

BEFORE THE STATE BOARD OF EQUALIZATION  
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	No. 98I-1046
Michael and Sonia Kishner	)	
	)	

Representing the Parties:

For Appellants:	Michael and Sonia Kishner
For Franchise Tax Board:	John Penfield, Counsel
Counsel For Board of Equalization:	Craig R. Shaltes, Tax Counsel Alina C. Ghitea, Legal Intern

OPINION

This appeal is made pursuant to section 19104, subdivision (c)(1)(C)(ii), of the Revenue and Taxation Code<sup>1</sup> from the action of the Franchise Tax Board in denying a request for abatement of interest by Michael and Sonia Kishner for tax years 1988 and 1989. The issue presented in this appeal is whether respondent abused its discretion in making its determination not to abate interest.

On June 16, 1994, respondent issued Notices of Proposed Assessment (NPA's) for 1988 and 1989 based on information from the Internal Revenue Service (IRS) regarding federal adjustments to appellants' tax returns. Appellants did not protest the NPA's, so the assessments became final, collectible tax liabilities. (See Rev. & Tax. Code, §19042.) In February of 1995, appellants made an Offer in Compromise to the IRS and a \$5,000 payment for an unspecified tax year; the IRS rejected that offer. In June of 1996, appellants made a second unsuccessful Offer in Compromise to the IRS for an unspecified tax year. As part of the collection process respondent contacted appellants on November 12, 1997, in order to determine why appellants felt the NPA's were

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<sup>1</sup> Unless otherwise indicated all section references are to the applicable provisions of the California Revenue and Taxation Code.

incorrect. Appellants' representative responded that the IRS did not adjust tax year 1989, but provided no explanation for tax year 1988.

On December 19, 1997, respondent sent a position letter to appellants explaining both the IRS adjustments and respondent's corresponding adjustments for 1988 and 1989. In this position letter, respondent advised appellants that if they did not reply, respondent would assume appellants agreed with the adjustments. On January 5, 1998, appellants' representative sent a letter stating that appellants were confused and that they were unable to confirm the adjustments because they were having difficulties finding copies of their applicable returns. It appears that appellants subsequently provided some information which prompted respondent to determine that a net operating loss for 1988 should have been larger, resulting in a correction to appellants' 1988 tax liability; respondent made no changes for the 1989 tax year NPA. Appellants agreed with the revised tax; however, they argued that interest should not be assessed due to delays by respondent in calculating the correct tax liability. On August 10, 1998, respondent issued a Notice of Determination Not To Abate Interest. Thereafter, appellants appealed.

The imposition of interest on a tax deficiency is mandatory. (Appeal of Amy M. Yamachi, Cal. St. Bd. of Equal., June 28, 1977.) Further, interest is not a penalty, but is simply compensation for appellants' use of money after the due date of the tax. (Appeal of Audrey C. Jaegle, Cal. St. Bd. of Equal., June 22, 1976.) Respondent has the power to abate the interest accrued on a deficiency. (Rev. & Tax. Code, §19104.) Furthermore, by statute, the Legislature recently conferred jurisdiction on this Board to review respondent's decision not to abate interest if a taxpayer appeals that determination to this Board within 180 days. (Rev. & Tax. Code, § 19104, subd.(c)(1)(C)(ii).) This Board's jurisdiction is limited to determining whether respondent's failure to abate interest under section 19104 was an abuse of discretion; if so, this Board may order an abatement. (Rev. & Tax. Code, § 19104, subd. (c)(1)(C), as amended, operative Jan. 1, 1998.)<sup>2</sup>

The plain meaning of statutory language ordinarily is conclusive. (United States v. Ron Pair Enters, Inc. (1989) 489 U.S. 235, 241-242.). Section 19104, subdivision (c)(1)(C)(ii), only grants this Board jurisdiction to review denials by respondent of requests to abate assessed interest. According to the plain language of the statute, this Board cannot review that denial unless (1) respondent rejects a taxpayer's timely request that respondent abate interest and (2) the taxpayer thereafter files an appeal with this Board within 180 days after respondent has mailed out its Notice of Determination Not to Abate Interest.

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<sup>2</sup> To the extent the newly added language of section 19104 conflicts with any of our formal opinions stating that this Board does not have the power to review respondent's exercise of its discretion not to abate interest arising from delays or errors by its officers or employees, as in the Appeal of Nicholas Schillace (95-SBE-005), decided on August 2, 1995, those cases are overruled as to appeals to which the January 1, 1998, amendments to section 19104 apply.

The administrative process begins when respondent initially sends out a notice of the deficiency proposed to be assessed, which notice sets forth the reasons for the proposed corrections or changes to a taxpayer's return, the computations used to arrive at the additional proposed assessment amount, any applicable penalties, and any accrued interest. (Rev. & Tax. Code, § 19033.) This document, according to the statute, is formally titled by respondent as a "Notice of Proposed Assessment," i.e., the NPA. If no protest is filed, the amount of the proposed deficiency becomes final upon the expiration of a 60 day period. (Rev. & Tax. Code, § 19042.) If a protest is filed, respondent may reconsider the proposed assessment of the deficiency and the taxpayer is entitled to a hearing to contest the validity of the proposed assessment. (Rev. & Tax. Code, § 19044.)

If respondent reexamines the proposed assessment, however, and still determines that the additional tax is due, it will issue a final determination, or Notice of Action (NOA), that the assessed deficiency is due and payable. (Rev. & Tax. Code, § 19045.) Prior to the issuance of the NOA, the proposed assessment is best described as a tentative amount due which the taxpayer has no obligation to pay; this view is bolstered by the fact that the taxpayer is not required to make payment until after the assessment becomes final. (See King v. Franchise Tax Board (9th Cir. 1992) 961 F.2d 1423, 1427.) Thus, interest is not "assessed" within the terms of the abatement statute until the underlying tax obligation becomes final and collectible as a liability.<sup>3</sup> Only then can the taxpayer make a request to the FTB to reconsider whether it would be appropriate to abate the assessed interest.<sup>4</sup>

In the instant case, the NPA became final when appellants did not file a protest. However, appellants did file a request to abate interest after the assessment became final. FTB mailed the Notice of Determination Not to Abate Interest on August 10, 1998, and appellants filed their appeal with this Board on September 17, 1998, well within the 180-day statutory period.

Appellants ask us to review whether respondent abused its discretion in deciding not to abate interest. They allege respondent made errors in determining the initial proposed deficiency amounts for both tax years at issue, even though the NPA for the 1989 tax year was

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<sup>3</sup> Usually the assessed amount is final and payable 30 days after respondent mails the NOA. (Rev. & Tax. Code, §19045.)

<sup>4</sup> Although not a statutory requirement, in order for respondent to better consider such requests, taxpayers are encouraged to use respondent's Form 3701 "Request for Abatement of Interest," which must be submitted to respondent's Taxpayer Advocate Bureau for consideration. Respondent's Form 3701 is also helpful to taxpayers who later appeal a denial of such requests to this Board because use of the form may avoid issues related to this Board's jurisdiction (such as whether a taxpayer has made a formal request to respondent to abate interest prior to filing an appeal with this Board).

not revised. Revenue and Taxation Code section 19104, subdivision (c)(1), states, in relevant part:

“(c)(1) In the case of any assessment of interest, the Franchise Tax Board may abate the assessment of all or any part of that interest for any period in either of the following circumstances:

“(A) Any deficiency attributable in whole or in part to any unreasonable error or delay by any officer or employee of the Franchise Tax Board (acting in his or her official capacity) in performing a ministerial or managerial act.

“(B) Any payment of any tax described in section 19033 to the extent that any delay in that payment is attributable to that officer or employee being dilatory in performing a ministerial or managerial act.

“(C) For purposes of this paragraph:

“(i) An error or delay shall be taken into account only if no significant aspect of that error or delay can be attributed to the taxpayer involved, and after the Franchise Tax Board has contacted the taxpayer in writing with respect to that deficiency or payment.

“(ii) ....

“(iii) Except for the amendment adding clause (ii), the amendments made by the act adding this clause are operative with respect to taxable or income years beginning on or after January 1, 1998. The amendment adding clause (ii) is operative for requests for abatement made on or after January 1, 1998.”

Based on this statutory language, this Board will only abate assessed interest on appeal if the aggrieved taxpayer identifies an unreasonable error or delay” which 1) occurred after respondent contacted the taxpayer in writing about the particular deficiency or overpayment underlying the disputed interest; 2) is not significantly attributable to the taxpayer; and 3) is attributable to a ministerial act performed by respondent.<sup>5</sup>

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<sup>5</sup> The provision of section 19104 regarding an error while one of respondent’s employees performs a “managerial act” was newly added; said provision is only operative as to acts performed in tax years beginning on or after January 1, 1998, per section 19104, subdivision (c)(1)(C)(iii). Therefore, the statute limits our review of respondent’s refusal to abate interest which accrued due to delays in respondent’s “ministerial acts.”

When a California statute is substantively identical to a federal statute,<sup>6</sup> this Board may look to the federal authority interpreting the federal statute as highly persuasive in interpreting the California statute. (*Douglas v. State of California* (1942) 48 Cal.App.2d 831.) According to Treasury Regulation section 301.6404-2 (b), a “ministerial act” is defined as:

“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 law (or other federal or state law) is not a ministerial act. Furthermore, interpreting federal tax law is neither a ministerial nor a managerial act. (See Treas. Reg. § 301.6404-2(b), example 12.)”

In the instant case, respondent corrected the computation of a net operating loss carryforward in appellants’ 1988 return only. Appellants allege that this error led to their delay in paying the deficiency amount and the disputed accrued interest. Consistent with the provisions of Treasury Regulations section 301.6402-2(b) outlined above, respondent’s consideration of appellants’ 1988 and 1989 tax years constitutes a discretionary act involving the determination of facts and the direct application of tax law to the relevant facts. Such analysis cannot be considered a ministerial act. Since appellants are unable to prove that the deficiency is attributable to an error or delay by respondent in its performance of a ministerial act, respondent’s determination not to abate the interest must be sustained.

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<sup>6</sup> Revenue and Taxation Code section 19104, subdivision (c), is substantially identical to Internal Revenue Code sections 6404 (e) and (i).

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 19104, subdivision (c)(1)(C)(ii), of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the denial for request for abatement of interest of Michael and Sonia Kushner for the income years 1988 and 1989 be and the same is hereby sustained.

Done at Sacramento, California, this 29th day of September, 1999, by the State Board of Equalization, with Board Members Mr. Klehs, Mr. Andal, Mr. Chiang, Mr. Parrish, and Ms. Mandel\* present

Johan Klehs \_\_\_\_\_, Chairman

Dean F. Andal \_\_\_\_\_, Member

John Chiang \_\_\_\_\_, Member

Claude Parrish \_\_\_\_\_, Member

Marcy Jo Mandel \* \_\_\_\_\_, Member

\*For Kathleen Connell per Government Code section 7.9.