OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18010985
MICHAEL A. GORIN	)
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	)
	)
	)

OPINION

Representing the Parties:

For Appellant:	Michael A. Gorin
For Respondent:	Gi Nam, Tax Counsel Maria Brosterhous, Tax Counsel IV
For Office of Tax Appeals:	William J. Stafford, Tax Counsel III

J. ANGEJA, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19045, Michael Gorin (appellant) appeals an action by respondent Franchise Tax Board (FTB) on a proposed assessment of additional tax in the amount of $8,434, plus applicable interest, for the 2010 tax year.

Office of Tax Appeals (OTA) Administrative Law Judges Amanda Vassigh, Alberto T. Rosas, and Jeffrey G. Angeja, held an oral hearing for this matter in Sacramento, California, on July 30, 2019. At the conclusion of the hearing, the record was held open to allow the parties to address the newly-raised issue of interest relief. The record closed effective November 1, 2019, and this matter was submitted for decision.

ISSUES

1. Whether FTB's assessment is barred by the statute of limitations.
2. Whether appellant has demonstrated error in the proposed assessment of additional tax, which is based upon federal adjustments.
3. Whether appellant has shown that interest should be abated.

FACTUAL FINDINGS

1. Appellant filed a timely married filing jointly 2010 California personal income tax return.[1] On the return, appellant reported federal adjusted gross income of $86,484, taxable income of $38,909, and tax of $835. After subtracting exemption credits of $396, and withholding credit of $2,370, appellant's return reported a refund due of $1,931, which FTB refunded.
2. Subsequently, under Internal Revenue Code (IRC) section 6103(d), FTB received federal information on November 26, 2013, showing that the Internal Revenue Service (IRS) had adjusted appellant's 2010 federal return for interest income of $10 and pension or annuity income of $84,095. Specifically, appellant's Wage and Income Transcript from the IRS shows a pension distribution (Form 1099-R) from Charles Schwab & Co. Inc., in the amount of $84,095. The transcript also indicates that there is no known exception to the early distribution penalty. The federal information also included a federal CP2000 report, which showed that the IRS had assessed a 10 percent early distribution tax.
3. Based on the federal information, FTB issued a Notice of Proposed Assessment (NPA) dated August 15, 2014, that applied the federal adjustments to appellant's California return and increased appellant's California taxable income from $38,909 to $123,105. The NPA showed a proposed additional tax of $8,434 plus applicable interest. The additional tax included a 2.5 percent early distribution tax of $2,102.
4. The NPA was FTB's first contact, written or otherwise, with appellant regarding the deficiency.
5. Appellant protested FTB's proposed assessment. FTB received appellant's protest letter on October 17, 2014. In his subsequent September 13, 2017 appeal letter, appellant further explains that it has been seven years since he filed the 2010 tax return, and appellant asserts that the proposed assessment is barred by the statute of limitations.
6. Afterwards, FTB sent appellant a letter dated June 15, 2015, explaining FTB's position(s) on protest.
7. Appellant replied to FTB's position letter via facsimile on November 6, 2015.
8. FTB created a computer file for the protest hearing on February 2, 2016.

[1] Appellant filed a joint return for the 2010 tax year with his spouse, Bonita Johnson-Gorin; however, only appellant filed this appeal and therefore he is the sole appellant in this matter.

9. FTB assigned a hearing officer on October 21, 2016.
10. FTB sent appellant a letter dated March 23, 2017, scheduling an oral protest hearing.
11. On June 20, 2017, FTB held a telephonic protest hearing with appellant.
12. Subsequently, FTB issued a Notice of Action dated August 14, 2017, affirming the NPA. This timely appeal followed.
13. There is no evidence that the IRS cancelled or reduced its assessment. The federal information shows that appellant has made payments to the IRS for his additional federal liability, but FTB's records show no payments for the additional state tax liability.

DISCUSSION

Issue 1: Whether FTB's assessment is barred by the statute of limitations.

In general, FTB must issue a proposed assessment within four years of the date the taxpayer files his or her California return. (R&TC, § 19057.) If there are adjustments to a taxpayer's federal account and the taxpayer or the IRS notifies FTB within six months of the date that the federal changes become final, then FTB may issue a proposed assessment within two years of the date of notification, or within the general four-year statute of limitations period, whichever expires later. (R&TC, § 19059.) R&TC section 19060(b) provides that, if the taxpayer or the IRS notifies FTB of the federal change or correction after the six-month period required by R&TC section 18622, then FTB may issue a proposed assessment within four years of the date of the notification. R&TC section 19060(a) provides that if the taxpayer fails to notify FTB of the federal changes, then FTB may issue a proposed assessment at any time.

Here, appellant's tax return for 2010 was timely filed on or before the original filing deadline of April 18, 2011. Because the NPA was issued on August 15, 2014, less than four years from the date the return was filed, we conclude that FTB's NPA was issued in a timely manner.

Issue 2: Whether appellant has demonstrated error in the proposed assessment of additional tax, which is based upon federal adjustments.

R&TC section 18622(a) provides that a taxpayer shall either concede the accuracy of a federal determination or state wherein it is erroneous. It is well settled that a deficiency assessment based on a federal audit report is presumptively correct and that a taxpayer bears the burden of proving that the determination is erroneous. (*Appeal of Brockett* (86-SBE-109) 1986

WL 22731; *Appeal of Hutchinson* (82-SBE-121) 1982 WL 11798.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof with respect to an assessment based on a federal action. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

Unless an exemption applies, pensions are includible in the gross income of all California residents who receive them. (R&TC, §§ 17071, 17504; IRC, §§ 61, 402(a).) R&TC section 17085 in relevant part conforms to IRC section 72, pursuant to which early distributions from qualified retirement plans are taxable, and a 10 percent additional tax applies at the federal level. (IRC, § 72(a)(1), (t).) R&TC section 17085(c)(1) reduces the percentage of the tax on early distributions to 2.5 percent for California purposes.

Here, FTB properly assessed additional tax based upon federal adjustments. The evidence establishes that appellant received and failed to report an $84,095 early pension distribution from Charles Schwab & Co. Inc., with no known exceptions to the applicable penalty. Appellant has not presented any argument or evidence to show error in the federal adjustments or in FTB's determination based upon those adjustments.

Issue 3: Whether appellant has shown that interest should be abated.

Interest is not a penalty but is merely compensation for a taxpayer's use of money after it should have been paid to the state. (*Appeal of Yamachi* (77-SBE-095) 1977 WL 3905.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Jaegle* (76-SBE-070) 1976 WL 4086.)

To obtain relief from interest, a taxpayer must qualify under one of three statutes: R&TC sections 19104, 19112 or 21012. R&TC section 21012 is not applicable, because there has been no reliance on any written advice requested of FTB. R&TC section 19112 requires a showing of extreme financial hardship caused by significant disability or other catastrophic circumstance. OTA, however, does not have jurisdiction to review an FTB interest abatement determination under R&TC section 19112. (*Appeal of Moy*, 2019-OTA-057P.) Nevertheless, the Legislature did provide OTA with jurisdiction over appeals of denied interest abatement requests under R&TC section 19104, as discussed below.

Under R&TC section 19104(a)(1), 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's jurisdiction in an interest abatement case, however, is limited. We only review FTB's determination for abuse of discretion. (R&TC, § 19104(b)(2)(B).) To show an abuse of discretion, a taxpayer must establish that, in refusing to abate interest, FTB exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Woodral v. Commissioner* (1999) 112 T.C. 19, 23.) Interest abatement provisions are not intended to be routinely used to avoid the payment of interest, thus abatement should be ordered only '"where failure to abate interest would be widely perceived as grossly unfair.'" (*Lee v. Commissioner* (1999) 113 T.C. 145, 149.)

Appellant contends that interest should be abated for three periods. The first period is measured from the date FTB first received the federal audit information (November 26, 2013) until the date FTB sent the NPA to appellant (August 15, 2014). As for the first period, no interest may be abated for any period accruing before the date FTB first contacted appellant in writing concerning the deficiency. (R&TC, § 19104(b)(1).) Here, the NPA was FTB's first contact, written or otherwise, with appellant regarding the deficiency. Thus, interest for the first period may not be abated, as the first period represents a time period before FTB first contacted appellant.

The second period is measured from the date FTB received appellant's protest letter (October 17, 2014) until the date FTB sent a letter to appellant explaining FTB's position (June 15, 2015). As for the second period, FTB asserts that, given workload constraints, six months was a reasonable amount of time for FTB to have issued a position letter to appellant. FTB concedes that interest should be abated for the remaining portion of the second period (i.e., April 17, 2015 until June 15, 2015). We find no abuse of discretion with FTB's determination in this respect.

The third period is measured from the date of appellant's reply to FTB's position letter (which appellant faxed to FTB on November 6, 2015) until the date FTB sent a letter to appellant scheduling a protest hearing (which FTB mailed to appellant on March 23, 2017). The evidence shows that during this third period, FTB took 248 days to assign a hearing officer to the protest matter. Specifically, FTB created a computer file for the protest hearing on February 2, 2016, and did not assign a hearing officer until October 21, 2016.

The definition of "managerial act" found in Treasury Regulation section 301.6404-2(b)(1) includes "the exercise of judgment or discretion relating to management of personnel." This Treasury Regulation also includes two relevant examples in which there was a "decision not to reassign" an employee's cases, and the examples indicate that such decisions did not constitute ministerial acts but that they did constitute managerial acts. (Treas. Reg. § 301.6404-2(b)(1), Examples 3 and 4.) The facts before us are in the general spirit of the facts outlined in these two examples; here, although FTB created a computer file for the protest hearing on February 2, 2016, FTB made the decision not to assign the case (or, not to reassign from the prior employee) to a hearing officer until October 21, 2016. This is analogous to the examples above, and we conclude that FTB's decision not to assign a hearing officer until October 21, 2016, was a managerial act.

In examining the 248 days it took to assign a hearing officer, we realize that the mere passage of time does not establish error or delay in performing a managerial act. (See *Cosgriff v. Commissioner*, T.C. Memo. 2000–241 (citing *Lee v. Commissioner*, *supra*, 113 T.C. 145, 150).) However, a tax agency is in the best position to know what actions were taken by the agency's officers and employees during the period for which an abatement request was made. (See *Jacobs v. Commissioner*, T.C. Memo. 2000–123.) Where the administrative record is silent regarding the actions taken on a taxpayer's matter and the tax agency does not come forth with evidence to show that the employees assigned to the matter or involved in its review were actively working on it, there may be no apparent basis to support the agency's determination not to abate interest, and the unsupported determination may constitute an abuse of discretion. (*Ibid*.) As discussed below, the evidentiary record is silent, and there is no apparent basis to support FTB's determination not to abate interest for this third period as well; thus, both of these factors support appellant's contention that there was unreasonable delay in the handling of this matter.

FTB has provided no explanation or evidence regarding any activity that it took during this period, or explained the delay in assigning a hearing officer to the protest matter. In other words, the evidence in the record does not show that FTB took any steps towards assigning this protest to a hearing officer during this period, and appellant has shown that FTB exercised its discretion without sound basis in fact or law. Without an explanation of what caused the absence of activity after the computer file was created for the protest hearing, abatement of interest is

appropriate for this period. Therefore, we conclude that FTB abused its discretion in failing to relieve interest that accrued during this period.

HOLDINGS

1. FTB's assessment is not barred by the statute of limitations.
2. Appellant has failed to demonstrate error in the proposed assessment of additional tax, which is based upon federal adjustments.
3. FTB concedes on appeal that interest should be abated from April 17, 2015 through June 15, 2015. We conclude that interest should also be abated for the period February 2, 2016 through October 21, 2016. Otherwise, appellant has failed to show that any additional interest should be abated.

DISPOSITION

FTB's action is modified, such that interest is abated from April 17, 2015 through June 15, 2015, and from February 2, 2016 through October 21, 2016. Otherwise, FTB's action is sustained.

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Jeff Angeja
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Jeffrey G. Angeja
Administrative Law Judge

We concur:

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Alberto T. Rosas
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Alberto T. Rosas
Administrative Law Judge

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Amanda Vassigh
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Administrative Law Judge

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