

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:

**M. FUMAGALLI AND**  
**R. FUMAGALLI**

) OTA Case No. 22039828  
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**OPINION**

Representing the Parties:

For Appellants:

Aggie Rees  
M. Fumagalli

For Respondent:

Noel Garcia-Rosenblum, Tax Counsel  
Nancy Parker, Tax Counsel IV

C. AKIN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, M. Fumagalli and R. Fumagalli (appellants) appeal actions by respondent Franchise Tax Board (FTB) proposing additional tax of \$1,214 and \$1,000, plus applicable interest, for the 2009 and 2010 tax years, respectively.

Appellants elected to have this appeal determined pursuant to the procedures of the Small Case Program. Those procedures require the assignment of a single Administrative Law Judge. (Cal. Code Regs., tit. 18, § 30209.1.) Office of Tax Appeals (OTA) Administrative Law Judge Cheryl L. Akin held an electronic oral hearing for this matter on February 24, 2023. At the conclusion of the hearing, the record was closed and this matter was submitted for an opinion.

**ISSUES**

1. Whether appellants have shown error in FTB’s proposed assessments for the 2009 and 2010 tax years which were based on final federal determinations.
2. Whether appellants have established a basis for the abatement of interest.

FACTUAL FINDINGS

1. Appellants timely filed California Resident Income Tax Returns for the 2009 and 2010 tax years on April 13, 2010, and April 15, 2011, respectively.
2. Subsequently, on May 20, 2013, FTB received information that the IRS audited appellants' 2009 and 2010 federal tax returns and made adjustments increasing appellants' federal taxable income for both tax years. For the 2009 tax year, the IRS disallowed appellants' federal itemized deductions and allowed the federal standard deduction instead. For the 2010 tax year, the IRS disallowed appellants' Schedule C car and truck expense in the amount of \$16,705, allowed additional itemized deductions of \$437, and decreased appellants' self-employment income by \$287.<sup>1</sup>
3. Based on the information provided by the IRS, on January 15, 2014, FTB issued Notices of Proposed Assessment (NPAs) to appellants for the 2009 and 2010 tax years making corresponding adjustments to appellants' California tax returns. The NPAs proposed additional tax of \$1,214, and \$1,000, plus applicable interest, for the 2009 and 2010 tax years, respectively.
4. Appellants timely protested the NPAs on March 20, 2014.<sup>2</sup> FTB acknowledged appellants' protest on April 26, 2014.
5. No action was taken by FTB on appellants' protest until November 10, 2020, when FTB issued a letter to appellants explaining that the basis of its NPAs was the 2009 and 2010 final federal determinations. FTB requested appellants provide a copy of the most recent Form 4549, Revenue Agent Report, and indicated that in the absence of a reply, FTB would affirm its NPAs.
6. FTB sent a second letter on January 21, 2022, indicating that it had not received a response to its letter dated November 10, 2020, was closing appellants' protest, and would be issuing notices affirming its NPAs.
7. On January 25, 2022, FTB issued Notices of Action (NOAs) affirming its NPAs for the 2009 and 2010 tax years. This timely appeal followed.

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<sup>1</sup> As the \$437 increase to appellants' itemized deductions and \$287 decrease to appellants' self-employment income for the 2010 tax year are beneficial to appellants, these two adjustments will not be discussed further in this Opinion.

<sup>2</sup>Appellants' protest letter is dated March 15, 2014; however, it is stamped as received by FTB on March 20, 2014.

8. On appeal, FTB agrees to abate interest for the periods of April 27, 2015, through November 10, 2020, and December 12, 2020, through January 25, 2022.
9. IRS Account Transcripts for 2009 and 2010, both dated March 30, 2022, indicate that the federal assessments were final on April 29, 2013. The account transcripts do not indicate that the IRS has reduced or cancelled its adjustments or that the IRS is in the process of reconsidering the adjustments to appellants' 2009 and 2010 tax years.

### DISCUSSION

Issue 1: Whether appellants have shown error in FTB's proposed assessments for the 2009 and 2010 tax years which were based on final federal determinations.

#### FTB's Proposed Assessments Based on Final Federal Determinations

Taxpayers shall either concede the accuracy of a final federal determination or state how it is erroneous. (R&TC, § 18622(a).) A deficiency assessment based on a federal audit report is presumptively correct, and taxpayers bear the burden of proving that the determination is erroneous. (*Appeal of Gorin*, 2020-OTA-018P.) Unsupported assertions are insufficient to satisfy the taxpayers' burden of proof with respect to an assessment based on a federal action. (*Ibid.*) In the absence of credible, competent, and relevant evidence showing that FTB's determination is incorrect, such determination must be upheld. (*Appeal of Bindley*, 2019-OTA-179P.)

Income tax deductions are a matter of legislative grace, and taxpayers bear the burden of establishing entitlement to the deductions claimed. (*Appeal of Vardell*, 220-OTA-190P, citing *New Colonial Ice Co. v. Helvering* (1934) 292 U.S. 435, 440.) To meet this burden, the taxpayers must point to an applicable statute authorizing the deduction and show by credible evidence that the deduction claimed falls within the scope of the statute. (*Appeal of Dandridge*, 2019-OTA-458P; *Appeal of Jindal*, 2019-OTA-372P.)

Here, the IRS audited and disallowed appellants' claimed itemized deductions for the 2009 tax year and appellants' claimed Schedule C car and truck expense deduction for the 2010 tax year. Based on the final federal determinations for these tax years, FTB disallowed the same expenses claimed by appellants on their 2009 and 2010 California returns. In order to prevail in this appeal, appellants must show that the IRS canceled or revised its determinations for the 2009

and 2010 tax years disallowing these deductions, or that, regardless of the federal action, appellants are entitled to the claimed deductions.

Appellants first contend that the NPAs are “not correct”; however, appellants failed provide any evidence to establish that they are entitled to the disallowed itemized deductions for 2009 or the disallowed Schedule C car and truck expense deduction for 2010. The March 30, 2022 IRS Account Transcripts for appellants’ 2009 and 2010 tax years do not indicate that the federal assessments for these tax years have been canceled or revised, or that the IRS is in the process of reconsidering the federal audits for these two tax years. Because the IRS determinations for the 2009 and 2010 tax years are final and have not been withdrawn or revised, FTB’s proposed assessments based upon the final federal determinations are presumed correct and appellants have the burden of proving error in FTB’s proposed assessments. (*Appeal of Gorin, supra.*) Because appellants have failed to provide any evidence establishing that they are entitled to the disallowed deductions, appellants have failed to meet their burden of proof.

At the hearing, appellants also asserted that they do not owe any additional California income taxes for 2009 and 2010 because they paid the additional California taxes due “at the time [they] settled everything with the IRS,” but that they are unable to prove the payments to FTB as they are no longer able to obtain records from their bank showing their payments from more than 10 years ago. The IRS account transcripts show that appellants paid the 2010 federal assessment on May 17, 2013, and the 2009 federal assessment through transfers from their 2012 and 2013 tax years effective April 15, 2013, and April 15, 2014, respectively, and through installment payments made between January 3, 2014, and May 5, 2014. While appellants contend that they paid their California tax at the same time as these federal payments were made, this assertion is contradicted by the evidence in the record.

First, appellants timely protested the 2009 and 2010 NPAs on March 20, 2014. Appellants’ protest letter expressly stated that appellants “do not agree with [FTB’s] letter of demand and [appellants are] protesting [FTB’s] demand of payment[,]” and that appellants’ “look forward to hear[ing] from [FTB] with an update and reversal of [FTB’s] demand.” This suggests that appellants were contesting the proposed tax assessments in the NPAs and they did not pay the tax reflected in the NPAs at this time. OTA also notes that because appellants timely protested the NPAs (and timely appealed the subsequent NOAs to OTA), the proposed additional tax assessments reflected in the NPAs/NOAs are not yet final liabilities which are due and payable.

Additionally, FTB's payment records submitted in this appeal do not reflect that appellants made payments for the 2009 and 2010 tax years following the issuance of the NPAs for these tax years on January 15, 2014. FTB's payment records indicate that for the 2009 tax year, appellants made a payment of \$229 with the filing of their 2009 California return on April 13, 2010, and that FTB refunded \$1,147 to appellants on May 17, 2011, after appellants filed their 2010 California return on April 15, 2011. These payment records do not indicate that appellants made any subsequent payments after April 13, 2010, for the 2009 tax year, and after May 17, 2011, for the 2010 tax year, to satisfy the additional proposed tax assessments per the NPAs issued to appellants on January 15, 2014.

In conclusion, because appellants have failed to provide any evidence establishing that they are entitled to the disallowed deductions, appellants have failed to meet their burden of proof and FTB's proposed assessments of additional tax based on final federal determinations must be affirmed.

#### Timeliness of FTB's Actions

With respect to the timeliness of FTB's actions, appellants question why they have not heard anything from FTB since 2014, state that FTB cannot expect appellants to pay FTB's unreasonable request from 10 years ago, and contend that FTB is harassing them with its power and unreasonable requests. At the hearing appellants asserted that the statute of limitations is three or four years, and contend that FTB's action in 2022, more than 10 years after the 2009 and 2010 tax years, is clearly beyond the statute of limitations. Appellants assert that FTB should, therefore, be barred from assessing appellants.

While OTA understands appellants' frustration, FTB's proposed assessments were issued within the required statutory period. R&TC section 19057(a) states in relevant part, "every notice of proposed deficiency assessment shall be mailed to the taxpayer within four years after the return was filed." The "proposed deficiency assessment[s]" referenced in R&TC section 19057(a) are the NPAs which FTB mailed to appellants on January 15, 2014. Because FTB mailed the NPAs to appellants within four years of when appellants filed their 2009 and

2010 California returns on April 13, 2010, and April 15, 2011, respectively, the NPAs were timely pursuant to R&TC section 19057(a).<sup>3</sup>

While appellants timely protested these NPAs on March 20, 2014, and FTB took almost eight years to resolve appellants' protest and issue its NOAs, there is no statutory requirement that FTB resolve protests and issue its NOAs within a specified time period. As discussed below, FTB has agreed to abate interest for most of this time period, and OTA does not have statutory authority or jurisdiction to provide any other relief to appellants due to the delay by FTB in processing appellants' protest. (See, e.g., Cal. Code Regs., tit. 18, § 30104(d) [OTA does not have jurisdiction to decide whether an appellant is entitled to a remedy for a tax agency's actual or alleged violation of any substantive or procedural right to due process under the law, unless the violation affects the adequacy of a notice, the validity of the action, or amount at issue in the appeal].) OTA's function in the appeals process is to determine the correct amount of the taxpayers' California income tax liability and OTA lacks authority to make discretionary adjustments to the amount of a tax assessment. (*Appeal of Robinson*, 2018-OTA-059P.) OTA has no power to remedy any other wrongs taxpayers believe they may have suffered at the hands of FTB. (*Appeals of Dauberger, et al.* (82-SBE-082) 1982 WL 11759.)

At the hearing, appellants also asserted that they did not receive FTB's protest acknowledgment letter dated April 26, 2014, wherein FTB requested appellants' federal account transcripts. However, OTA notes that appellants' protest letter indicated that appellants had filed amended tax returns for the 2009 and 2010 tax years with the IRS and they would be providing FTB with copies of the amended returns (Forms 1040X), along with the IRS's decision on these amended returns. Appellants have not provided any evidence to show that this information (which is similar to the information FTB requested in the protest acknowledgement letter) was provided to FTB by appellants. Ultimately, whether appellants received this letter or not has no impact on this appeal, as FTB subsequently obtained and provided the IRS account transcripts

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<sup>3</sup> OTA also notes that where, as here, the IRS makes changes to the taxpayers' federal account that results in additional tax, and the IRS or the taxpayer notifies FTB of the changes within six months of the date the federal changes become final, FTB has two years from the date it is informed of the federal changes to issue its NPAs. (R&TC, § 19059(a).) Here, the IRS's changes to appellants' federal account for the 2009 and 2010 tax years were final on April 29, 2013, and FTB was notified of these changes by the IRS on May 20, 2013. Because FTB issued its NPAs to appellants on January 15, 2014, which is within two years of when FTB was notified of the federal changes on May 20, 2013, the NPAs were also timely pursuant to the special statute of limitations period provided in R&TC section 19059(a).

for appellants' 2009 and 2010 tax years, which show that the IRS's determinations are final and have not been revised or reconsidered by the IRS.

Because appellants have failed to provide any evidence establishing that they are entitled to the disallowed deductions, and OTA cannot make discretionary adjustments to the proposed assessments of tax, FTB's proposed assessments of additional tax must be affirmed.

Issue 2: Whether appellants have established a basis for the abatement of interest.

Interest must be assessed from the date a tax payment is due through the date that it is paid. (R&TC, § 19101.) Imposition of interest is mandatory; it is not a penalty, but it is compensation for appellants' use of money after it should have been paid to the state. (*Appeal of Moy*, 2019-OTA-057P.) As relevant here, FTB may abate interest to the extent it is attributable in whole or in part to any unreasonable error or delay by an officer or employee of FTB (acting in his or her official capacity) in performing a ministerial or managerial act. (R&TC, § 19104(a)(1).) The error or delay can be considered only if no significant aspect is attributable to the taxpayer, and only if the error or delay occurred after FTB contacted the taxpayers in writing about the underlying deficiency. (R&TC, § 19104(b)(1).)

OTA has jurisdiction to determine whether a failure by FTB to abate interest was an abuse of discretion and may order an abatement in such cases. (R&TC, § 19104(b)(2)(B).) To show an abuse of discretion, taxpayers must establish that, in refusing to abate interest, FTB exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Appeal of Gorin*, *supra*.) Interest abatement provisions are not intended to be routinely used to avoid the payment of interest, and thus abatement should be ordered only where failure to abate interest would be widely perceived as grossly unfair. (*Ibid.*)

FTB concedes that there was a delay in its issuance of its protest determination. FTB acknowledge appellants' protest on April 26, 2014, but did not issue its protest determination until November 10, 2020. FTB states that given workload constraints, one year was a reasonable amount of time for it to obtain updated account transcripts from the IRS and issue its protest determination letter. As such, FTB exercised its discretion and agreed to abate interest for the period of April 27, 2015, through November 10, 2020. FTB also concedes that there was a delay in the issuance of the NOAs affirming the proposed assessments following the issuance of its protest determination letter on November 10, 2020. The NOAs were issued on January 25, 2022. FTB states that this should have taken one month. FTB therefore exercised its

discretion and agreed to abate interest for the period of December 12, 2020, through January 25, 2022.

Appellants do not identify any other periods for which they assert interest should be abated. OTA notes that FTB has agreed to abate most of the interest that would have accrued during appellants' protest of the NPAs with FTB.<sup>4</sup> Interest may only be abated after FTB contacts the taxpayers in writing with respect to the deficiency. (R&TC, § 19104(b)(1)). Here, that contact is the 2009 and 2010 NPAs issued by FTB on January 15, 2014. Thus, interest may not be abated prior to January 15, 2014. As appellants have not established that FTB committed any other errors or delays during the period of January 15, 2014, through January 25, 2022, beyond those already conceded by FTB, appellants are not entitled to any additional interest abatement.

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<sup>4</sup> OTA notes that FTB has agreed to abate interest for the entire protested period, except for the period running from the filing of appellants' protest on March 20, 2014, through April 26, 2015, and the period running from November 11, 2020, through December 11, 2020. Thus, while FTB took approximately eight years to resolve appellants' protest, interest is only being charged for approximately one year and two months during this eight-year time period.




HOLDINGS

1. Appellants have not shown error in FTB’s proposed assessments for the 2009 and 2010 tax years which were based on final federal determinations.
2. Appellants have not established a basis for the abatement of interest, beyond the amounts conceded by FTB.

DISPOSITION

As conceded by FTB on appeal, interest shall be abated for the period of April 27, 2015, through November 10, 2020, and December 12, 2020, through January 25, 2022. Otherwise FTB’s actions with respect to the 2009 and 2010 tax years are sustained in full.

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Cheryl L. Akin  
Administrative Law Judge

Date Issued: 4/14/2023