

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18011221
)
JAMES KRAMER) Date Issued: March 6, 2018
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OPINION

Representing the Parties:

For Appellant: James I. Kramer, CPA

For Respondent: Gi Nam, Tax Counsel

ROSAS, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324, James I. Kramer (“Appellant”) appeals an action by the Franchise Tax Board (“FTB” or “Respondent”) in denying Appellant’s claim for refund in the amount of \$354.36¹ for the 2015 tax year.

Appellant waived his right to an oral hearing and therefore the matter is being decided based on the written record.

ISSUES

1. Did Appellant establish that his failure to timely pay the 2015 California tax due by April 18, 2016, was due to reasonable cause and not due to willful neglect?
2. Did Appellant establish the interest he paid in the amount of \$55.56 should be abated?

FACTUAL FINDINGS

1. In tax year 2015, Appellant was a nonresident of California and used a Florida address.
2. In 2015, Appellant was a general partner in Oseta Bloomfield Partners, a Florida general partnership (“Florida Partnership”). Through the James I. Kramer Revocable Trust dated

¹ The refund claim in the amount of \$354.36 includes a late payment penalty of \$298.80 plus interest of \$55.56.

September 7, 2000, Appellant indirectly held a twenty percent (20%) interest in Florida Partnership.

3. Florida Partnership started doing business in California on November 7, 2005.
4. Florida Partnership had California source income in 2015. Florida Partnership filed a Partnership Return of Income (Form 565) in California, reporting the 2015 California source income. Appellant, a Certified Public Accountant with the Florida firm Kramer & Associates, P.A., prepared Florida Partnership's 2015 California partnership return. Appellant also signed Florida Partnership's 2015 California partnership return as a general partner of Florida Partnership. Florida Partnership's 2015 California partnership return was dated and filed on May 16, 2016.
5. At or around the time Florida Partnership's 2015 California partnership return was filed in California, Appellant received a California Schedule K-1 (565) from Florida Partnership, reporting Appellant's California source amounts and credits.² Although the exact date is not specified, Appellant received the Schedule K-1 after April 18, 2016.
6. Appellant did not mail or submit payments to FTB by April 18, 2016.
7. On October 11, 2016, Appellant and his spouse, Kathy Kramer ("Mrs. Kramer"), filed a joint 2015 California Nonresident or Part-Year Resident Income Tax Return (540NR), which was prepared by Appellant's Florida firm, Kramer & Associates, P.A. Appellant reported his proportionate share of Florida Partnership's California source income, reporting California taxable income of \$37,166 and a California tax due of \$3,735. With the filing of his 2015 California nonresident return, Appellant included payment for the California tax due in the amount of \$3,735.
8. On November 1, 2016, Respondent mailed a Notice of Tax Return Change to Appellant and Mrs. Kramer, indicating Respondent imposed penalties in the sum of \$298.80 plus interest and fees in the sum of \$55.56.
9. On December 1, 2016, Appellant and Mrs. Kramer submitted a check to Respondent for the full amount due of \$354.36. Appellant and Mrs. Kramer also submitted a claim for

² Based on the written record, it is unclear how or when Appellant received the California Schedule K-1 (565). However, it is clear Appellant prepared the California partnership return, which was filed on May 16, 2016. Presumably, Appellant also prepared the Schedule K-1.

refund to Respondent (Reasonable Cause – Individual and Fiduciary Claim for Refund, Form FTB 2917), requesting that the penalties be abated.

10. On December 16, 2016, Respondent sent a letter to Appellant and Mrs. Kramer, indicating their claim for refund was denied.
11. Appellant filed a timely appeal on December 20, 2016.³

DISCUSSION

Issue 1 - Did Appellant establish that his failure to timely pay the 2015 California tax due by April 18, 2016, was due to reasonable cause and not due to willful neglect?

The Franchise Tax Board's determination is presumed correct and a taxpayer has the burden of proving it to be erroneous. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514.) An extension of time to file a tax return is not an extension of time to pay, and the tax is due on the original due date of the return without regard to the extension to file. (Rev. & Tax. Code, § 18567.) FTB allows an automatic six-month extension to file a California tax return if the return is filed within six months of the original due date. (*Ibid.*) The law requires FTB to impose a penalty for the late payment of tax when a taxpayer fails to timely pay the amount of tax due, unless the taxpayer establishes that the late payment was due to reasonable cause and was not due to willful neglect. (Rev. & Tax. Code, § 19132.)⁴

For tax year 2015, the tax payment deadline was extended to April 18, 2016, because Washington, D.C. celebrated Emancipation Day on Friday, April 15, 2016. Because the Internal Revenue Service honored this holiday and extended the federal tax payment deadline to Monday, April 18, 2016, FTB followed suit. The evidence in the written record established that although Appellant filed his 2015 California nonresident return within the automatic six-month extension, Appellant did not pay his 2015 California tax by the due date of April 18, 2016.

The burden of proof is on the taxpayer to show reasonable cause exists to support abatement of the late payment penalty. (*Appeal of Roger W. Sleight*, 83-SBE-244, October 26, 1983.) In order to establish reasonable cause for the late payment of tax, a taxpayer must show

³ This appeal was filed with the Office of Tax Appeals' predecessor (the State Board of Equalization). Because of Mrs. Kramer's failure to respond to the State Board of Equalization and her failure to indicate whether she joined Mr. Kramer in this appeal, this appeal remained in Mr. Kramer's name only.

⁴ The late payment penalty calculation consists of two parts. (Rev. & Tax. Code, § 19132, subd. (a)(2)(A), (B).) Appellant did not challenge how this penalty was determined and/or calculated. Accordingly, there is no need to discuss the determination and calculation of this penalty.

that the failure to timely pay the amount of tax due occurred despite the exercise of ordinary business care and prudence. (*Ibid.*) The taxpayer's reason for failing to timely pay the tax due must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Robert T. and M.R. Curry*, 86-SBE-048, March 4, 1986.)

Generally, partnerships with income from a California source are required to file a partnership return in California. (Rev. & Tax. Code, § 18633.) Partnership income flows through to the partners, and a nonresident partner is taxed on the portion of his distributive share of partnership income derived from the California source. (Rev. & Tax. Code, § 17951.) Appellant's reasons for failing to timely pay the tax due on or by April 18, 2016, included: (1) Appellant is not California resident, (2) Appellant had California source income from the pass-through Florida Partnership, and (3) Appellant was unaware he had California source income until he received a California Schedule K-1 after April 18, 2016. The evidence in the written record did not establish that Appellant's reasons were such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances

In discussing the ordinarily intelligent and prudent businessperson standard, we refer to a reasonable person under similar circumstances and possessing the same professional skills as the taxpayer in this case. Thus, we are dealing with a hypothetical ordinarily intelligent and prudent businessperson under the following facts and circumstances: (1) the hypothetical businessperson is a CPA, (2) the hypothetical businessperson has his own CPA firm, (3) the hypothetical businessperson holds a twenty percent (20%) general partnership interest in an out-of-state partnership, (4) the out-of-state general partnership started doing business in California ten years earlier in 2005, and (5) the hypothetical businessperson was responsible for preparing, signing, and filing the out-of-state partnership's California partnership return.

Here, Florida Partnership started doing business in California on November 7, 2005. In 2015, Appellant held a twenty percent (20%) general partnership interest in Florida Partnership. As a Certified Public Accountant and general partner, Appellant prepared Florida Partnership's 2015 California partnership return in order to report Florida Partnership's California source income, and this partnership return was dated and filed on May 16, 2016. Under the totality of these facts, Appellant's argument—that he was unaware of Florida Partnership's California source income until he received the California Schedule K-1 after April 18, 2016—does not

show reasonable cause existed to support abatement of the late payment penalty.

Generally, in California, each partner has equal rights in the management and conduct of the partnership's business. (Cal. Corp. Code, § 16401, subd. (f).) Accordingly, as a general partner who has rights in the management and conduct of an out-of-state partnership that started doing business in California on November 7, 2005, the evidence in the written record suggests that Appellant knew or reasonably should have known before April 18, 2016, that Florida Partnership had California source income in 2015. Thus, Appellant also knew or reasonably should have known before April 18 that he was required to pay the tax due on his proportionate share of Florida Partnership's California source income by April 18, 2016.

The evidence in the written record does not establish that the failure to timely pay the amount of tax due by April 18, 2016, occurred despite the exercise of ordinary business care and prudence. In the course of Appellant's preparation of Florida Partnership's 2015 California partnership return (before it was filed on May 16, 2016), Appellant knew or reasonably should have known the amount of his California source income from Florida Partnership. However, although Appellant had access to the data needed to compute his California source income by no later than May 16, 2016, he still did not pay his California tax due until October 11, 2016.

Therefore, Appellant did not establish that his failure to timely pay his 2015 California tax due by April 18, 2016, was due to reasonable cause and not due to willful neglect.

Issue 2 - Did Appellant establish that the interest he paid in the amount of \$55.56 should be abated?

As stated above, tax is due on the original due date of the return without regard to the extension to file. (Rev. & Tax. Code, § 18567.) If the tax is not paid by the original due date, the law provides for the charging of interest on the balance due, compounded daily. (Rev. & Tax. Code, § 19101.) FTB's imposition of interest is mandatory, and FTB is not allowed to abate interest except where authorized by law. (*Appeal of Amy M. Yamachi*, 77-SBE-095, June 28, 1977.) Interest is not a penalty; it is compensation for the use of money. (*Appeal of Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.) There exist certain limited situations where FTB may exercise its discretion to abate interest for errors or delays in the performance of ministerial or managerial acts by an FTB employee or officer. (Rev. & Tax. Code, § 19104, subd. (a).)

Appellant's 2015 California tax was due on or before Monday, April 18, 2016; however,

Appellant did not pay his 2015 California tax until October 11, 2016. The FTB imposed interest in the sum of \$55.56. FTB's imposition of interest is mandatory. Appellant does not allege, and the evidence in the written record does not show, any errors or delays in the performance of ministerial or managerial acts by an FTB employee or officer. Therefore, Appellant did not establish any basis for abating the interest.

HOLDINGS

1. Appellant did not establish that his failure to timely pay the 2015 California tax due by April 18, 2016, was due to reasonable cause and not due to willful neglect.
2. Appellant failed to establish that the interest he paid should be abated.

DISPOSITION


Respondent's action in denying Appellant's claim for refund is sustained in full.



Alberto T. Rosas
Administrative Law Judge

We concur:



Jeffrey G. Angeja
Administrative Law Judge

Tommy Leung
Administrative Law Judge