**OFFICE OF TAX APPEALS**

**STATE OF CALIFORNIA**

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| In the Matter of the Appeal of: | OTA Case No. 18093697 |
| **PAUL MICHAEL ROSS** | Date Issued: August 26, 2019 |

## OPINION

Representing the Parties:

For Appellant: Paul Michael Ross

For Respondent: Anne Mazur, Specialist

For Office of Tax Appeals: Neha Garner, Tax Counsel III

K. GAST, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) 19324, Paul Michael Ross (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying his claim for refund of $10,192.21 for the 2003 tax year.[1] Appellant waived his right to an oral hearing. Therefore, this matter is being decided based on the written record.

## ISSUES

1. Does the Office of Tax Appeals (OTA) have jurisdiction to consider whether interest on appellant's 2003 tax liability was discharged in bankruptcy?
2. Is appellant entitled to interest abatement?

## FACTUAL FINDINGS

1. Appellant timely filed his 2003 California income tax return, reflecting negative taxable income.
2. Subsequently, the Internal Revenue Service (IRS) audited appellant's 2003 federal return, and, on February 19, 2007, assessed additional tax, an accuracy-related penalty, and interest. Appellant did not report the final federal determination to FTB.

[1] As discussed below, the refund amount at issue in this appeal is limited to interest of $7,306.09.

3. About three years later, on September 20, 2010, FTB received notification from the IRS of the federal changes. Less than a year later, on July 6, 2011, FTB timely issued a Notice of Proposed Assessment (NPA). Based on the federal changes, FTB increased appellant's taxable income and proposed additional tax, an accuracy-related penalty of $1,894.80, and interest of $5,690.83.

4. Appellant did not protest the NPA, and, on September 4, 2011, it became final. In a Notice of State Income Tax Due, dated October 3, 2011, FTB sent appellant a bill for the liabilities owed. Appellant did not immediately pay them. Instead, in 2013, he entered into an installment agreement and paid all liabilities by January 14, 2017, including the accuracy-related penalty of $1,894.80, and interest that had accrued to $8,297.41 from the $5,690.83 originally stated in the NPA.

5. Appellant timely filed a refund claim of $10,192.21, which consisted of the accuracy-related penalty of $1,894.80 and interest of $8,297.41.[2] FTB denied it, and this timely appeal followed.

6. On appeal, appellant concedes the additional tax liability, but contends he is entitled to a refund of the accuracy-related penalty and interest because, among other reasons, he filed a Chapter 7 bankruptcy petition on October 30, 2009, and his 2003 liabilities were discharged on February 18, 2010. On January 3, 2012, due to the bankruptcy discharge, FTB credited appellant's 2003 account with $2,886.12, which consisted of the accuracy-related penalty of $1,894.80 and partial interest of $991.32.[3] Accordingly, on appeal, we find the refund amount at issue is limited to the remaining interest of $7,306.09 (i.e., $8,297.41 - $991.32).

[2] In his refund claim, appellant requested a refund of $10,000, not $10,192.21. However, on appeal and in its refund claim denial letter, FTB treated the refund amount as $10,192.21, instead of the $10,000 stated in appellant's refund claim. Therefore, we will do the same here.

[3] It is not clear from the record why FTB wrote off the $2,886.12, and not the remaining 2003 liabilities. In any event, FTB credited appellant's 2003 account with $2,886.12. This appears to mean that, although this amount was not refunded to appellant, FTB's records reflect that it is or was available to offset future liabilities.

## DISCUSSION

Issue 1 – Does OTA have jurisdiction to consider whether interest on appellant's 2003 tax liability was discharged in bankruptcy?

Appellant contends the interest assessed for the 2003 tax year was discharged in bankruptcy on February 18, 2010. On this basis, appellant asserts it should be refunded. However, OTA does not have jurisdiction to consider this matter. Appellant's argument pertains solely to the collectability of the interest at issue, which has no bearing on issues we can consider, such as whether the proposed assessment was properly imposed or computed. Such an argument should be raised in another forum, such as in the bankruptcy court. Indeed, for these reasons, OTA's predecessor, the Board of Equalization (BOE), consistently held it was without jurisdiction to determine if a bankruptcy discharge applies to taxes assessed by FTB. (See, e.g., *Appeal of Smith* (81-SBE-145) 1981 WL 11870.) Accordingly, we do not have jurisdiction to consider whether the interest on appellant's 2003 tax liability was discharged in bankruptcy.[4]

Issue 2 – Is appellant entitled to interest abatement?

To obtain relief from interest, a taxpayer must qualify under the waiver provisions of R&TC sections 21012, 19112, or 19104. The first two waiver provisions are inapplicable here. R&TC section 21012 does not apply because FTB did not provide appellant any written advice. R&TC section 19112 also does not apply because, even though appellant contends in his refund claim letter that he suffers from financial hardship caused by his disabilities, OTA does not have jurisdiction to review FTB's interest abatement determination, if one was ever made, under this provision. (*Appeal of Moy*, 2019-OTA-057P, March 18, 2019.)[5] In addition, we reject appellant's reasonable cause argument—that he unsuccessfully tried to enter into an offer in compromise—because there is no such exception to the imposition of interest. (*Appeal of Shubert* (79-SBE-161) 1979 WL 4202.) Therefore, the only remaining provision potentially applicable is R&TC section 19104.

[4] We note that our current Rules of Tax Appeals contain no explicit rule prohibiting us from determining whether an income tax liability has, or should have, been discharged in bankruptcy. (See Cal. Code Regs., tit. 18, § 30104.) This is in contrast to our since-repealed emergency Rules of Tax Appeals that did explicitly contain such a prohibition. (See Cal. Code Regs., tit. 18, § 30102(b)(3).) However, in this appeal, we will follow the precedent established in this area by the BOE, whose reasoning we find persuasive and consistent. (See Cal. Code Regs., tit. 18, § 30504.)

[5] OTA opinions are generally available for viewing on its website: <https://ota.ca.gov/opinions/>.

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; and (4) which occurred after FTB contacted the taxpayer in writing regarding the proposed assessment, provided no significant aspect of that error or delay is attributable to the taxpayer. (R&TC, § 19104(a)(1), (b)(1); *Appeal of Kishner* (99-SBE-007) 1999 WL 1080250.) OTA has jurisdiction to determine whether a failure by FTB to abate interest was an abuse of discretion and may order an abatement. (R&TC, §§ 20(b), 19104(b)(2)(B).)

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. (R&TC, § 19104; IRC, § 6404(e).)[6] "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." (Treas. Reg. § 301.6404-2(b)(2).) In contrast, managerial act means, in part, "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." (Treas. Reg. § 301.6404-2(b)(1).) Neither act involves a decision concerning the proper application of federal tax law (or other federal or state law). (Treas. Reg. § 301.6404-2(b)(1), (b)(2).)

Appellant contends he is entitled to interest abatement because FTB did not first notify him of the final 2003 California tax assessment until October 10, 2011, the day he received a Notice of State Income Tax due, dated October 3, 2011. Appellant appears to be arguing that the first—and longest—period interest should be abated is from the date his return was timely filed until October 10, 2011. However, we initially find FTB first contacted appellant in writing about the 2003 deficiency on July 6, 2011, the date of the timely issued NPA, and not October 3 or 10, 2011, because both the billing notice and the NPA contain the same last known Washington

[6] The R&TC does not define what is meant by an "unreasonable error or delay," or "a ministerial or managerial act." (R&TC, § 19104(a)(1).) Nevertheless, R&TC section 19104(a)(1) 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*.)

State mailing address. (See R&TC, § 18416(b).) Consequently, the statute expressly prohibits appellant from obtaining interest abatement prior to July 6, 2011.[7] (R&TC, § 19104(b)(1).)

For the three-month period from July 6, 2011, until October 3, 2011, appellant has not shown FTB acted with unreasonable delay. Rather, the unprotested NPA went final on September 4, 2011, and just a month later, FTB issued to appellant the October 3, 2011 billing notice. Similarly, appellant has not shown—or even alleged—FTB was at fault for the interest on or after October 3, 2011, until he fully paid it by January 14, 2017, under an installment agreement.

We also find any alleged error or delay is attributable to appellant, and not to a ministerial or managerial act by FTB. Under R&TC section 18622(a), appellant was obligated to, but did not, report the federal changes to FTB within six months after the final federal determination on February 19, 2007. Rather, about three years later, on September 20, 2010, the IRS notified FTB of the federal changes. And, less than a year after that, on July 6, 2011, FTB promptly and timely issued the NPA, reflecting the changes. Thus, during this four-year period, from 2007 through 2011, appellant did not take steps to mitigate the interest accrual. He also waited until 2013 to enter into an installment agreement, which took roughly another four years to complete. Finally, appellant controlled the timing of his bankruptcy, which he could have used to eliminate or further mitigate the interest. In short, the delay was attributable to appellant, and therefore he is barred from relief under R&TC section 19104.

## HOLDINGS

1. OTA does not have jurisdiction to consider whether interest on appellant's 2003 tax liability was discharged in bankruptcy.
2. Appellant is not entitled to interest abatement.

[7] In any event, even if, as appellant alleges, the first FTB written contact occurred on October 3 or 10, 2011, that does not help him here. R&TC section 19104(b)(1) would prohibit interest abatement for the entire period prior to October 3 or 10, 2011, rather than only for the period prior to July 6, 2011.

## DISPOSITION

FTB's denial of appellant's refund claim is sustained.

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Kenneth Gast
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Kenneth Gast
Administrative Law Judge

We concur:

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Tommy Leung
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Tommy Leung
Administrative Law Judge

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Linda C. Cheng
Administrative Law Judge