Selman v. United States* (W.D. Okla. 1990) 733 F.Supp. 1444, 1445-6.) Additionally, courts that have considered whether an administrative agency’s decision is reviewable absent a statutory grant of authority, have concluded that courts cannot review a purely discretionary act without a “meaningful standard against which to judge the agency’s exercise of [that] discretion.” (*Horton Homes, Inc., supra*, at p. 552; see also *Heckler v. Chaney* (1985) 470 U.S. 821, 830-835.)

As noted previously, OTA only has authority to review FTB’s decisions on interest abatement requests when the California Legislature has specifically granted review authority, such as under the provisions of R&TC section 19104. No such authority to review FTB’s action for any abuse of discretion has been granted under the financial hardship provisions of R&TC section 19112. Accordingly, we conclude that we may not review FTB’s rejection of appellants’ claim for a waiver of interest due to financial hardship.<sup>6</sup>

#### HOLDING

The Office of Tax Appeals does not have the authority to review FTB’s denial of a waiver of interest based on extreme financial hardship, and appellants have shown no basis to abate interest.

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<sup>5</sup> IRC section 6404 substantially mirrors the provisions adopted by California in R&TC sections 19104 and 21012. Judicial review for abuse of discretion was expressly added to IRC section 6404 in the version that became effective on July 30, 1996. There is no provision in the IRC that is similar to R&TC section 19112, which is at issue here.

<sup>6</sup> We note that Ms. Martin concedes that there would be no financial hardship to appellants. Rather, she asserts that she feels morally obligated to pay the interest, and relief should be available based on the financial hardship to Ms. Martin. However, financial hardship must be due to appellants’ circumstances, and not to the hardship of their representative.

DISPOSITION

FTB's denial of appellants' claim for refund is sustained.

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Teresa A. Stanley  
Administrative Law Judge

We concur:

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Jeffrey G. Angeja  
Administrative Law Judge

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Sara A. Hosey  
Administrative Law Judge