OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of: **J. O'HARA AND** **C. WELDON**	)	OTA Case No. 220710945

OPINION

Representing the Parties:

For Appellants:	Christopher W. Campbell, Representative Hana Kim, Representative
For Respondent:	Christopher Cook, Attorney Adam Susz, Attorney Supervisor
For Office of Tax Appeals:	Michelle Huh, Attorney

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324,[1] J. O'Hara and C. Weldon (appellants) appeal an action by respondent Franchise Tax Board (FTB) denying appellants' claim for refund of $442,496.96[2] for the 2017 tax year.

Office of Tax Appeals (OTA) Panel Members Josh Lambert, Greg Turner, and Seth Elsom held an oral hearing for this matter in Cerritos, California, on June 18, 2025. At the conclusion of the hearing, the record was closed, and this matter was submitted for an opinion.

ISSUES

1. Whether OTA has jurisdiction to determine whether FTB properly calculated the amount of accrued interest in this appeal.
2. If OTA has jurisdiction, whether FTB properly calculated the amount of accrued interest.

[1] As discussed below, OTA treats this appeal as a claim for refund.

[2] This is the interest indicated on the Notice of Action dated June 27, 2022. FTB states that it calculated $240,938 of interest due on appellants' 2017 deficiency assessment from April 15, 2019, to June 30, 2022. In their opening brief, appellants assert that they owe interest of approximately $110,000, and in their reply brief, they assert that they owe interest of $37,981.

FACTUAL FINDINGS

1. Appellants timely filed joint California resident income tax returns (Forms 540) for the 2017 through 2019 tax years in October of 2018 through 2020, respectively. On the return for each tax year, appellants elected to transfer their overpayment to the subsequent year (credit-elect overpayment).
2. FTB determined a deficiency for the 2017 tax year. On March 22, 2021, appellants sent to FTB the 2017 deficiency amount of $2,269,115, and FTB calculated interest to accrue on the determined remaining balance.
3. On June 10, 2021, FTB issued a Notice of Proposed Assessment (NPA) for the 2017 tax year, which proposed an assessment of additional tax of $2,269,115, plus interest.[3]
4. On July 1, 2021, appellants sent FTB their "Protest and Claim for Refund." Appellants did not dispute the additional tax but argued that interest was incorrectly calculated. Specifically, appellants argued that, under the "use-of-money" doctrine, for any period during which the government has possession of the taxpayers' money in excess of the amount owed, interest on a subsequent assessment should not be charged, citing *May Dept. Stores Co. and Subsidiaries v. U.S.* (*May*) (Fed.Cl. 1996) 36 Fed.Cl. 680.
5. FTB recomputed interest to start accruing on April 15, 2019, as opposed to the previous accrual start date of April 15, 2018, because FTB determined that, up until April 15, 2019, FTB had use of appellants' 2017 overpayment in an amount sufficient to offset the 2017 deficiency under *May*.[4] However, FTB determined that on the due date for the 2018 tax year, April 15, 2019, the 2017 overpayment was transferred to the 2019 tax year due to appellants' irrevocable election to apply the overpayment to the subsequent year. As a result, FTB determined that after April 15, 2019, the 2017 overpayment was no longer available to offset the 2017 deficiency, and the accrual of interest began.

[3] The NPA states that appellants' payment will be credited to their account effective March 22, 2021, and when the notice is final, the payment will be applied as of the payment date, and interest will be adjusted.

[4] FTB applied part of the 2017 overpayment to appellants' quarterly estimated tax payments due for the 2018 tax year. Appellants also made payments towards estimated taxes for the 2018 tax year on June 15, 2019, and September 15, 2019.

6. On June 22, 2022, appellants sent to FTB the remainder of the balance due of $240,938, and interest accrual ended.[5]
7. On June 27, 2022, FTB issued a Notice of Action (NOA) affirming the NPA. The NOA stated that FTB determined that it correctly calculated the interest on the additional tax based on *May*. The NOA states that "[o]nce this notice becomes final all payments will be applied and the interest will be determined as discussed during [appellants'] protest." The NOA also states that interest will be charged until the balance is paid in full.
8. On July 26, 2022, appellants timely appealed the calculation of interest on the basis that FTB had use of appellants' money past April 15, 2019, so interest accrual should begin after that date. Appellants do not dispute the underlying deficiency.

DISCUSSION

Issue 1: Whether OTA has jurisdiction to determine whether FTB properly calculated the amount of accrued interest in this appeal.

"An administrative agency's jurisdiction depends upon the provisions of the statute, or other act of delegation, from which its powers are derived; and it cannot validly act in excess of the limits of jurisdiction which have been conferred upon it." (*Appeal of Schillace* (95-SBE-005) 1995 WL 671736 (*Schillace*).)

The imposition of interest is mandatory. (R&TC, § 19101(a); *Appeal of Moy*, 2019-OTA-057P (*Moy*).) If any amount of the tax is not paid by the due date, interest is required to be imposed from the due date until the date the taxes are paid. (R&TC, § 19101(a).) R&TC section 19104 provides for abatement when the interest is attributable to any unreasonable error or delay by an officer or employee of FTB when performing a ministerial or managerial act. R&TC section 21012 provides for abatement of interest when a taxpayer reasonably relies on written advice from FTB.

Appellants do not contend that interest should be abated under R&TC sections 19104 or 21012. Rather, appellants argue that interest was improperly calculated by FTB. FTB contends that OTA does not have jurisdiction to recalculate interest and cites *Schillace* in support.

In *Schillace*, the taxpayer argued for the abatement of unpaid interest due to financial hardship, and OTA's predecessor, the Board of Equalization (BOE), held that it did not have

[5] FTB correspondence dated June 16, 2022, states that it is FTB's "understanding [appellants] will be making a tax deposit payment on June 30, 2022." FTB's Payment History shows a "Pending Items List" with a "Suspense Credit" for a "Tax Dep Pymt" of $2,269,115 on March 22, 2021, and a "PA Payment" of $240,938 on June 22, 2022. It appears that "Tax Dep Pymt" may mean "Tax Deposit Payment" and "PA Payment" may mean "Proposed Assessment Payment."

jurisdiction over the matter when the appeal arose from a proposed deficiency assessment. BOE stated that former R&TC section 18593 (renumbered as R&TC section 19045) provided that a taxpayer may file an appeal with BOE of an NOA on the taxpayer's protest against a proposed "deficiency" assessment. BOE stated that a "deficiency" is defined in former R&TC section 18591.1 (renumbered as R&TC section 19043) and does not include interest. BOE held that, to appeal an FTB action regarding interest on a deficiency, the taxpayer must first pay the entire deficiency and interest, file a refund claim with FTB for interest paid, and, if denied, file an appeal to BOE of the refund claim denial. BOE stated that its conclusion is consistent with numerous federal cases, such as *Standard Oil Co. v. McMahon* (2d Cir. 1957) 244 F.2d 11, which interpreted the federal statute defining the term deficiency, Internal Revenue Code (IRC) section 6211, that is substantially identical to R&TC section 18591.1. BOE stated that such federal cases have consistently held that prepayment challenges to interest are premature, and not within the jurisdiction of the U.S. Tax Court.

Interest Abatement

Schillace also stated that, even if the interest was paid, BOE had no jurisdiction to review whether FTB abused its discretion in denying interest abatement. BOE's holding analogized its jurisdiction to that of the Tax Court, and OTA notes that its holding was consistent with the federal statutes at that time, which did not provide the Tax Court with jurisdiction over interest abatement of unpaid interest. However, federal law was later amended with the addition of IRC section 6404(h) to provide the Tax Court jurisdiction over requests for interest abatement when the tax or any liability with respect to the tax has been unpaid. (See *Hinck v. U.S.* (2007) 550 U.S. 501, 503-504; *Cheesecake Factory Inc. v. United States* (2013) 111 Fed. Cl. 686, fn. 6.) To be consistent with federal law, California revised R&TC section 19104 to give BOE jurisdiction over appeals involving interest abatement, whether paid or unpaid. (See *Appeal of Kishner* (99-SBE-007) 1999 WL 1080250.) However, appeals as to interest abatement are nevertheless limited to requests for review of FTB's denial of interest abatement under R&TC sections 19104 and 21012.[6] (See *Moy*, *supra*.) As noted above, appellants do not request interest abatement, but rather that FTB adjusts its calculation of interest.

[6] In *Schillace*, BOE noted that, even if the interest were paid, it may not have the statutory authority to review FTB's exercise of its discretion to waive or abate interest under the financial hardship exception under R&TC section 18693 (renumbered as R&TC section 19112). In *Moy*, OTA determined that it has no jurisdiction to determine whether taxpayers are entitled to the abatement of interest under R&TC section 19112.

Deficiency Assessment

The term "deficiency" is defined for federal purposes in IRC section 6211(a) and the definition does not include interest. IRC section 6601(e)(1) states that any reference to any tax shall be deemed also to refer to interest imposed on such tax, except for references to tax as to "deficiency procedures." Therefore, the language of IRC section 6601(e)(1) expressly excludes interest from the definition of a "tax" for purposes of IRC section 6211(a) and, as a result, interest is not a deficiency. (*White v. Commissioner* (1990) 95 T.C. 209, 213.) Accordingly, the interest imposed on underpayments by IRC section 6601(a) is considered part of the tax, except in the context of deficiency determinations, over which the Tax Court has jurisdiction.[7] (*Sunoco Inc. v. Commissioner* (2011) 663 F.3d 181, 189.)

Where federal law and California law are the same, federal rulings and regulations dealing with the IRC are persuasive authority in interpreting the applicable California statute. (*Appeal of Sedillo*, 2018-OTA-101P.) As applicable to this case, the federal IRC provisions regarding interest are substantially similar to the R&TC.

R&TC section 19043, which defines a "deficiency" for California personal income tax purposes, includes substantially similar language to IRC section 6211(a), and does not include interest in the definition of a deficiency. In addition, R&TC section 19101(c)(1) provides substantially similar language to IRC section 6601(e)(1), stating that any reference to any tax shall also refer to interest imposed on such tax, except as to "deficiency procedures."[8] The deficiency procedures include the statutes regarding protests to FTB and appeals to OTA using the term "deficiency assessments" in association with FTB notices of proposed assessment and action. (See e.g., R&TC, §§ 19033, 19041, 19044, 19045; see also Cal. Code Regs., tit. 18, § 30103(a)(1) [OTA jurisdiction over proposed "deficiency" assessment].)[9]

Therefore, in an appeal of a proposed deficiency assessment, OTA has no jurisdiction over disputes as to interest, other than interest abatement under R&TC sections 19104 and 21012. This holding is consistent with previous BOE Opinions and *Schillace*, which have

[7] The Tax Court has jurisdiction over interest in other circumstances, such as those involving IRC sections 7481(c) and 6512(b), which are not applicable to this case.

[8] Penalties do not have a similar exclusion from deficiency assessments.

[9] The term "deficiency" was previously used in former R&TC section 18591.1, as discussed in *Schillace*. R&TC section 19045 (formerly R&TC section 18593), which grants authority for taxpayers to appeal FTB's notice of its action to OTA, does not include the word "deficiency." However, the notice of action is in response to a protest of the "deficiency" assessment. (See R&TC, § 19044.)

consistently followed federal law on jurisdictional issues as to interest abatement where the law is substantially similar.[10]

Claim for Refund

In a claim for refund, OTA may address whether there has been an overpayment of "any liability…for any reason." (See R&TC, § 19301(a).) Therefore, in a claim for refund, "any liability," including interest, may be reviewed by OTA to determine whether there was an overpayment "for any reason," including whether interest was erroneously calculated.[11] FTB agrees that OTA has jurisdiction over the calculation of interest when the appeal arises from a claim for refund.

R&TC section 19041.5, which conforms to IRC section 6603, unless otherwise noted, provides that taxpayers can make deposits to suspend the running of interest on potential underpayments. However, a deposit does not qualify as a payment for purposes of filing a claim for refund unless, as applicable here, the taxpayer provides a written statement to FTB specifying that the deposit shall be a payment of tax for purposes of R&TC sections 19306 or 19335.[12] R&TC section 19335 states that if, with or after the filing of a protest, a taxpayer pays the tax protest before FTB acts upon the protest, or OTA upon the appeal, FTB or OTA shall treat the protest or the appeal as a claim for refund or an appeal from the denial of a claim for refund.

It is unclear from the record whether the amounts appellants sent to FTB are considered "payments" or "deposits." However, on July 26, 2022, appellants filed their opening brief, stating that they paid the deficiency and are "owed a refund," and on March 28, 2023, appellants filed

[10] Therefore, although OTA has jurisdiction to hear appeals from notices of action on proposed deficiency assessments that may include interest as part of the notice (see, e.g., Gov. Code, § 15671(a)(4); Cal. Code Regs., tit. 18, § 30103(a)(1)), this jurisdiction is subject to specific limitations under applicable statutes and case law. (See, e.g., *Schillace*, *supra*; *Moy*, *supra*.)

[11] Appellants assert that BOE has previously considered appeals involving the calculating of interest, citing *Appeal of Correia* (65-SBE-016) 1965 WL 1353 and *Appeal of Craft* (80-SBE-105) 1980 WL 5037. And in the *Appeal of Fluor Corporation* (95-SBE-009) 1995 WL 672095, BOE considered the issue of whether FTB correctly calculated the amount of interest due on deficiencies when interest was paid, and when the deficiencies were not at issue. However, those cases were claims for refund.

[12] As previously noted, FTB documents indicate the payments could be deposits. However, it is not verified which payments were designated as deposits with their remittance, and IRS Revenue Procedure 2005-18 states that a remittance that is not designated as a deposit will generally be treated as a payment. A Revenue Procedure is not binding on OTA, though OTA notes that FTB follows Revenue Procedure 2005-18. (See FTB notice 2005-6.)

their reply brief, stating that they paid the balance due and "claim a refund."[13] These documents indicate appellants' requests that amounts sent to FTB be payments of the balance due for purposes of filing a claim for refund. Therefore, OTA considers the amounts as payments for purposes of filing a claim for refund, pursuant to R&TC section 19041.5. Appellants made the payments during protest before the issuance of the NOA and, therefore, the administrative action is converted to an action of a claim for refund pursuant to R&TC section 19335.[14] (See R&TC, §§ 19041.5, 19335.) FTB's issuance of the NOA, denying the recalculation of interest, is the denial of the claim for refund. Appellants timely filed their appeal to OTA on July 26, 2022, within 90 days of the denial of the claim for refund. (See R&TC, § 19324(a); Cal. Code Regs., tit. 18, § 30103(a)(3).) As a result, OTA has jurisdiction over this matter.

Issue 2: If OTA has jurisdiction, whether FTB properly calculated the amount of accrued interest.

If any amount of the tax is not paid by the due date, interest is required to be imposed from the due date until the date the taxes are paid. (R&TC, § 19101(a).) Imposition of interest is mandatory; it is not a penalty, but it is compensation for a taxpayer's use of money after it should have been paid to the state. (*Moy*, *supra*.) The taxpayer bears the burden of proving entitlement to a refund. (*Appeal of Jali, LLC*, 2019-OTA-204P.)

Use of Money

"Under the use-of-money principle, a taxpayer is liable for interest only when the Government does not have the use of money it is lawfully due." (*Goldring v. U.S.* (*Goldring*) (5th Cir. 2021) 15 F.4th 639, 647, citing *Manning v. Seeley Tube & Box Co. of New Jersey* (1950) 338 U.S. 561, 566.) In other words, interest shall begin running when a tax becomes both due and unpaid. (*Avon Products, Inc. v. U.S.* (1978) 588 F.2d 342 (*Avon*).)

In *May*, *supra,* 36 Fed.Cl. at p. 682, the federal court applied the use-of-money doctrine to allow a credit-elect overpayment to offset a subsequently determined deficiency for a prior

[13] The briefs were issued to FTB. Appellants also note that FTB stated in its Opening Brief that it "received a $240,938 payment from appellants on June 22, 2022, satisfying the full amount of interest due."

[14] To the extent the amounts were payments and not deposits, OTA has jurisdiction over the matter. Appellants paid the tax and interest during protest, and before FTB acted upon the protest by issuing the NOA. As a result, the protest is considered a claim for refund under R&TC section 19335. FTB's issuance of the NOA, denying the recalculation of interest, is the denial of the claim for refund. Appellants timely filed their appeal to OTA on July 26, 2022, within 90 days of the denial of the claim for refund. (See R&TC, § 19324(a).)

year (Year 1), resulting in a later interest accrual start date on the deficiency.[15] Specifically, the court concluded that interest on a subsequently determined deficiency for Year 1 does not accrue until the government no longer has use of the taxpayer's money. Revenue Ruling 99-40, which follows *May*, provides that once a credit-elect amount is applied to unpaid installments of Year 2 estimated tax, the government no longer has use of that amount to offset the Year 1 deficiency.[16] When there is no longer a credit-elect amount sufficient to offset the deficiency, interest accrual begins.

Contentions

FTB contends the accrual of interest cannot begin later than April 15, 2019, because on that date, the 2017 overpayment was deemed paid for 2018, and the 2018 overpayment was transferred to 2019 as a result of the election to apply the overpayment to the subsequent tax year. As a result, FTB asserts that the 2017 overpayment can no longer be used to offset the 2017 deficiency after April 15, 2019.

Appellants contend that interest accrual should start after April 15, 2019, because FTB continued to have use of their overpayments, which was sufficient to offset amounts owed up to June 15, 2019, and no amount was both due and unpaid until April 15, 2020. Appellants assert that application of the use-of-money doctrine allows for the offset of the deficiency by overpayments spread across multiple years, citing *Goldring*.

Analysis

In this case, FTB agreed to start interest accrual on April 15, 2019; therefore, OTA only examines whether interest accrual begins after April 15, 2019.[17] Revenue Ruling 99-40 and *May* do not specifically address circumstances where interest accrual begins after the due date for Year 2. However, there is California precedent in *Appeal of Fluor Corporation* (95-SBE-009) 1995 WL 672095, where the issue was whether overpayments in one year may be used to temporarily offset deficiencies in another year in order to reduce the accrual of interest on those deficiencies. The BOE held that the taxpayer could not net overpayments for one year against deficiencies for another year to reduce interest, and that the pertinent sections of the IRC and

[15] The IRS acquiesced to *May*. (See IRS Announcement Relating to: The May Department Stores Co. 1997-31 I.R.B. 4, August 4, 1997.)

[16] A revenue ruling is not binding on OTA, but may be found persuasive.

[17] Similarly, in *FleetBoston*, the court stated that it need not address whether the credit elects became effective at some earlier point within the succeeding year, because the government does not argue for an earlier date. (See *FleetBoston Financial Corp. v. U.S.* (Fed.Cir. 2007) 483 F.3d 1345, 1354.)

R&TC, *Avon*, and revenue rulings (e.g., Rev. Rul. 99-40) all refer to credits and offsets within the same year, which FTB already implements.[18]

Federal courts have also examined the issue, including in *FleetBoston Financial Corp. v. U.S.* (*FleetBoston*) (Fed.Cir. 2007) 483 F.3d 1345, where the court determined that once a taxpayer elects to transfer a credit to the subsequent year, it is no longer in the first year's "account." The court explained that IRC sections 6402(b) and 6513(d) provide for crediting funds from one tax account to another, which indicates that a tax for a particular year is not paid by money generally held by the IRS, but rather by money assigned as payment of the tax for that year. (*FleetBoston*, *supra*, 483 F.3d at p. 1350.) Under California law, a credit-elect overpayment is considered payment of tax for the succeeding year, pursuant to R&TC sections 19002(e) and 19364, which mirror IRC sections 6402(b) and 6513(d) in stating that a credit-elect overpayment is assigned to the account for the succeeding year.[19]

The court in *FleetBoston* stated that interest no longer accrues when tax for a particular year is "paid" within the meaning of IRC section 6601(a) (which is mirrored by R&TC section 19101(a)), which means a payment can only be made from funds in a taxpayer's account for that particular tax year. (*FleetBoston*, *supra*, 483 F.3d at p. 1350.)

The court in *FleetBoston* discussed that Congress intended IRC sections 6601(f) and 6611(b)(1) to apply the use-of-money doctrine in certain circumstances, stating that IRC section 6601(f) sets aside deficiency interest for certain periods, and IRC section 6611(b)(1) sets aside overpayment interest for the same period. (*FleetBoston*, *supra*, 483 F.3d at p. 1350.) The court stated that allowing interest to accrue at a later date by applying the use-of-money doctrine would render those statutes redundant.[20] (*Id*.)

Under California law, R&TC section 19113 mirrors IRC section 6601(f), and R&TC

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[18] While *Fluor* involved a refunded overpayment and this case involves a credited overpayment, this distinction is irrelevant because the holding in *Fluor* was based on a general determination that California law does not allow cross-year netting of overpayments against deficiencies to reduce interest accrual, without regard to whether the overpayment is credited or refunded.

[19] R&TC section 19108(a) generally provides that FTB shall credit an overpayment to a deficiency for any year and no interest shall be applied to the portion of the deficiency extinguished. (See also R&TC, § 19301(a).) Here, the overpayment was not credited to the 2017 deficiency. Appellants elected to credit the overpayment to estimated taxes for 2018, and the overpayment was used to offset the deficiency for purposes of calculating interest under *May*. Therefore, the statute does not apply to reduce interest based on extinguishment of the 2017 deficiency.

[20] The court also stated that, to apply the use-of-money doctrine would allow taxpayers to indefinitely offset overpayments without regard to specific tax years and would be unmanageably open-ended. (*FleetBoston*, *supra*, 483 F.3d at p. 1353.)

section 19340 mirrors IRC section 6611(b).[21] In addition, BOE in *Fluor* held that the temporary netting of overpayments and deficiencies would "obfuscate" provisions like former R&TC section 26080.5 (no interest on refunds of overpayments within 90 days of filing), which is substantially similar to R&TC section 19341. These statutes demonstrate that the legislature did not intend a broad application of the use-of-money doctrine without limitations, and broadly applying the use-of money doctrine would allow taxpayers to bypass such statutes without meeting their requirements, thus rendering them superfluous.

In *Goldring*, *supra*, 15 F.4th at p. 649, the court allowed an overpayment that was transferred over a period of five years to offset a deficiency because the government had the use of the funds throughout the entire period.[22] In making its determination, the court stated that *FleetBoston's* court "fixates on theoretical migration of credit-elect overpayment funds from one tax year to another" and that the IRS was never deprived of its money during the five-year period. (*Goldring*, *supra*, 15 F.4th at p. 649.) The court held that there is no clear statutory authority preventing application of the use-of-money principle such that interest does not accrue when the IRS has use of enough of credit-elect overpayment funds to satisfy the deficiency. (*Ibid*.) The court broadly applied the use-of-money principle without providing specifics as to its conclusions on the applicability of statutory authorities or the implications of its holding on such statutes.

BOE's holding in *Fluor* is consistent with that in *FleetBoston*, and contrary to that in *Goldring*, in limiting broad cross-year netting of overpayments and deficiencies for purposes of calculating interest that could undermine statutes already providing for offsets, and in rejecting applying the use-of-money principle when it is inconsistent with the statutory scheme.[23]

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[21] R&TC section 19314 provides that, notwithstanding the statute of limitations, any overpayment due for any year, shall be allowed as an offset in computing any deficiency for the same or any other year, with certain restrictions, such as that there must be a transfer of items of income or deductions between years, and a 7-year limit. As with R&TC section 19108, this statute does not apply, and the overpayment was not credited against the deficiency, but used to offset the deficiency for purposes of calculating interest. Nevertheless, R&TC section 19314 demonstrates statutory restrictions on using overpayments to credit deficiencies, as opposed to an unrestricted flow of funds between tax years.

[22] There is a federal circuit split between *FleetBoston* and *Goldring*. FTB states that it is only bound by precedent from federal courts in its jurisdiction, and the court of appeals for the Ninth Circuit has not weighed in on this issue. However, where the federal circuits are in conflict, the decisions of the Ninth Circuit (which decides appeals from federal courts in California) are entitled to no greater weight than those of other circuits. (*Forsyth v. Jones* (1997) 57 Cal.App.4th 776, 783.)

[23] The use-of-money principle, which is merely a principle of statutory construction, cannot be used to trump the specific statutory scheme Congress has devised. (*FleetBoston*, *supra*, 483 F.3d at p. 1353, citing *Marsh & McLennan Cos. v. U.S.* (Fed.Cir.2002) 302 F.3d 1369, 1380.)

Therefore, based on the statutory framework under the R&TC, combined with California precedents and persuasive federal authority, OTA concludes that appellants have not shown that interest should be recomputed under the use-of-money doctrine. As noted above, R&TC sections 19002(e) and 19364 provide for the statutory transfer of the overpayment to the 2019 tax year on April 15, 2019. Therefore, after that date, the overpayment can no longer offset the deficiency for purposes of calculating interest, and the deficiency is both due and unpaid within the meaning of R&TC section 19101(a) on April 15, 2019, resulting in the accrual of interest starting on that date.[24]

As previously noted, FTB agreed to recompute interest to be accrued from April 15, 2019, to when the balance is paid in full, which is June 22, 2022. FTB stated that this adjustment is in accordance with *May*, but that the adjustment would not be made until the assessment is final. Therefore, as agreed to by FTB, appellants are due a refund in accordance with a period of interest accrual from April 15, 2019, to June 22, 2022.

[24] (See *Avon*, *supra*, 588 F.2d at p. 346 [interest accrued when taxpayer "shifted part of its payments from its 1967 account to that for 1968"]; Rev. Rul. 99-40 [interest begins "from the date on which the overpayment is applied to the succeeding year's estimated taxes."] *May*, *supra*, 36 Fed.Cl. at fn. 5 [interest accrual begins when returns filed and overpayments credited to following year]; IRS CCA 200944032, TAM 200303012 ["the Service loses the use of the taxpayer's money in the account for which the payments were made on the due date of the succeeding year's income tax return."] (non-binding IRS administrative guidance).)

HOLDINGS

1. OTA has jurisdiction to determine whether FTB properly calculated the amount of accrued interest in this appeal.
2. FTB properly calculated the amount of accrued interest.

DISPOSITION

FTB's action is modified as agreed to by FTB for an interest accrual period from April 15, 2019, to June 22, 2022. FTB's action is otherwise sustained.

Signed by:
Josh Lambert
CB1E7DA37831416...
Josh Lambert
Administrative Law Judge

I concur:

Signed by:
Seth Elsom
C04CD432E3254ED...
Seth Elsom
Hearing Officer

G. TURNER, concurring in part and dissenting in part:

I agree with the majority opinion that the Office of Tax Appeals' (OTA) has jurisdiction to determine the proper method of calculating interest. I disagree that OTA needs to decide here whether that jurisdiction is limited to post-payment remedies. I also do not agree with the majority opinion on the proper method of calculating interest.

OTA Jurisdiction

The majority finds that OTA lacks jurisdiction over disputes of interest, including in an appeal of a proposed deficiency assessment, except for interest abatement (not at issue here) and when interest is at issue in a claim for refund, citing *Appeal of Schillace* (95-SBE-005) 1995 WL 671736 and *Appeal of Moy*, 2019-OTA-057P. Given the matter before us is on a claim for refund, reaching this conclusion is unnecessary. Nevertheless, chosen to answer it, I would reach a different conclusion. *Moy* is not authority for the majority's conclusion as that case only addressed a question of interest abatement. *Schillace* only went so far as to find that the Board of Equalization's jurisdiction did not extend to pre-payment questions of interest alone.[1] Additionally, the holding here appears directly in conflict with California Code Regulations, title 18, (Regulation) section 30103(a).[2] Whether OTA's jurisdiction is restricted based on the Board of Equalization's decision in *Schillace* in light of subsequently enacted express legislative authority is a question that need not be addressed in this appeal.

Calculating Interest

The matter before us asks that OTA discern the legislative intent of Revenue and Taxation Code (R&TC) section 19101(a), which provides simply that if "any amount of tax" imposed by the personal or corporate income tax regimes is "not paid" on or before "the last date prescribed for payment," interest on that amount must be paid from "that last date to the date paid."[3] When interpreting a statute, the "fundamental task ... is to determine the

[1] "Because interest is not a 'deficiency' as defined by former section 18591.1, this board does not have subject matter jurisdiction over questions relating solely to unpaid interest on a deficiency." (*Schillace, supra*.)

[2] "Appeal from an action of FTB" includes where "FTB mails a notice of action on a proposed deficiency assessment of additional tax, which may also include penalties, fees, *and interest*." (Regulation section 30103(a)(1); Italics added.)

[3] R&TC section 19101 and Internal Revenue Code (IRC) § 6601(a) are substantially similar regarding the imposition of interest. Consequently, federal rulings and regulations interpreting and applying IRC section 6601(a) are persuasive authority in interpreting R&TC section 19101. (See *Appeal of Sedillo*, 2018-OTA-101P; *J.H. McKnight Ranch v. Franchise Tax Board* (2003) 110 Cal.App.4th 978, fn. 1.)

Legislature's intent so as to effectuate the law's purpose." (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616–617 citing *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 165-166.) The question here is when did appellants have amounts "both due and unpaid" which obligated respondent to begin charging interest. (*Avon Prod., Inc. v. United States* (2nd Cir. 1978) 588 F.2d 342.)

It is well settled that interest is not a penalty but compensation for the *use of money* after it should have been paid but it was not. (*U.S. v. Childs* (1924) 266 U.S. 304; *Manning v. Seeley Tube & Box Co. of New Jersey* (1950) 338 U.S. 561; *Avon, supra.*; *Appeal of Rougeau*, 2021-OTA-335P.) This "use of money" principal colors our understanding of the intent and application of section 19101 because it represents the *purpose* of charging interest. (*Manning v. Seeley Tube & Box Co.* (1950) 266 U.S. 304 ["A penalty is a means of punishment; interest a means of compensation. Bouvier defines it to be 'a consideration paid for the use of money or forbearance in demanding it when due.'"].) The "use of money" principle is more than a "useful tool of statutory construction" (*FleetBoston Financial Corp. v. U.S.* (Fed. Cir. 2007) 483 F.3d 1345, 1348 (*FleetBoston*)), but the very expression of the meaning of R&TC section 19101. "[I]n order to prevail, [the IRS] must point to a clearly expressed legislative intent to overrule the "use of money" principle and, in effect, *overrule section 6601*." (*May Dept. Stores Co. v. U.S.* (1996) 36 Fed.Cl. 680, 688 (*May*), italics added.) Additionally, it is important to acknowledge that money is fungible. (*United States v. Sperry Corp.* (1989) 493 U.S. 52.) Meaning that the nature of money is such that the individual units are interchangeable and indistinguishable from one another in value and function. (See Black's Law Dictionary (12th ed. 2024).)

Here, when appellants filed their 2017 return, they reported owing $2,933,736 in tax. Having paid $6,693,088[4] by the due date (April 15, 2018), the State of California was in possession of $3,759,352 more than any amount due by appellants. At that time, rather than receive the refund, appellants applied the entire overpayment to their 2018 estimated tax obligations (aka the "credit elect overpayment"). (See R&TC, § 19364.)[5] Pursuant to R&TC sections 19002(e) and 19363, that overpayment was deemed "paid" for 2018 on the last day prescribed for filing the 2018 return, which was April 15, 2019. In June of 2021 respondent

[4] This amount is represented by overpayment from the 2016 tax year as well as estimated tax payments during the 2017 tax year.

[5] "If any overpayment of tax is claimed as a credit against estimated tax for the succeeding taxable year, that amount shall be considered as payment of the tax for the succeeding year (whether or not claimed as a credit in the return of estimated tax for that succeeding year), and no claim for credit or refund of that overpayment shall be allowed for the taxable year in which the overpayment arises." (R&TC, § 19364.) Respondent likens R&TC section 19364 to IRC section 6513(d).

issued a Notice of Proposed Assessment (NPA) on the 2017 tax year in the amount of $2,269,115, which appellants had paid in anticipation of the assessment on March 22, 2021.

Respondent and the majority, citing *May*, *FleetBoston*, and *Appeal of Fluor Corp.* (95-SBE-009) 1995 WL 672095, conclude that the determination of whether an amount is due but unpaid, and therefore when interest begins to accrue under R&TC section 19101, is determined on a *tax year* or tax year "account" basis. Meaning, that appellants' carry-over credit from 2017 to 2018 in the amount of $3,759,352 became siloed to the 2018 tax year on April 15, 2019 (the date prescribed for payment of taxes owed for the 2018 tax year). At that time, respondent began the calculation of interest on the 2017 tax year deficiency until paid on March 22, 2021.

Appeal of Fluor Corp. is not authority for respondent's position. There, appellants argued that the amount of an overpayment actually made in a subsequent year, *which was refunded to them*, should nevertheless have been available prior to the refund to "offset" a subsequently determined liability for a prior year when calculating interest. It was to this proposal the Board of Equalization found "[n]one of the authorities cited by appellant prescribes the netting of overpayments for one year against the deficiencies of another year, *as it proposes*." (*Id.* at p. 3, italics added.) What's more, *Appeal of Fluor Corp.* constructs its finding on the false premise that the calculation of interest amounts to a deduction or credit and "allowable only where the conditions established by the legislature have been satisfied." (*Id*. at p. 3.) First, it is precisely the question of legislative intent of R&TC section 19101 which is at issue here. Second, this construction is expressly at odds with *May* which makes clear, the "use of money" principle *is* R&TC section 19101/IRC section 6601, and overruling the "use of money" principle is to "overrule section 6601." (*May*, *supra*, at p. 689.) The point is not that *Appeal of Flour Corp.'s* conclusion is wrong, only that the bridge constructed to arrive there from the facts is not supported by the law.

May is also being pressed to do work for which its facts and holding cannot cover. There, the taxpayer paid well in excess of their calculated liability and chose to apply the overpayment to their subsequent tax year. When the IRS later assessed a deficiency against the taxpayer for that year it still was not sufficient to exhaust the amount of the taxpayer's overpayment. The IRS, however, began calculating interest on the day of the subsequent tax year that the first estimated tax installment was due, *despite the taxpayer having already paid those estimated tax payments*. The taxpayer simply argued that it was not until the overpaid funds were later elected to be carried over or used to satisfy the liability in a subsequent year that, under the "use of money" principal, interest should begin to accrue. "The IRS's application

of the overpayment to the first installment of estimated tax for the following year, *which had already been paid*, cannot change the fact that the government had the use of the funds in issue from April 15 to October 15, and, therefore suffered no underpayment." (*May, supra*, at p. 689, italics added.) Unlike *FleetBoston*, discussed below, the decision in *May* is built on the "use of money" principle being the driving force for the calculation of interest. "Therefore, consistent with the 'use of the money' principle followed in both *Manning* and *Avon Products*, interest on deficiencies may be charged to compensate the government for funds *which it did not possess* but which it rightfully should have possessed." (*Ibid*., italics added.) It is exactly this point appellants argue respondent is ignoring because the 2017 overpayment was not fully utilized (even after accounting for the NPA) in the 2018 tax year because appellants made $550,000 in estimated tax payments for 2018. Like in *May* "Plaintiff's position is straightforward and simple" (*Id*. at p. 682), on April 15, 2019, the State of California possessed $761,246 more of appellants' funds than what it was rightly owed.

Ultimately, the foundation of respondent's argument rests with *FleetBoston*. There a taxpayer overpaid their taxes for the 1984 and 1985 tax years and in each elected to credit overpayments to the following tax year's liability. This pattern continued until 1991 when the taxpayer requested and received a refund. The IRS subsequently determined additional liabilities for the 1984 and 1985 tax years. Although the taxpayer's overpayments for each of those years exceeded what was necessary to satisfy the subsequently determined liabilities, the IRS charged interest on the deficiency from the date the credit-elect overpayment was deemed "paid" in the subsequent tax year (the due date of the return). The majority in *FleetBoston* constructed the meaning of the term "paid" in Internal Revenue Code section 6601(a) based upon its survey of related statutory requirements as "account-specific", meaning that "a credit elect overpayment will be deemed to reside in the tax account for the succeeding year, *even if it is not needed to pay estimated tax in that year*." (*FleetBoston*, *supra*, at p. 1353, italics added.)

If the *purpose* of charging interest is to compensate for the use of money, not penalize taxpayers for assessments, ***FleetBoston's*** overly complex bridge of statutory construction to artificially tombstone otherwise fungible money to "tax accounts" creates an artifice that elevates form over substance. As the court in *Goldring v. United States* (5th Cir. 2021) 15 F.4th 639, noted, ***FleetBoston's*** conclusion "fixates on a theoretical migration of credit-elect overpayment funds from one tax year to another" while ignoring a very simple undisputed fact, "the IRS was never deprived of its use of the money." (*Id*. at p. 649) "[FleetBoston] departs from the principles of several statutory provisions, and diverges from the rulings of other courts that have considered similar situations." (*FleetBoston*, *supra*, at p. 1355 (Newman, J., dissenting).)

Moreover, reliance on *FleetBoston* and its overt rejection of the use of money principle stands in contrast to 9th Circuit precedent, notwithstanding respondent's dismissal of *Goldring*. (See *Brookhurst, Inc. v. U.S.* (9th Cir. 1991) 931 F.2d 554; *U.S. v. Northwestern Mut. Ins. Co.*, (9th Cir. 1963) 315 F.2d 723 citing *Manning*, *supra*, at p. 566; see also *Otis Spunkmeyer, Inc. v. United States* (N.D. CA, 2004) 2004 WL 5542870 ["Both the agency and the courts have embraced the 'use of money' principle as a sort of touchstone, when a clear and unambiguous statutory directive is lacking, for determining when the IRS is entitled to collect interest from taxpayers."].)

Rejecting *FleetBoston's* artificial "tax year account" construct in the calculation of interest, is not a rejection of the commonsense recognition that appellants "use" credit-elect overpayments in satisfaction of a subsequent year's tax liability, but the absurdity that even after that "use" that excess funds (the amounts paid exceeding amounts due) are not in the ongoing possession of the state. *FleetBoston's* artificial tombstoning of tax payments to tax year accounts not only abandons the precedent it alleges to adhere but treats money as if it were not fungible. Consequently, *FleetBoston* transforms interest from compensation for use of money into a penalty for the taxpayer's transgression for the subsequent assessment.

The "economic substance" here is rather simple and straightforward. Appellants overpaid their 2017 taxes by more than three million dollars and instead of having those funds returned to them, chose to allow the State of California to the use those funds, interest free, in anticipation of a subsequent tax year liability. Even after respondent subsequently determined appellants owed additional sums on the 2017 tax year, there was no amount "due and unpaid" by appellants. Again, for the 2018 tax year, after accounting for the impact of the assessment on the carry-over credit and additional sums paid by appellants as estimated taxes, the simple fact is that the State of California possessed $761,246 more of appellants' money than necessary for any amounts then due and unpaid. Because appellants exhausted their overpayments in the subsequent 2019 tax year, after inclusion of any additional estimated tax payments made, the amount of tax that was "both due and unpaid" determined as of April 15, 2020 was only $1,040,626.[6] It is only then that respondent is required under R&TC section 19101 to begin the collection of interest on those unpaid sums.

Signed by:
Greg Turner
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Greg Turner
Administrative Law Judge

Date Issued: 9/25/2025

[6] Balance as of April 19, 2019, of $761,246, plus $8 in 2019 tax year estimated tax payments, less tax owed for 2019 of $1,801,880.