

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18053204
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KENNETH S. AND SUE A. KOWALSKI) Date Issued: April 17, 2019
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OPINION

Representing the Parties:

For Appellants: Kenneth and Sue Kowalski

For Respondent: Brian Werking, Tax Counsel III

A. ROSAS, Administrative Law Judge: Under Revenue and Taxation Code (R&TC) section 19324,¹ appellants Kenneth S. and Sue A. Kowalski appeal respondent Franchise Tax Board’s (FTB) action denying their \$840.24 claim for refund² for the 2012 tax year.

The Kowalskis waived their right to an oral hearing and therefore we decide this matter based on the written record.

ISSUES

1. Have the Kowalskis established that FTB erred in proposing additional tax based on a final federal determination?
2. May the collection cost recovery fee be abated?
3. Are the Kowalskis entitled to interest abatement?

¹ Unless otherwise indicated, all statutory references are to sections of the Revenue and Taxation Code.

² The claim for refund encompasses additional tax (\$506), a collection cost recovery fee (\$266), and interest (\$68.24).

FACTUAL FINDINGS

1. The Kowalskis timely filed a 2012 California Resident Income Tax Return (the Original Return). On the Original Return, they reported itemized deductions of \$90,937,³ total tax of \$10,584, withholding of \$19,260, and an overpayment of \$8,676.
2. FTB accepted the Original Return and issued a refund of \$8,676.
3. Over two years later, in September 2015, FTB received information from the IRS regarding changes it had made to the Kowalskis' 2012 federal tax return. Specifically, IRS disallowed \$5,437 of the Schedule A mortgage interest deduction, thereby reducing the Federal itemized deduction from \$111,153 to \$105,716.
4. On June 22, 2016, FTB issued a Notice of Proposed Assessment (NPA), proposing to disallow the same mortgage interest deduction (\$5,437) as the IRS had disallowed, and proposing total tax of \$11,090 and additional tax of \$506.⁴ The Kowalskis did not protest the NPA, and it became final.
5. On September 19, 2016, FTB sent the Kowalskis a Notice of State Income Tax Due requesting that they pay the balance due (\$506 plus interest). The notice advised that failure to pay the balance due within 30 days may result in collection action, such as filing and recording a lien and imposing a collection cost recovery fee.
6. Two months later, on November 2, 2016, FTB sent an Income Tax Due Notice to the same address. For unknown reasons, FTB addressed this notice only to Mrs. Kowalski. In this notice, FTB requested that Mrs. Kowalski pay the balance due (\$506 plus interest). This notice also advised that failure to pay the balance due within 30 days may result in collection action.
7. After the Kowalskis did not make any payments, FTB began collection action and imposed a \$266 collection cost recovery fee.
8. In a December 2016 letter to FTB, the Kowalskis disagreed with the additional tax. Their letter included a copy (the Return Copy) of their Original Return.
9. In April, May, and June 2017, the Kowalskis made three consecutive monthly payments totaling \$840.24. These payments satisfied their 2012 tax liability in full.

³ Federal itemized deductions (\$111,153), minus California state and local taxes (\$20,216).

⁴ The additional tax is the difference between the proposed total tax (\$11,090) minus the total tax reported on the Original Return (\$10,584).

10. In December 2017, FTB mailed the Kowalskis a letter indicating FTB had received full payment. That letter also indicated FTB would treat the Kowalskis' Return Copy as a claim for refund.⁵
11. In addition, FTB's December 2017 letter also explained that FTB would deny the claim for refund unless FTB received additional information showing the IRS had revised its federal adjustment. The parties did not present any such evidence.
12. In a letter dated March 1, 2018, FTB denied the Kowalskis' claim for refund.
13. Soon thereafter, the Kowalskis filed this timely appeal and included an unfiled, revised 2012 return (the Revised Return)⁶ that acknowledged the federal changes and reported itemized deductions of \$85,499.⁷ This Revised Return reported \$11,090 as the total tax.⁸

DISCUSSION

Issue 1 - Have the Kowalskis established that FTB erred in proposing additional tax based on a federal change?

A taxpayer must either concede the accuracy of federal changes to a taxpayer's income or state where the changes are erroneous. (R&TC, § 18622(a).) Under well-settled law, there is a presumption of correctness when FTB bases its deficiency assessment on a federal adjustment to income, and a taxpayer bears the burden of proving FTB's determination is erroneous. (*Appeal of Brockett*, 86-SBE-109, June 18, 1986; *Appeal of Lew*, 78-SBE-073, Aug. 15, 1978; *Appeal of Webb*, 75-SBE-061, Aug. 19, 1975.) The applicable burden of proof is by a preponderance of the evidence. (Evid. Code, § 115; *Appeal of Estate of Gillespie*, 2018-OTA-052P, June 13, 2018, at p. 4.) That is, a party must establish by documentation or other evidence that the circumstances it asserts are more likely than not to be correct. (*Concrete Pipe and Products of*

⁵ This self-prepared Return Copy is identical to the Original Return. FTB treated the Return Copy as a claim for refund because, FTB explained, the Return Copy reported a tax amount (\$10,584) less than the amount assessed on the deficiency assessment (\$11,090).

⁶ It seems that a paid-preparer prepared the Revised Return. Although the timely-filed Original Return indicated on its face when it was filed electronically, there is no indication on the Revised Return whether it was ever filed. Furthermore, in its appeal brief, FTB stated that it does not have a record showing the Kowalskis filed the Revised Return, or any other return showing these revised amounts.

⁷ Adjusted and allowed federal itemized deductions (\$105,716), minus California state and local taxes (\$20,216).

⁸ This reported tax amount is identical to the NPA's proposed total tax.

California, Inc. v. Construction Laborers Pension Trust for Southern California (1993) 508 U.S. 602, 622.)

The Kowalskis filed a valid claim for refund. (R&TC, § 19322 et seq.) However, they did not prove that FTB’s determination, based on federal changes, is erroneous. Furthermore, the Kowalskis seem to agree with FTB that \$85,499 is their California itemized deduction and that \$11,090⁹ is their California total tax.

Issue 2 - May the collection cost recovery fee be abated?

If a taxpayer “fails to pay any amount of tax, penalty, addition to tax, interest, or other liability . . . a collection cost recovery fee shall be imposed if the Franchise Tax Board has mailed a notice to that person for payment that advises that the continued failure to pay the amount due may result in a collection action, including the imposition of a collection cost recovery fee.” (R&TC, § 19254(a).) Once properly imposed, there is no reasonable cause exception or any other provision in the statute allowing for relief from the collection cost recovery fee. (*Appeal of Myers*, 2001-SBE-001, May 31, 2001.) Here, FTB properly imposed the collection cost recovery fee. There is no statutory authority for granting the Kowalskis relief from the collection cost recovery fee.

Issue 3 - Are the Kowalskis entitled to interest abatement?

Tax is due on the return’s original due date without regard to any filing extension. (R&TC, § 18567.) If a taxpayer does not pay the tax by the original due date, or if FTB assesses additional tax, the law provides for charging interest on the balance due. (R&TC, § 19101.) Interest is mandatory, and FTB cannot abate interest except where authorized by law. (*Appeal of Balch*, 2018-OTA-159P, Oct. 9, 2018, at p. 7.) Interest is not a penalty; it is compensation for the use of money. (*Ibid.*) To obtain interest abatement, a taxpayer must qualify under sections

⁹ However, the Kowalskis seem mistaken in their appeal letter. They write that when they submitted the Revised Return to FTB, they “did in fact provide the correct itemized deductions and NOT the \$111,153 that the FTB contends.” (Emphasis in original.) There is no evidence the Kowalskis filed the Revised Return with FTB; instead, the Kowalskis submitted the Revised Return to the Office of Tax Appeals with their appeal. They are correct, however, when they indicate in their appeal letter that their Revised Return “reflects the corrected federal amount for itemized deductions” That corrected amount is the amount FTB used in determining the deficiency owed by the Kowalskis in this appeal.

19104, 21012, or 19112.¹⁰ But the Kowalskis present no arguments that they qualify. And the evidence does not show that they qualify under any of these statutory provisions. Therefore, the Kowalskis have not demonstrated any grounds for interest abatement.

HOLDINGS

1. The Kowalskis did not establish error on the FTB's part in proposing an additional tax based on a federal change.
2. The collection cost recovery fee may not be abated.
3. The Kowalskis are not entitled to interest abatement.

DISPOSITION

We sustain FTB's actions in full.

DocuSigned by:
Alberto Rosas
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Alberto T. Rosas
Administrative Law Judge

We concur:

DocuSigned by:
Michael Geary
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Michael F. Geary
Administrative Law Judge

DocuSigned by:
Tommy Leung
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Tommy Leung
Administrative Law Judge

¹⁰ Section 19104 allows an abatement when the interest is attributable to any unreasonable error or delay by an FTB officer or employee when performing a ministerial or managerial act. These circumstances are neither alleged nor shown to be present here. Interest relief under section 21012 is irrelevant here because FTB did not give the Kowalskis written advice. Section 19112 requires a taxpayer to show extreme financial hardship caused by a significant disability or other catastrophic circumstance. However, there is no evidence of these circumstances in the record.