

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19044582
N. FRANKFORT AND)
D. FRANKFORT)
_____)

OPINION

Representing the Parties:

For Appellants: Lusy Brutyan, EA
For Respondent: Mira V. Patel, Tax Counsel

J. MARGOLIS, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, N. Frankfort and D. Frankfort (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants’ claim for abatement of interest for their 2004 tax year.

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

ISSUE

Whether appellants are entitled to an abatement and refund of interest paid with respect to their 2004 tax year.

FACTUAL FINDINGS

1. Appellants filed a joint California income tax return for 2004.
2. FTB audited appellants’ 2004 income tax return. The audit resulted in FTB issuing a Notice of Proposed Assessment (NPA) on December 26, 2008, proposing a tax deficiency of \$355,025. The adjustments proposed in the NPA were the following:
 - a. A \$3,773,940 increase to appellants’ capital gain income.
 - b. A reduction to appellants’ allowable itemized deductions due to the above increase in their adjusted gross income.

3. Appellants protested the NPA.
4. On March 29, 2010, FTB issued a Notice of Action (NOA) affirming its NPA.
5. Appellants appealed the NOA to our predecessor, the State Board of Equalization (SBE).
6. On September 13, 2012, SBE issued a summary decision upholding FTB’s determination in full. SBE’s summary decision contains additional information concerning the basis for FTB’s deficiency determination. It indicates that FTB’s determination was based upon:
 - a. Appellants having double-counted various capital gains transactions, resulting in appellants overreporting their capital gain income by \$113,549 and their capital losses by \$17,785.
 - b. Appellants’ failure to substantiate that they were entitled to a capital loss carryover of \$792,404.
 - c. Appellants’ failure to substantiate that they were entitled to losses of \$2,858,589 and \$218,712.
7. After SBE’s decision became final, FTB commenced collection activity against appellants. FTB’s records reveal that appellants made the following payments towards the deficiency in tax and interest owed thereon: \$345,025 on October 13, 2015; \$139,654.21 on July 25, 2016; and a \$1,922.43 transfer from appellants’ prior tax year, 2003, that was credited on April 15, 2004.¹
8. Appellants’ representative sent a letter dated September 22, 2014, to Mr. Clint, an “Offer Specialist” at FTB. The letter disputes appellants’ cost basis in stock and various municipal bonds, and asks FTB to reduce appellants’ income from the disposition of those securities during 2004 by \$156,726.
9. Appellants provided FTB with a letter bearing a handwritten date of December 15, 2015, in which they requested “the abatement of any and all penalties” imposed against them for 2004. As noted in footnote 1, only \$0.74 of penalties were imposed for 2004.
10. Appellants’ representative sent a letter to FTB dated August 16, 2016, requesting FTB to reduce appellants’ 2004 tax liability by \$14,575 and refund that amount, plus any interest and penalties associated therewith, to appellants. The letter explains the basis for

¹ FTB’s records of appellants’ 2004 account also reveal that a de minimis amount (\$0.74) of penalties were imposed, and that appellants were assessed, and paid, collection related fees totaling \$186. Appellants make no specific argument requesting abatement of the fees, and we see no basis for abating them.

appellants' claim as follows: "taxpayers are disputing the cost basis of the stocks and bonds ... and are requesting to reduce both the capital gain and California taxable income by \$156,726."

11. On September 27, 2016, appellants provided FTB with a letter "request[ing] a refund and the adjustment of the cost basis of certain municipal bonds and stocks and a refund of interest paid on our 2004 FTB Form 540 State Income Tax Return Balance due to special and unusual circumstances" (Appellants also transmitted a copy of their August 16, 2016 letter to FTB with this correspondence.) In their letter, appellants asserted that:
 - a. Appellants are elderly and struggling financially.
 - b. Prior to 2004, appellants had a good history of tax compliance.
 - c. Appellants had "reasonable cause" for their failure to timely pay their 2004 tax liability and, as a result, believe they are entitled to "be relieved of the interest and penalties provided."
 - d. Appellants relied upon statements they received from their broker, Brookstreet Securities Corporation, in reporting their securities transactions for 2004.
 - e. Appellants asked for penalty relief on the grounds of reasonable cause, even though, as explained above, a penalty of only \$0.74 had been imposed in this matter.
 - f. Guidance given in Treasury Regulation section 1.6664-4(b)(1) applies to them.²
12. In response to appellants' various letters, FTB reconsidered its determination regarding appellants' 2004 tax liability and reduced appellant's 2004 total tax liability (before the crediting of any payments) by \$14,575 (from \$375,076 to \$360,501), the amount claimed in appellants' letter of August 16, 2016.
13. On or about March 3, 2017, FTB issued a refund warrant to appellants for \$24,948.23, which amount was comprised of the \$14,575 reduction in their 2004 tax liability and \$10,373.23 of interest thereon. Appellants do not deny receiving this refund warrant.
14. FTB issued a notice to appellant-husband dated May 3, 2017, advising him that FTB had revised appellants' income for 2004 and reduced their total liability from the \$514,731.07

² In this regard, we assume that appellants' references in their briefs to Treasury Regulation section 1.664-4(b)(1) was intended to refer to Treasury Regulation section 1.6664-4(b)(1), since the former provision applies to charitable remainder trusts, and the latter provision deals with abatement of the accuracy-related penalty. However, Treasury Regulation section 1.6664-4(b)(1) also is not relevant to this appeal, since no accuracy-related penalty has been imposed.

- previously paid, to \$490,205.51, resulting in an overpayment of \$24,948.23 that FTB was refunding to appellants. FTB’s notice advised appellants that they could file an amended return and a new claim for refund if they wished to further contest the amount of interest FTB determined to be due from and to appellants for 2004.
15. In response to FTB’s May 3, 2017 notice, appellants submitted an amended California income tax return for 2004, dated June 13, 2017, reflecting the \$14,575 reduction in their 2004 tax liability.
 16. On January 3, 2019, FTB issued a letter to appellants purporting to deny a request by appellants for interest abatement. However, FTB’s letter does not identify which of appellants’ various letters requesting refunds it was responding to.³
 17. Appellants timely filed this appeal from FTB’s January 3, 2019 letter denying appellants’ request for interest abatement.
 18. In its opening brief, FTB denied that appellants were entitled to any abatement of interest imposed for 2004.⁴
 19. Appellants filed a reply to FTB’s opening brief. In their reply, appellants explained their position with greater clarity than they had done previously. They alleged that FTB had “misconstrued” appellants’ position and that appellants’ position is that FTB had erred by reducing appellants’ 2004 tax liability by \$24,948.23, but not refunding to them the interest associated with that reduction in tax. Appellants also asked for penalty abatement, and that interest be abated pursuant to R&TC section 6592(a).
 20. FTB filed a reply to appellants’ reply brief. In it, FTB explained that the warrant (refund check) already refunded interest as the result of the reduction in tax FTB had allowed for 2004. FTB also attached a schedule setting forth its interest computations for the period at issue. FTB’s schedule claims that FTB has refunded interest on the reduction in tax,

³ For this reason, in the discussion section below, we address all of the bases raised in appellants’ various letters and requests for refund.

⁴ However, FTB subsequently alleged, in its reply brief, that it had suspended interest for a significant period. (See paragraph 20, below.)

and that FTB suspended interest on the underlying tax deficiency for a significant period, from October 15, 2006 until December 17, 2012, which further reduced the interest amount due from appellants by \$84,318.74.⁵

21. Appellants filed no response to FTB’s reply brief.

DISCUSSION

In an action for tax refund, the burden of proof is on the taxpayer. (*Apple, Inc. v. Franchise Tax Bd.* (2012) 199 Cal.App.4th 1, 22.) “The taxpayer must not only prove that the tax assessment is incorrect, but also he must produce evidence to establish the proper amount of the tax.” (*Honeywell, Inc. v. State Bd. of Equalization* (1982) 128 Cal.App.3d 739, 744.) A taxpayer may recover a refund only if he shows “ ‘that more has been exacted than in equity and good conscience should have been paid.’ ” (*Sprint Communications Co. v. State Bd. of Equalization* (1995) 40 Cal.App.4th 1254, 1259, quoting *Goodwill Industries v. County of L.A.* (1953) 117 Cal.App.2d 19, 27.)

Appellants are appealing from an FTB letter that denies them a refund of interest paid for their 2004 tax year. However, neither party has specifically identified which piece(s) of correspondence from appellants was the refund claim(s) that FTB’s letter intended to deny. The record in this appeal contains several communications from appellants to FTB that requested reductions in their liability for tax, penalty or interest (or some combination thereof) for their 2004 tax year, and any reduction in tax or penalty may affect the amount of interest owed. However, even construing appellants’ requests broadly, so as to include the taxes, penalties and interest appellants paid for 2004, we are unable to conclude that appellants have sustained their burden of proving they are entitled to any further refunds for 2004 (beyond the amount that was refunded to them in March 2017).

First, we address the tax. Appellants’ letter to FTB dated August 16, 2016, entitled “Request for Refund,” explained that appellants were “requesting a tax refund in the amount of \$14,575, plus adjustments of interest and penalty for tax year 2004 Form 540.” FTB granted the claim in full. In March 2017, FTB issued a \$24,948.23 refund to appellants, which includes the requested \$14,575 reduction in tax and \$10,373.23 of interest thereon. Because no penalties had

⁵ FTB has not explained the basis for this interest suspension.

been imposed with respect to the amounts refunded, there were no penalties to be refunded. In other words, it appears that appellants received all the overpaid taxes to which they were entitled, with interest.⁶

Next, we address the penalties. Although appellants seek a refund of penalties, they have not identified any penalties that were imposed against them that are subject to abatement. FTB's records of appellants' account transcript reveals that only a \$0.74 penalty has been imposed. This penalty appears to have arisen from a small underpayment of the amount reported as due on appellants' originally filed 2004 return. Appellants have made no showing that FTB's imposition and computation of this \$0.74 penalty, which apparently was imposed automatically pursuant to R&TC section 19132 at the time appellants' return was filed, was improper.

Finally, we address the interest. Appellants raise several arguments seeking refund of interest paid for 2004. It appears appellants' primary contention is that because FTB allowed a refund of tax for 2004, FTB "should have also reduced the amount of the assessed interest owed." *But FTB already has done that.* When FTB reduced appellants' tax liability by \$14,575 pursuant to appellants' request, FTB paid appellants a refund of \$24,948.23, which includes \$14,575 of overpaid tax and \$10,373.23 of interest.

Appellants also contend that interest should be refunded to them under the interest abatement provision contained of R&TC section 6592(a). That provision is located in Part 1 of Division 2 of the R&TC, which deals primarily with sales and use taxes; it has no applicability to interest paid on income taxes. Moreover, that provision only permits relief from penalties, not from interest. Interest is not a penalty; it is compensation for appellants' 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 Goodwin* (97-SBE-003) 1997 WL 258474.)

Furthermore, we have no authority to abate interest simply because a taxpayer is elderly or facing difficult financial circumstances. To obtain relief from interest, a taxpayer must qualify under the waiver provisions of R&TC sections 21012, 19112, or 19104. (*Appeal of Balch*, 2018-OTA-159P.) R&TC section 21012 does not apply because FTB did not provide appellants any

⁶ Several earlier letters from appellants made less specific, seemingly broader claims that FTB erred in determining the original tax deficiency amount paid for 2004. Appellants, however, have not shown that they are entitled to a greater reduction in tax than the amount specifically claimed in their August 16, 2016 letter and their amended Form 540.

written advice. R&TC section 19112 also does not apply because the Office of Tax Appeals does not have jurisdiction to review FTB’s interest abatement determination under this provision. (*Appeal of Moy*, 2019-OTA-057P.) R&TC section 19104 does not apply because appellants do not allege any delay caused by a managerial or ministerial act by FTB. Finally, we note that in computing the amount of interest that was due from appellants, FTB already has suspended the accrual of interest for a significant period of time (from October 15, 2006 until December 17, 2012), resulting in \$84,318.74 of interest not being charged to appellants.

HOLDINGS

Appellants have not shown that they are entitled to any additional refund of interest paid for 2004.

DISPOSITION

FTB’s denial of appellants’ refund claim is sustained.

DocuSigned by:
Jeffrey I. Margolis
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Jeffrey I. Margolis
Administrative Law Judge

We concur:

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Elliott Scott Ewing
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Elliott Scott Ewing
Administrative Law Judge

DocuSigned by:
Kenneth Gast
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Kenneth Gast
Administrative Law Judge

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