

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

In the Matter of the Appeal of:

**J. GIVENS AND**  
**R. GIVENS**

) OTA Case No. 230112502  
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**OPINION**

Representing the Parties:

For Appellants: J. Givens and R. Givens

For Respondent: Annika McClure, Attorney

J. ALDRICH, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19045, J. Givens and R. Givens (appellants) appeal, in part, an action by respondent Franchise Tax Board (FTB) proposing additional tax of \$9,107 and applicable interest for the 2016 tax year.<sup>1</sup>

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

**ISSUE**

Whether appellants are entitled to additional interest abatement.

**FACTUAL FINDINGS**

1. Appellants timely filed their 2016 California Resident Income Tax Return (return).
2. On September 29, 2020, FTB issued a Notice of Proposed Assessment (NPA) to appellants that proposed an additional tax of \$9,107 and applicable interest, based on the addition of unreported pension/annuities income. In the NPA, FTB explained that appellants needed to file a protest or the NPA would become due and payable on November 30, 2020.

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<sup>1</sup> Appellants agree that they owe the tax and state that they will pay the tax due. Therefore, the proposed assessment of tax will not be addressed.

3. On November 30, 2020, FTB received appellants' protest. Based on their withholdings, appellants contended that they owed \$7,447.25 in additional tax and requested that FTB waive the interest. Appellants included a copy of a 2016 Form 1099-R indicating appellants received a gross distribution, elected to withhold federal income taxes, and elected to withhold \$1,828.58 for state income taxes. The 2016 Form 1099-R relates to the withdrawal of funds from an Internal Revenue Code (IRC) section 401(k) defined contribution plan (401(k)).
4. On December 9, 2020, FTB issued an acknowledgement letter confirming receipt of appellants' protest. The letter informed appellants that interest will continue to accrue and that FTB will assign appellant's case to a FTB representative.
5. On December 2, 2022, FTB issued a letter stating that the NPA is correct. FTB noted that appellants were not disputing that they owed tax on the pension/annuities income, but rather were disputing the amount of taxes proposed to be assessed based on taxes already paid, which FTB stated were accounted for in the NPA.
6. On December 27, 2022, FTB issued a Notice of Action (NOA) that affirmed the NPA and proposed an additional tax of \$9,107.00 and interest of \$2,391.72. FTB also issued a determination letter which denied appellants' interest abatement request.
7. On January 24, 2023, FTB received appellants' request to reconsider its determination.
8. On January 31, 2023, FTB received appellants' agreement to pay the proposed additional tax, but appellants requested an abatement of the interest totaling \$2,391.72.
9. This timely appeal followed.
10. On May 10, 2023, FTB filed its opening brief. Therein, FTB conceded to abate interest from May 31, 2021, to December 1, 2022 (abatement period).

#### DISCUSSION

Interest generally must be assessed from the date a payment is due through the date that it is paid. (R&TC, § 19101.) The imposition of interest is mandatory, and FTB cannot abate interest except where authorized by law. (R&TC, § 19101; *Appeal of Balch*, 2018-OTA-159P.) Interest is not a penalty; it is compensation for the use of money. (*Appeal of Balch, supra.*) Interest accrues on a deficiency assessment regardless of the reason for the assessment. (*Ibid.*)

Generally, to obtain relief from interest, taxpayers must qualify under R&TC sections 19104, 19112, or 21012.<sup>2</sup> (*Appeal of Balch, supra.*) Under R&TC section 19104(a)(1), FTB may abate interest related to a proposed deficiency to the extent the interest is attributable in whole or in part to: (1) any unreasonable error or delay; (2) by an officer or employee of FTB; (3) in performing a ministerial or managerial act; and (4) which occurred after FTB contacted the taxpayer in writing regarding the proposed assessment, provided no significant aspect of that error or delay is attributable to the taxpayer. (R&TC, § 19104(a)(1), (b)(1).)

OTA has limited jurisdiction in an interest abatement appeal. (R&TC, § 19104(b)(2)(B).) OTA reviews FTB's determination for abuse of discretion. (*Ibid.*; *Appeal of Gorin*, 2020-OTA-018P.) To show an abuse of discretion, appellants 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; thus, abatement should be ordered only where failure to abate interest would be widely perceived as grossly unfair. (*Ibid.*)

Appellants assert that interest relief is warranted. Appellants contend that interest abatement should be granted based on their history of good standing and circumstances relating to the withdrawal of funds from a 401(k). Regarding the withdrawal, appellants contend that they had never withdrawn funds from a 401(k), were unaware that such a withdrawal was income, and thought that they had elected to withhold sufficient taxes. Accordingly, appellants state that they were unaware that they owed additional taxes until they were notified by FTB in 2020.

Here, there are three periods to review for abuse of discretion for interest abatement. That is, the period prior to the NPA; the period between the NPA and FTB's December 2, 2022 letter; and the period between FTB's December 2, 2022 letter and the appeal to OTA.

No interest may be abated for any period accruing before the date FTB first contacted appellants in writing concerning the deficiency. (R&TC, § 19104(b)(1).) Accordingly, interest relief prior to the September 29, 2020 NPA is not warranted.

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<sup>2</sup> Under R&TC section 19112, FTB may waive interest for any period for which FTB determines that an individual has extreme financial hardship. OTA does not have authority to review extreme financial hardship determinations. (See *Appeal of Moy*, 2019-OTA-057P.) Under R&TC section 21012, a person may be relieved from interest if that person reasonably relies on written advice from FTB in response to a written request. Appellants have not alleged reliance upon written advice from FTB; thus, OTA does not discuss it further.

Between September 29, 2020, and December 9, 2020, FTB sent appellants correspondences. The next correspondence, however, did not occur until two years later, on December 2, 2022. FTB concedes that interest abatement is warranted for the abatement period. OTA notes that slightly less than six months passed between FTB’s acknowledgement letter on December 9, 2020, to beginning work on the protest, and the start of the abatement period on May 31, 2021, which is reasonable.<sup>3</sup> OTA has reviewed the remaining period between December 2, 2022, and the appeal to OTA, and finds no abuse of discretion since the FTB was actively working on the appeal. Accordingly, OTA finds that appellants have not established entitlement to additional interest abatement.

HOLDING

Appellants are not entitled to additional interest abatement.

DISPOSITION

OTA modifies FTB’s action pursuant to its concession to abate interest for the period May 31, 2021, to December 1, 2022. Otherwise, OTA sustains FTB’s action.

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Josh Aldrich  
Administrative Law Judge

We concur:

DocuSigned by:  
  
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Kenneth Gast  
Administrative Law Judge

DocuSigned by:  
  
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Huy "Mike" Le  
Administrative Law Judge

Date Issued: 9/21/2023

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<sup>3</sup> See *Appeal of Gorin, supra*, and FTB Notice 2018-01 regarding of length of time FTB generally takes to process docketed protests.