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2023 – OTA – 502
Nonprecedential

OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:

S. BOTSFORD AND
D. BOTSFORD

OTA Case No. 22019424

OPINION

Representing the Parties:

For Appellants: Mark Bernsley, Attorney

For Respondent: Parviz Iranpour, Attorney

V. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, S. Botsford and D. Botsford (appellants) appeal an action by respondent Franchise Tax Board (FTB) proposing additional tax of $288,503 and applicable interest for the 2014 tax year.

Appellants waived the right to an oral hearing; therefore, the matter is being decided by the Office of Tax Appeals (OTA) based on the written record.

ISSUES

1. Whether appellants have established entitlement to additional basis in real property in Pasadena, CA (the Residence).
2. Whether appellants have established error in FTB's determination that a portion of cost basis attributable to a demolished structure should be excluded from appellants' basis in the Residence.
3. Whether appellants are entitled to additional interest abatement.

FACTUAL FINDINGS

1. Appellants purchased the Residence in 1985. After purchasing the Residence, appellants demolished the original structure except for one section of footing and a framed wall. In 2014, appellants sold the Residence.

2. Appellants' 2014 California income tax return reported the sale. Appellants reported purchasing the Residence on June 1, 1983, for $475,000, and selling it on September 2, 2014, for $4,300,000. Appellants reported $3,495,850 of basis comprised of the purchase price plus $3,020,850 of improvements, and $183,996 of selling expenses. Appellants also reported a $500,000 gain exclusion pursuant to Internal Revenue Code (IRC) section 121 and recognized $120,154 of gain.

3. FTB audited appellants' return and appellants provided a document titled "Sale of El Campo Home" (i.e., the Residence) showing their gain computation for the Residence and a document titled "Tax Basis Calculation." Both documents include appellants' claimed costs for improvements, however, some of listed items are different. For example, original construction is listed as $2,509,000 on document and $2,147,150 on the other, but both documents reflect $475,000 as the purchase price and $3,495,850 as the total amount of improvements.

4. Appellants' Tax Basis Calculation document indicates a total tax basis of $3,495,850, comprised of:

- 1985, "Total Acquisition Basis" of $599,000, including $475,000 as "tear down" for land and building;
- 1986, $2,147,150 for construction of the new house, guest house, garage, pool, and tennis court, as well as hardscaping and landscaping;
- 1994, $56,750 for "earthquake repairs – stucco cracks, flooring cracks;"
- 1998, $202,950 for the addition of a fitness center, sauna, and shower;
- 1999, $45,000 for gates and landscaping; and
- 1985 to 2014, "Customary Maintenance," including: $160,000 to remodel the kitchen twice ($80,000 per remodel); $100,000 to "redo" bathrooms five times ($20,000 for each "redo"); $50,000 for exterior panting; $60,000 for a replaced roof; and $75,000 for replaced floors.

5. Appellants provided permit applications and invoices totaling $291,667, which were accepted by FTB.[1]
6. Appellants provided a letter dated June 22, 2018, from a contractor (MM) estimating a cost of $350 per square foot to build the Residence in 1986. The contractor stated the home "was designed by Johannes Van Tilburg, a highly decorated architect" who was known for "very high ceilings, multiple skylights, and free-standing fireplaces."
7. At audit, FTB applied a document transfer tax formula of $0.55 for each $500.00 of the purchase price to the $416.35 document transfer tax that is reflected on the grant deed to establish $378,500.00 as appellants' purchase price for the Residence. FTB corroborated the purchase price amount using information from the Los Angeles County Assessor's Office's (Assessor's) website that reflects an assessed value of $378,300.00 on December 31, 1985. Appellants do not dispute FTB's adjustment that reflects the reduction in their original purchase price from the reported $475,000.00 to $378,500.00.
8. At audit, FTB calculated appellants' basis in the Residence by allowing a cost basis of $375,500 to reflect the property's purchase price and allowed appellants a basis increase of $465,290 for the value of improvements prior to 1999, $291,667 of invoices provided by appellants, and $1,797 for permits provided by appellants. FTB arrived at the figure of $465,290 by acknowledging that appellants assert the majority of the improvements were performed prior to 1999, and $465,290 was the assessed value of all improvements to the property recorded by the Assessor in 1999. As a result, at audit, FTB allowed appellants a total basis in the Residence of $1,137,254.
9. FTB issued a Notice of Proposed Assessment (NPA) that reduced appellants' reported purchase price by $96,500 to reflect the purchase price of $378,500 corroborated by the Assessor's records rather than the $475,000 reported by appellants. The NPA allowed basis for $758,754 of capital improvements and disallowed the remaining $2,262,096 of unsubstantiated improvements reported by appellants. The NPA allowed appellants a total basis of $1,113,254 in the Residence. The NPA proposed taxable gain of $2,358,596 on the transaction computed by reducing the sales price of $4,300,000 by

[1] Many of these photocopied documents are difficult to read; however, they appear to include an application for permit indicating a valuation of $110,000 and a date that is unclear and a hand-written notation of "1987?", an application for permit listing a valuation of $8,000 and what appears to be a date in 1986; a 1989 application for a pool permit with a valuation of $17,000; and a 1998 building permit with a hand-written notation indicating it was for a sauna, fitness room, and walk-in closet with a valuation of $36,000.

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basis of $1,113,254, selling expenses of $183,996, gain nonrecognition of $500,000, and the $120,154 of taxable gain previously reported by appellants.

10. Appellants protested the NPA and submitted a report of estimated costs (Report) prepared by an individual (Kennedy) estimating a range of total construction and remodeling costs between $2.83 million and $3.54 million. The Kennedy Report:
    - Indicated the following sources of information were used to create the Report: (1) a brief telephone conversation with S. Botsford; (2) a written "work description" provided by S. Botsford (presumably created from memory); (3) photographs of the Residence from outside the property and listing photographs by Sotheby's International Realty (presumably from the 2014 sale); (4) a floor plan of the Residence; (5) historical permits; and (6) an "on site visit … for personal observation, photos taken [and] site analysis."
    - Indicated the landscaping and hardscaping were a major expense and that Kennedy obtained current price estimates for landscaping from businesses located in Woodland Hills and North Hollywood. Kennedy described concrete as a leading factor in construction forecasting and stated that he obtained current concrete estimates from the Internet.
    - Indicated the original house was torn down to one section of footing and one framed wall, a one-half bath in the garage was replaced at that time, and the garage was replaced later in time with the driveway.
    - Estimated current costs for the main house, the tennis court and pool, and the landscape and hardscape, using construction websites and personal experience, as follows: (1) the current cost of the main house was $2 million to "$5+" million and estimated the cost to have been 45 percent to 65 percent of this range; (2) the current price of the tennis court and pool was $1.4 to $1.8 million and estimated the cost to have been 80 percent to 90 percent of this range; and (3) the current cost of landscape and hardscape amenities was $950,000 to $1.4 million and estimated the cost was 80 percent to 90 percent of this range.
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11. During the protest process, FTB revised its assessment and allowed appellants $1,475,734 of total basis. FTB arrived at this assessment by estimating appellants'

improvements using an estimation tool called SwiftEstimator.[2] Using SwiftEstimator, FTB estimated costs of improvements in 1986 totaled $1,068,810 and added appellants' invoices from 1987 through 1999 totaling $276,774 to this amount. FTB also determined that it erred during its audit process in allowing the full amount of purchase price to be included in appellants' basis because almost all of the original house had been removed, save for the wall and part of the foundation, and was not part of the sale in 2014. The FTB hearing officer allowed $113,550 of the original purchase in the basis computation and $16,600 in demolition costs.

12. FTB abated interest from November 5, 2020, through October 14, 2021, and issued a Notice of Action (NOA) on December 7, 2021. The NOA decreased the amount of basis allowed for the purchase of property from $378,500 to $113,550. The NOA increased the amount of basis allowed for the improvements to the property by adding the SwiftEstimator estimate of $1,068,810 to the $276,774[3] of previously-allowed invoices, and allowed basis of $16,600 for demolition costs, for a basis of $1,362,184 in the improvements. Overall, the NOA allowed a total basis of $1,482,338[4], which, when added to the selling expenses of $183,996, resulted in $2,520,116 of gain, less $500,000 of gain nonrecognition pursuant to IRC section 121, for a total taxable gain of $2,020,116. The NPA represents in a reduction in recognized gain of $338,480 from the amount proposed by the NPA.

13. Appellants filed this timely appeal.

14. On appeal, appellants provide a declaration submitted under penalty of perjury from a licensed contractor, CW, in response to FTB's use of the SwiftEstimator. CW states that the data relied on by the software is compiled through telephone contacts with contractors who generally build track homes and not contractors who are "high-end custom

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[2] On appeal, FTB states that, for approximately one year, it tried to retain a cost expert of its own to estimate the costs of the improvements. However, due to issues that included restrictions in place for the COVID-19 pandemic, FTB used the SwiftEstimator to estimate the costs of improvements for the remodel/rebuild that occurred in 1986. According to FTB, the SwiftEstimator is based on the Marshall & Swift database, a trusted source of building costs, and is commonly used to determine the cost to reproduce a particular residence.

[3] At audit, FTB stated that appellants had provided invoices totaling $291,667. At protest, FTB instead stated that appellants had provided invoices totaling $276,774, and FTB did not address the reduction of $14,893 from the amount of invoices allowed at audit.

[4] Although this amount should equal $1,362,184, it appears FTB may have erroneously added the $120,154 of gain reported by appellants to the amount of basis it allowed in computing the NOA.

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builders." CW further states that any such builders who respond to such telephone contacts do so with such infrequency that any such data would not truly be represented in comparison to the track homes. CW concludes that the SwiftEstimator is a starting point for cost estimates of standard homes but not useful for cost estimates of luxury homes.

DISCUSSION

Issue 1: Whether appellants have established entitlement to additional basis in the Residence.

FTB's determinations are generally presumed correct, and the taxpayer bears the burden of proving otherwise. (*Appeal of Vardell*, 2020-OTA-190P.) Unsupported assertions cannot satisfy a taxpayer's burden of proof. (*Ibid.*) A taxpayer's failure to produce evidence that is within his or her control gives rise to a presumption that such evidence, if provided, would have been unfavorable to the taxpayer's case. (*Ibid.*)

It is well settled that establishing a taxpayer's cost basis is a factual matter. (*Vaira v. Commissioner* (3d Cir. 1971) 444 F.2d 770, 774.) "Proof of basis is a specific fact which the taxpayer has the burden of proving." (*O'Neill v. Commissioner* (9th Cir. 1959) 271 F.2d 44, 49.)

R&TC section 18031 adopts the following IRC sections related to computation of gain from the disposition of property. Gain from the disposition of property is the excess of the amount realized over the adjusted basis. (IRC § 1001(a).) Adjusted basis is the cost basis, determined under IRC section 1012 or other applicable provisions, adjusted as provided in IRC section 1016. (IRC § 1011.) Cost basis is increased by capital expenditures but does not include improvements that are no longer part of the property at the time of sale. (IRC § 1016(a)(1)(A); *Bayly v. Commissioner*, T.C. Memo 1981-549; IRS Pub. 523.) For example, where a taxpayer incurs the cost of installing carpeting and later replaces the carpeting, only the cost of the carpeting that is part of the home at the time of sale may be included in the basis. (*Bayly v. Commissioner*, *supra*; IRS Pub. 523.)

Where a taxpayer shows that an expense is deductible but cannot show the precise amount, a court may estimate the amount of deductible expense. (*Tabe v. Commissioner*, T.C. Memo. 2019-149.) This rule, known as the *Cohan* rule, springs from the case *Cohan v. Commissioner*, wherein the taxpayer, Mr. Cohan, had clearly "spent much" on travel and entertainment related to the production of his plays and directed the Board of Tax Appeals (Board) to approximate the amount of expenses incurred, if it could, "bearing heavily if it

chooses upon the taxpayer whose inexactitude is of his own making." (*Cohan v. Commissioner* (2d Cir. 1930) 39 F.2d 540, at pp. 543-544.)

The principle of the *Cohan* rule has been applied to estimate the adjusted basis of property. (See, e.g., *Dockery v. Commissioner*, T.C. Memo. 1978-63.) OTA's predecessor, the California State Board of Equalization (SBE), applied the *Cohan* rule, stating "[w]here [FTB] has allowed part of a deduction, [SBE] will not alter [FTB's] determination unless facts appear from which a different approximation can be made." (*Appeal of Swimmer, et. al.* (63-SBE-138) 1963 WL 1744.) Similarly, SBE expressed "reluctance to disturb [FTB's] determinations involving unsubstantiated amounts without independent facts on which to base a different finding." (*Appeal of California Steel Industries, Inc*. (2003-SBE-001) 2003 WL 176962.) A taxpayer must demonstrate some "basis on which an estimate can be made" that goes beyond mere speculation, unsupported allegations, or mere inference. (*Vanicek v. Commissioner* (1985) 85 T.C. 731, at pp. 742-43; see also *Appeal of Hakim* (90-SBE-005) 1990 WL 176081.)

Cost Estimates and Disposition

Both parties provide estimates of appellants' basis in the Residence, citing the *Cohan* rule. FTB used a cost estimate based the property's assessed value and limited contemporaneous documentation to compute $758,754 for appellants' cost of improvements, and then used the SwiftEstimator to allow $603,520[5] of additional cost of improvements. FTB asserts the SwiftEstimator is a trusted source of building costs that is used in many industries, and that it is a reliable and accepted tool to estimate costs for residential buildings.

In contrast, appellants rely on Kennedy's Report, which consists of cost estimates using percentages of the current prices, but does not state how the percentages were computed or adjusted for the time period (i.e., 1986, 1994, 1999, or later). Appellants assert the SwiftEstimator is unreliable for reasonable cost valuations for luxury homes. In support, appellants submit the declaration from CW asserting, based on his long experience as a licensed contractor, the SwiftEstimator is not useful to estimate the cost of luxury homes. Additionally, appellants argue the SwiftEstimator is a valuation tool, and this appeal concerns the costs of improvements, not value.

[5] This amount is computed by adding the auditor's allowance for invoices and permit fees of $293,464 to the SwiftEstimator amount of $1,068,810, to equal $1,362,274, and then subtracting the $758,754 of improvements allowed by the auditor.

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In *Cohan*, *supra*, the court instructed Board to use its judgment, weighing against Mr. Cohan if it chose to do so, because he was unable to provide the proper records. As the California Supreme Court stated in *Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514:

> The taxpayer cannot merely assert the incorrectness of a determination of a tax or the method used and thereby shift the burden to the commissioner to justify the tax and the correctness thereof. It is the well-established rule that when the plan of allocation is found to be reasonable and rational the burden of showing error in defendant's computation or application is upon the taxpayer.

Accordingly, OTA must weigh the evidence presented and determine whether appellants have established error in FTB's determination.

Upon review, OTA notes that Kennedy's Report does not provide cost estimates for work performed after 1986. The Report states that it relied on information provided by S. Botsford, including work detail that Kennedy explained was used for a "partial critical path analysis," but appellants have not provided any accompanying affidavits, affirmations, or declarations to explain what information was provided. The evidentiary record indicates that some information appellants provided is not accurate, such as appellants' reported purchase price.[6] Furthermore, the Report was performed six years after the sale, and many years after the reported improvements were made.

In addition, appellants did not provide documentation to substantiate several reported improvements. Appellants' reported basis includes $45,000 spent on gates and landscaping in 1990; $80,000 for each of two remodels of the kitchen; $20,000 for each of five remodels of bathrooms; $50,000 to paint; $60,000 to replace a roof; and $75,000 to replace marble floors. However, the record does not include any documentation to establish these alleged improvements were performed. In contrast, permits for post-1986 years show appellants built a pool, sauna, fitness room, and walk-in closet. Property tax records show construction was done in 1986, 1987, and 1998. FTB accepted invoices for work completed from 1986 to 1991 and after 1999, but neither party has stated what work these invoices substantiated.[7]

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[6] As previously explained, appellants reported a purchase price of $475,000 but the County Assessor's record reflects a purchase price of $378,500.

[7] As explained previously, FTB also allowed the Assessor's assessed improvement amount of $465,290 from 1999 property tax records.

Kennedy estimated current cost ranges of $2 million to $5 million for the main house; $1.4 million to $1.8 million for the tennis court and pool; and $950,000 to $1.4 million for landscape and hardscape at the time the Report was prepared in September 2020. Kennedy reduced these amounts by certain percentage reductions to account for the reduction in cost in prior years when the improvements occurred. However, the Report does not provide any details or substantiation of how Kennedy computed these percentage reductions. For example, there is a noticeable difference in the percentage reductions for the main house (i.e., 45 percent to 65 percent) compared to the tennis court, pool, landscape and hardscape (i.e., 80 percent to 90 percent). Appellants' basis schedule shows these improvements were done at around the same time in 1986,[8] but the percentage reductions are not comparable.

Kennedy reduced the listed current prices for custom luxury homes by an average of 22.5 percent to set his cost range of $2.83 million to $3.54 million. Again, he provided no analysis for this overall percentage reduction, other than a very brief discussion of ready-mix concrete costs. He explained ready-mix concrete, priced at the time of the Report, was roughly twice the cost in "'86 – 2000's." However, he did not explain why his estimated cost in the past remained constant for more than 14 years. Thus, Kennedy's Report lacks support and OTA weighs it accordingly.

Also, MM's June 22, 2018 letter does not provide any analysis for computing the $350 per square foot cost estimate. The contractor explained the architect's plans would have increased the costs but did not address how much the architect's plans would have cost or how the increase was calculated.

The documents appellants provide do not support the amount of cost basis asserted. The cost basis worksheet includes work labeled as "Customary Maintenance," including the remodels of the kitchen and bathrooms, and replacement of the roof and floors. However, expenditures for maintenance are not considered capital in nature and not includable in appellants' basis. (See, e.g., *Indopco v. Commissioner* (1992) 503 U.S. 79; Rev. Rule 94-12, 1994-1 C.B. 36.)

Additionally, only improvements that are part of the home when it is sold are includable in appellants' basis. (*Bayly v. Commissioner*, *supra*; IRS Pub. 523.) Appellants state that they performed certain remodels multiple times and included each instance in the basis asserted.

[8] The pool permit was issued in 1989.

Only the cost of improvements that are part of the home, i.e., the final remodel, are includable in appellants' basis. (*Bayly v. Commissioner*, *supra*; IRS Pub. 523.)

FTB based its estimate, in part, on contemporaneous documentation, including invoices and property tax records, and appellants' purchase price for the Residence. FTB used the SwiftEstimator to provide additional basis. FTB states that it allowed $1,345,584 in basis for improvements, comprised of appellants' invoices totaling $276,774 and $1,068,810 for the SwiftEstimator estimate, plus $113,550 for the land and $16,600 in demolition costs, for a total adjusted basis of $1,475,734. However, FTB's NOA allowed a total basis of $1,482,338,[9] or $120,154 in excess of the amount. While FTB determined appellants provided invoices substantiating improvements of $291,667, as opposed to the $276,774 in invoices FTB allowed during protest, FTB has not explained the $14,893 discrepancy.[10] However, FTB's final assessment allows basis in excess of this amount.

Appellants ask OTA to greatly increase the amount of basis, based on Kennedy's Report. However, the record does not provide OTA with a means of determining the accuracy of Kennedy's methods, assumptions, or conclusions. Also, the information provided in the Report does not make clear whether the alleged improvements made after the 1980's were incorporated into the Report. Appellants have not established that the alleged improvements: were in fact made; did not constitute maintenance; or were still part of the Residence at the time it was sold (i.e. multiple remodels of the same bathroom). The record also indicates inconsistencies in appellants' arguments and the contemporaneous records; specifically, between the costs represented in appellants' permits and property tax records compared to their reported basis.

While FTB's assessment appears to contain computational errors, they err in favor of appellants. Based on this, FTB's determination is sustained. OTA next considers whether appellants' cost basis should be reduced due to the partial demolition of the original structure.

[9] The NOA assessed capital gain of $2,020,116. With a sales price of $4,300,000, less a $500,000 gain exclusion, and $183,996 of selling expenses, leaves a basis of $1,595,888. Of this amount, FTB allocated $113,550 to the purchase price and the remaining $1,482,338 to capital improvements.

[10] At audit, FTB stated that appellants had provided invoices totaling $291,667. At protest, FTB instead stated that appellants had provided invoices totaling $276,774, and FTB did not address the reduction of $14,893 from the amount of invoices allowed at audit.

Issue 2: Whether appellants have established error in FTB's determination that a portion of cost basis attributable to a demolished structure should be excluded from appellants' basis in their prior residence.

FTB asserts that appellants' cost basis of $378,500 should be reduced by $264,950 to $113,550 for the portion of appellants' purchase price attributable to the original structure because appellants demolished the original structure except for one section of footing and one framed wall. The demolition occurred as a part of the extensive remodel planned by appellants.

In support of this assertion, FTB cites *U.S. v. Rogers* (9th Cir. 1941) 120 F.2d 244 (*Rogers*). In *Rogers,* the taxpayer paid $55,000 for land with a residence, made $48,777 of initial improvements to the residence, and then made $23,033 in improvements to the grounds, including adding a garage, barn, pool fence, and shrubbery. (*Id.* at p. 245.) It was then discovered that the residence had extensive termite damage and, accordingly, the home was razed. (*Ibid.*) The taxpayer sold the land without rebuilding the home for $150,000. (*Ibid.*) The taxpayer's asserted basis included the cost of the land and residence, cost of improvements to the residence, and the cost of the improvements to the grounds. (*Ibid.*) The IRS asserted that the cost of improvements to the residence should not be included, but permitted the cost of the land, residence, and improvements to the grounds.[11] (*Ibid.*) In sustaining the IRS's position, the court explained that "basis is 'the cost of such property [sold].' . . . What property was sold? It was . . land with certain improvements, but without a house." (*Id.* at p. 247.)

The holding in *Rogers* does not support FTB's contention because in *Rogers*, the IRS did not seek to reduce the taxpayer's cost basis by the amount of purchase price allocable to the original residence. (*Rogers*, *supra*.) Also, in this case appellants' sale included both the land and residence. Although a taxpayer's cost basis can be increased only by capital improvements that are part of the residence at the time of sale, the starting point is a taxpayer's cost basis, which is the cost of such property. (*Bayly v. Commissioner*, *supra*; IRS Pub. 523; IRC § 1012.) OTA is not aware of statutory or precedential authority that would permit FTB to reduce a taxpayer's cost basis by the value of a demolished structure. (See IRC, §§ 1012-1016.)

Accordingly, FTB's determination to reduce appellants' cost basis by the portion of appellants' purchase price allocable to the original structure that was demolished is reversed.

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[11] The IRS asserted that there was $71,997 of gain, which is equal to the sales price of $150,000 less the purchase price of $55,000 and the $23,033 of improvements made to the grounds. (*Ibid.*)

Issue 3: Whether appellants are entitled to additional interest abatement.

The imposition of interest is mandatory. (R&TC, § 19101(a); *Appeal of Moy*, 2019-OTA-057P.) Interest is charged from the due date of the tax payment to the date the tax is paid. (R&TC, § 19101(a).) Interest is not a penalty but is compensation for the taxpayer's use of money after it should have been paid to the state. (*Appeal of Moy*, *supra*.) There is no reasonable cause exception to the imposition of interest and interest can only be waived in certain limited situations when authorized by law. (*Ibid*.)

FTB abated interest for the time period it spent searching for an expert for a cost valuation for the cost of improvements, November 5, 2020, through October 14, 2021, pursuant to R&TC section 19104. Appellants assert they are entitled to additional interest abatement for the time period beginning October 12, 2020, to December 7, 2021, the date of the Notice of Action, because appellants requested that the hearing officer stop working on the protest and issue a Notice of Action, by correspondence dated October 21, 2021.[12] Appellants state that this is when the hearing officer used the SwiftEstimator to estimate the cost of improvements made to the Residence.

To obtain relief from interest, a taxpayer must qualify under the provisions of R&TC sections 19104, 21012, or 19112. The relief of interest under R&TC section 21012 is not relevant here because FTB did not provide appellants with any written advice. R&TC section 19112 requires a taxpayer to make a showing of extreme financial hardship caused by a significant disability or other catastrophic circumstance, and OTA does not have jurisdiction to review FTB's denial of interest under this section. (*Appeal of Moy*, *supra*.) R&TC section 19104 provides for an abatement when interest is attributable to an unreasonable error or delay by an officer or employee of FTB when performing a ministerial or managerial act.

An error or delay by an officer or employee of FTB can only be considered when no significant aspect of the error or delay is attributable to appellants and after FTB has contacted appellants in writing with respect to the deficiency or payment. (R&TC, § 19104(b)(1).) Jurisdiction for interest abatement is limited by statute to a review of FTB's determination for an abuse of discretion. (R&TC, § 19104(b)(2)(B).) To show an abuse of discretion, appellants must establish that, in refusing to abate interest, FTB exercised its discretion arbitrarily,

[12] Appellants did not attach a copy of the correspondence to their briefs. Also, appellants have requested additional interest abatement from October 12, 2020, rather than October 21, 2021.

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capriciously, or without sound basis in fact or law. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.)

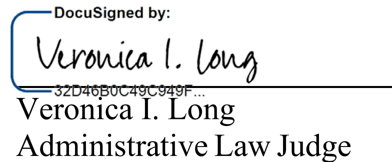
Appellants assert that they are entitled to interest abatement for approximately three additional months during which time FTB's protest officer continued working on appellants' case. The fact that FTB did not hire an expert to review appellants' cost estimate has no bearing on this issue and FTB has already abated interest for any delays that occurred during that process. Additionally, FTB explains that during this time it used the SwiftEstimator. During this process, FTB reviewed appellants' cost basis in determining the computation of gain from the sale of the Residence. Thus, FTB was engaged in the proper application of tax law, as opposed to performing a ministerial or managerial act. Additionally, outside of the period for which FTB agreed to abate interest, FTB needed time to prepare and respond to appellants' protest, and such activities are also not ministerial or managerial. As such, FTB has not abused its discretion in refusing to abate interest. Further, there is no reasonable cause exception to the imposition of interest. (*Appeal of GEF Operating, Inc.*, *supra*.) Accordingly, there is no basis for interest abatement.

HOLDINGS

1. FTB's disallowance of additional basis for improvements is sustained.
2. Appellants have established error in FTB's determination that a portion of the cost of the basis attributable to a demolished structure should be excluded from appellants' basis in the Residence.
3. Appellants are not entitled to additional interest abatement.

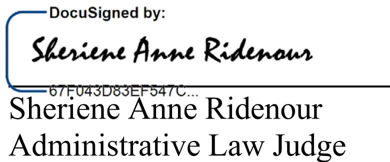
DISPOSITION

FTB's action is modified to allow appellants' basis of $264,950 for the portion of the original house that was demolished, and thus allowing appellants' full purchase price of $378,500 in their basis. FTB's action is otherwise sustained.

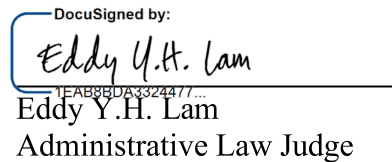


Veronica I. Long
Administrative Law Judge

We concur:



Sheriene Anne Ridenour
Administrative Law Judge



Eddy Y.H. Lam
Administrative Law Judge

Date Issued: 8/25/2023