OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 19054763
W. ROCHA	)
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	)
	)
	)

OPINION

Representing the Parties:

For Appellant: Vicki Ivy Renne, EA

For Respondent: Anne Mazur, Specialist

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, W. Rocha (appellant) appeals an action by Franchise Tax Board (respondent) in denying appellant's request for abatement of interest on a proposed assessment for the 2012 tax year.

Appellant waived his right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUE

Whether appellant has established that he is entitled to interest abatement.

FACTUAL FINDINGS

1. Appellant filed a timely 2012 California income tax return.
2. Subsequently, respondent received information from the Internal Revenue Service (IRS) indicating appellant underreported his 2012 income by $104,211.
3. Consistent with the federal adjustments, respondent issued appellant a Notice of Proposed Assessment (NPA) on January 12, 2016, proposing additional tax, plus interest.
4. On March 9, 2016, respondent received appellant's timely protest of the NPA. Appellant asserted that he was a victim of tax return preparer fraud. Appellant alleged that the person he hired to prepare his 2012 return filed the return without his consent or

signature, and that the preparer directed appellant's 2012 tax refunds to be deposited directly into the preparer's personal bank account. Appellant requested a copy of the 2012 tax return.

5. In response, respondent sent appellant a letter, dated February 19, 2019, stating that information recently received from the IRS did not show that the federal tax assessment was cancelled or reduced. The letter also stated that the matter between appellant and his tax return preparer was a civil matter. Respondent indicated that appellant had until March 19, 2019, to provide any additional information that he wanted respondent to consider.
6. When respondent did not receive a response, it issued a Notice of Action (NOA) dated March 27, 2019, affirming the proposed tax assessment, plus applicable interest.
7. Appellant filed this timely appeal.
8. During the appeal, appellant conceded to the tax assessment, thereby leaving the abatement of interest as the only remaining disputed issue, and respondent agreed to abate interest that accrued from January 9, 2017, to January 19, 2019.

DISCUSSION

If any amount of tax is not paid by the due date, interest is required to be imposed from the due date until the date the taxes are paid. (R&TC, § 19101(a).) Imposition of interest is mandatory and there is no reasonable cause exception to the imposition of interest. (*Appeal of Goodwin* (97-SBE-003) 1997 WL 258474; *Appeal of Yamachi* (77-SBE-095) 1977 WL 3905.) Respondent may abate interest related to a deficiency or a proposed deficiency to the extent the interest is attributable in whole or in part to: (1) an unreasonable error or delay by an officer or employee of respondent in performing a ministerial or managerial act; (2) which occurred after respondent contacted the taxpayer in writing regarding the proposed assessment; and (3) 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.) The Office of Tax Appeals' jurisdiction is limited to determining whether respondent's failure to abate interest under R&TC section 19104 was an abuse of discretion; if so, we may order an abatement of interest. (R&TC, § 19104(b)(2)(B); *Appeal of Teichert* (99-SBE-006) 1999 WL 1080256.) To show an abuse of discretion, a taxpayer must establish that, in refusing to abate interest,

respondent exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Woodral v. Commissioner* (1999) 112 T.C. 19, 23.)

The Revenue and Taxation Code does not define what is meant by an "unreasonable error or delay," or "a ministerial or managerial act." (R&TC, § 19104(a)(1).) However, R&TC section 19104(a)(1), California's interest abatement provision for unreasonable error or delay, 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*.) Congress only intended abatement of interest in circumstances where the failure to do so would be widely perceived as grossly unfair. (*Franklin v. Commissioner* (2008) T.C. Memo. 2008-13 [citing H. Rept. 99–426, at 844 (1985), 1986–3 C.B. (Vol. 2) 1, 844; S. Rept. 99–313, at 208 (1986), 1986–3 C.B. (Vol. 3) 1, 208].) The tax court has held that the mere passage of time does not establish error or delay in performing a ministerial or managerial act, and workload constraints are not a basis for an abatement of interest. (*Ibrahim v. Commissioner* (2011) T.C. Memo. 2011-215; *Leffert v. Commissioner* (2001) T.C. Memo. 2001-23; *Strang v. Commissioner* (2001) T.C. Memo. 2001-104.)

Unreasonable error or delay due to a ministerial or managerial act may be eligible for interest abatement, whereas error or delay due to general administrative decisions are not eligible for interest abatement. (R&TC, § 19104; IRC, § 6404(e).) Treasury Regulation section 301.6406-2(b) defines these terms as follows:

> (1) Managerial act means 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. A decision concerning the proper application of federal tax law (or other federal or state law) is not a managerial act. Further, a general administrative decision, such as the IRS's decision on how to organize the processing of tax returns or its delay in implementing an improved computer system, is not a managerial act for which interest can be abated under paragraph (a) of this section.
>
> (2) 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. A decision concerning the proper application of federal tax law (or other federal or state law) is not a ministerial act.

(Treas. Reg. § 301.6404-2(b)(1), (b)(2).) Under IRC section 6404(e), delays which are due to specified types of workload limitations are viewed as resulting from general administrative decisions and, as such, do not qualify for interest abatement. (Treas. Reg. § 301.6404-2(a)(1), (b)(1)-(2), (c)(8); *Leffert v. Commissioner*, *supra*; *Strang v. Commissioner*, *supra*; see also IRS Chief Counsel Advice 199931039, June 10, 1999.)

Appellant contends that respondent and the IRS did not timely provide him with information regarding into which bank account(s) his 2012 tax refunds were deposited. Appellant asserts he could not control where the refund was deposited and that respondent, in first providing the information with its opening brief, violated his rights and impeded him from filing a civil suit against the tax return preparer within the statute of limitations. Appellant contends that he should not be held responsible for interest that accrued "on the money he could not be told where it was deposited." Appellant asserts that since he did not receive the requested information until respondent filed its opening brief, there is reasonable cause to abate interest to July 15, 2019 (the date respondent filed its opening brief in this appeal).

In order to provide potential grounds for the abatement of interest, an alleged unreasonable error or delay must occur after respondent initially contacts the taxpayer regarding the deficiency. (R&TC, § 19104(b)(1); *Appeal of Teichert*, *supra*.) Here, the first written contact regarding the deficiency occurred when respondent issued appellant the 2012 NPA on January 12, 2016. Therefore, interest abatement is not available prior to January 12, 2016.

Respondent concedes that there was an unreasonable delay in acknowledging appellant's March 9, 2016 protest, and that the delay resulted from a managerial act. Respondent explains that during 2016 and 2017, its backlog for acknowledging protests was approximately 10 to 11 months and, therefore, respondent should have mailed a position letter to appellant within 10 months of his protest letter. On this basis, respondent will abate interest for the period from January 9, 2017 (10 months after appellant filed his protest), through February 19, 2019 (the date respondent acknowledged the protest).[1] As for the backlog in 2016 and 2017, which resulted in respondent taking approximately 10 to 11 months to acknowledge protests (i.e., from appellant's March 9, 2016 protest until 10 months thereafter, January 9, 2017), the mere passage of time

[1] While respondent states January 19, 2019 as the date it responded to appellant's protest, this appears to be a typographical error, as respondent acknowledged the protest by letter dated February 19, 2019. Respondent agrees to abate interest from 10 months after appellant filed his protest to the date respondent acknowledged the protest; therefore, the correct period for interest abatement, as conceded by respondent, is January 9, 2017, through February 19, 2019.

does not establish error or delay in performing a ministerial or managerial act. Moreover, we find that such delays due to workload constraints result from general administrative decisions, which do not qualify for interest abatement.

With regard to the period between February 20, 2019 (the date after respondent acknowledged appellant's protest), and July 15, 2019 (the date respondent filed its opening brief in this appeal), appellant has not demonstrated an unreasonable error or delay by an officer or employee of respondent in the performance of a ministerial or managerial act. We find that respondent issued appellant the March 27, 2019 NOA, as well as filed its opening brief in this appeal, in a timely manner. Furthermore, during this period, respondent was working on appellant's appeal. The act of reviewing and considering a taxpayer's position and the proper application of the law to the case is not a managerial or ministerial act, and we cannot grant interest abatement on such a basis. (Treas. Reg. § 301.6404-2(b)(1), (b)(2).)

Pursuant to R&TC section 19104(a)(1), respondent may abate interest related to a deficiency or a proposed deficiency. R&TC section 19043(a) defines a "deficiency," in part, as the amount by which imposed personal income tax exceeds the excess of (1) the sum of (A) the amount of tax shown on the tax by the taxpayer on an original or amended return, if an original or amended return was filed, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over (2) the amount of rebates, as defined in R&TC section 19043(b)(2), made.

The interest at issue accrued on a deficiency that was based on a finding that appellant underreported his 2012 income by $104,211, of which appellant concedes liability. The interest at issue is unrelated to where the refund was deposited. Appellant underreported his 2012 income, which lead to a tax deficiency, on which interest is required to accrue. There is no reasonable cause exception to the imposition of interest, and appellant has not demonstrated that respondent caused the accrual of interest on the deficiency due to an unreasonable error or delay in the performance of a ministerial or managerial act. As such, appellant has not overcome his burden in showing that respondent abused its discretion in failing to abate interest.

HOLDING

Appellant has not established that he is entitled to full interest abatement.

DISPOSITION

Based on its concession on appeal, respondent's action is modified to abate interest that accrued from January 9, 2017, to February 19, 2019. In all other respects, respondent's action is sustained.

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Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

We concur:

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E.L.Ewing
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Elliott Scott Ewing
Administrative Law Judge

DocuSigned by:
Kenneth Gast
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Date Issued: 3/5/2020