

<sup>1/</sup> Unless otherwise specified, all section references are to sections of the Revenue and Taxation Code as in effect for the year in issue.

At issue is whether this board has jurisdiction to review respondent's exercise of its discretion to waive or not to waive interest on a deficiency assessment under section 18688 of the Revenue and Taxation Code.

Appellants filed a 1984 California personal income tax return which claimed a \$4,000 IRA deduction. Respondent Franchise Tax Board (FTB) disallowed \$1,000 of the deduction because the California IRA deduction may not exceed \$1,500 for each appellant, and, on April 11, 1988, issued appellants a notice of proposed additional tax due (NPA), plus interest, because of that disallowance. Appellants telephoned the FTB and were advised that there was an error in the NPA. On June 3, 1988, appellants wrote the FTB asking for a corrected NPA.

After receiving Internal Revenue Service (IRS) information which adjusted appellants' taxable income for unreported dividend income, the FTB made a similar adjustment to appellants' California taxable income and on September 9, 1988, issued an additional NPA for 1984 for \$47 in tax, plus interest. Appellants paid this amount and assumed that this NPA was the requested correction of the April 11, 1988, NPA.

Because appellants indicated on their 1984 return that they had used income averaging, the FTB requested a copy of appellants' 1984 Schedule G on September 22, 1988. Appellants supplied the Schedule G on October 31, 1988. The FTB recalculated appellants' liability using income averaging to revise the NPA of April 11, 1988, and on December 6, 1989, issued its notice of action (NOA), which stated that appellants owed \$2,224 in tax, plus interest.

Appellants paid the tax and interest and filed a refund claim for the interest which accrued after April 11, 1988. The refund claim was denied, and on appeal appellants' position is that the FTB's delay in calculating their final tax liability, in the light of appellants' prompt responses, was unreasonable and prejudicial and resulted in the additional accrued interest, and for that reason all interest which accrued after the first NPA should be abated.

The well-established general rule is that interest on a proposed assessment is mandatory. (Rev. & Tax. Code, § 18688, subd. (a); Appeal of Ruth Wertheim Smith, Cal. St. Bd. of Equal., Aug. 3, 1965; Appeal of Audrey C. Jaegle, Cal. St. Bd. of Equal., June 22, 1976.) However, the FTB does have discretion to waive interest if the taxpayer's delay in paying the tax is attributable to an FTB employee being dilatory in performing a ministerial act. (Rev. & Tax. Code, § 18688, subd. (c)(1)(B).) The FTB argues, however, that this board has not been granted any power to review the FTB's refusal to waive interest under subdivision (c) of section 18688, relying on the established interpretation of the comparable federal statute, Internal Revenue Code (I.R.C.) section 6404(e).

Subdivision (c) of section 18688 was added to the Revenue and Taxation Code in 1987 (Stats. 1987, ch. 1138) as the counterpart of I.R.C. section 6404(e), which it repeats substantially verbatim. It is settled law in California that when a state statute is patterned after federal legislation on the same subject, the interpretation and effect given the federal provision by the federal courts and administrative bodies are relevant in determining the proper construction of the California

statute. (Andrews v. Franchise Tax Board, 275 Cal.App.2d 653, 658 [80 Cal.Rptr. 403] (1969); Rihn v. Franchise Tax Board, 131 Cal.App.2d 356, 360 [280 P.2d 893] (1955).)

A number of federal courts have considered whether the IRS's discretionary refusal to abate interest under I.R.C. section 6404(e) is subject to judicial review. Those courts concluded either that Congress had not provided the courts with subject matter jurisdiction over interest abatement questions arising out of the application of section 6404(e), or that the courts were unable to subject the administering agency's exercise of its statutorily conferred discretion to judicial review, either because Congress had intended to preclude a court review of that discretion or because the statute was so drawn that the court would have no meaningful standard against which to review the agency's exercise of that discretion, or both. (Horton Homes, Inc. v. United States, 936 F.2d 548 (11th Cir. 1991); Cain v. United States, 1990 U.S. Dist. Lexis 17124 (W.D.Okla. 1990); Selman v. United States, 733 F.Supp.2d 1444 (W.D.Okla. 1990); Brahms v. United States, 64 A.F.T.R.2d (P-H) ¶ 89-5193 (Cl. Ct. 1989).) Those courts which have considered the IRS's failure to abate interest under section 6404(e), but which have not contemplated whether the IRS's discretion to abate was subject to judicial review, found that the court's jurisdiction failed on other grounds. (Klein v. Commissioner, 899 F.2d 1149 (11th Cir. 1990); Magnone v. United States, 902 F.2d 192 (2nd Cir. 1990), cert. den., \_\_\_ U.S. \_\_\_ [112 L.Ed.2d 113] (1991); McMullen v. United States, 66 A.F.T.R.2d (P-H) ¶ 90-5113 (Cl. Ct. 1990); 508 Clinton Street Corp. v. Commissioner, 89 T.C. 352 (1987); Nicklo v. Commissioner, ¶ 88,235 T.C.M. (P-H) (1988).)

Although the federal decisions thus have offered various reasons for reaching their result, that result has always been the same: the courts have uniformly refused to subject the IRS's exercise of its discretion to abate or not to abate interest under I.R.C. section 6404(e) to any judicial review. Those courts have never suggested that such a review might be possible under other factual circumstances. We find this consistent pattern of decisions compelling for purposes of interpreting the nearly identical California statute. Accordingly, we hold that the Franchise Tax Board's exercise of its discretion to abate or not to abate interest under subdivision (c)(1) of section 18688 is not subject to further review.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, pursuant to section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of Philip C. and Ellen Boesner Snell for refund of personal income tax in the amount of \$2,224 for the year 1984 be and the same is hereby sustained.

Done at Sacramento, California, this 30th day of July, 1992, by the State Board of Equalization, with Board Members Mr. Sherman, Mr. Dronenburg, and Ms. Scott present.

Brad Sherman \_\_\_\_\_, Chairman

Ernest J. Dronenburg, Jr. \_\_\_\_\_, Member

Windie Scott\* \_\_\_\_\_, Member

\_\_\_\_\_, Member

\_\_\_\_\_, Member

\*For Gray Davis, per Government Code section 7.9