OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	)	OTA Case No. 18011759
	)	
CARTER W. HUMPHREY AND MEGAN L.	)	Date Issued: May 8, 2018
	)	
HUMPHREY	)	
	)	

OPINION

Representing the Parties:

For Appellants:	Bernie Cullen, EA, CFP
For Respondent:	Brian Werking, Tax Counsel
For Office of Tax Appeals:	Neha Garner, Tax Counsel III

BRAMHALL, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,[1] Carter W. Humphrey and Megan L. Humphrey (appellants) appeal an action by the Franchise Tax Board (FTB or respondent) in denying appellants' claim for refund in the amount of $742.25[2] for the 2014 tax year.

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

ISSUES

1. Whether appellants have shown reasonable cause for the late payment of tax?
2. Whether interest may be abated?

[1] Unless otherwise indicated, all "Section" references are to sections of the California Revenue and Taxation Code. Section 19324 states that taxpayers have 90 days to appeal FTB's action upon a taxpayer's protest to the board (Board of Equalization.) As relevant, Section 20, subdivision (b) provides that for appeals transferred to the Office of Tax Appeals on or after January 1, 2018: "Unless the context requires otherwise, as used in this code or any other code, 'board,' with respect to an appeal, means the Office of Tax Appeals."

[2] Appellants filed their appeal claiming a refund of $743.33. However, appellants' claim for refund was for $742.25, and respondent's account records reveal that appellants paid only $742.25 in penalty and interest. Accordingly, respondent asserts that the proper refund claim is for that amount.

FACTUAL FINDINGS

1. Appellants filed a timely joint 2014 California income tax return (Form 540) on June 5, 2015. On the return, appellants reported federal adjusted gross income (AGI) and California AGI of $240,881, claimed the standard deduction of $7,984, taxable income of $232,897, and tax of $16,461. Appellants claimed income tax withholdings of $8,695 and reported a tax due of $7,766. Appellants remitted a payment of $7,766 to pay the reported tax due on June 5, 2015.
2. Respondent accepted appellants' return as filed and imposed a late payment penalty of $465.96.[3] Appellants did not pay their tax liability by the original due date of their 2014 tax return. Therefore, on June 23, 2015, respondent issued a Return Information Notice (RIN) that advised appellants of their late payment penalty in the total sum of $465.96, plus interest. Respondent's records indicated that it mailed the RIN to appellants at their last-known address in Pomona, California, which was the same address appellants listed on their 2014 return.[4]
3. When appellants failed to pay the balance due, respondent began collection proceedings and issued Income Tax Due Notices to appellants on August 19, 2015.
4. Upon subsequent investigation, respondent determined that its notices, and various follow-up notices, had been sent to incorrect addresses. Those notices advised appellants that if they did not pay the balance due, they could be subject to a collection cost recovery fee.
5. The notices also advised appellants of the potential collection action, including imposition of the collection cost recovery fee. On November 6, 2015, respondent imposed a collection cost recovery fee of $226.00.

[3] The late payment of tax is computed as five percent of the total tax unpaid plus one-half of one percent for every month or partial month the payment of tax is late. In this case, the five percent penalty was $388.30 (i.e., $7,766 x .05 = $388.30) and the monthly penalty was $77.66 (i.e., $7,766 x .005 x 2 months = $77.66), for a total of $465.96.

[4] Respondent noted that it was unaware that due to the computer software utilized by appellants to remit their electronic return, their apartment number was not fully transmitted to respondent. Respondent noted that instead of "Unit93," only "Unit9" appeared on appellants' return. Therefore, the RIN was returned to respondent as undeliverable. When respondent received the returned mail, respondent utilized its resources to attempt to ascertain a more current address and sent future notices to various addresses that it located for appellants.

6. On March 2, 2016, respondent issued an Intent to Offset Federal Payments Notices to appellant-wife at a Claremont address, and to appellant-husband at appellants' correct Pomona address.
7. On August 18, 2016, respondent received a payment of $742.25 satisfying appellants' full balance due.
8. On September 15, 2016, respondent received appellants' claim for refund for $742.25.[5]
9. On October 25, 2016, respondent denied appellants' claim for refund.
10. This timely appeal followed.
11. In its reply brief, respondent agreed to refund appellants $233.48, consisting of the $226.00 collection cost recovery fee and an abatement of $7.48 of interest. This abatement is for interest that accrued from August 19, 2015 until March 2, 2016. Accordingly, the amount remaining in dispute in this appeal is $508.77, consisting of the $465.96 penalty and $42.81 interest.

DISCUSSION

Issue 1 - Whether appellants have shown reasonable cause for the late payment of tax?

Section 19001 provides that the personal income tax "shall be paid at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return)." Section 19132 provides that a late payment penalty shall be imposed when a taxpayer fails to pay the amount shown as due on the return on or before the due date of the return. The late payment penalty has two parts. The first part is 5 percent of the unpaid tax. (Section 19132(a)(2)(A).) The second part is a penalty of 0.5 percent per month, or portion of a month, calculated on the outstanding balance. (Section 19132(a)(2)(B).) The late payment penalty may be abated if a taxpayer shows that the failure to make a timely payment of tax was due to reasonable cause and not due to willful neglect. (Section 19132(a).)

To establish reasonable cause for a late payment of tax, a taxpayer must show that his or her failure to make a timely payment of the proper amount of tax occurred despite the exercise of the burden of proving that both conditions existed. (*Appeal of Roger W. Sleight*, 83-SBE-244,

[5] Although appellants' refund claim was for the amount paid, $742.25 (consisting of a late-payment penalty of $465.96, interest of $50.29, and a collect fee of $226.00), the FTB's claim denial letter incorrectly references the claim amount as $742.33, and appellant's appeal letter also references that amount.

Oct. 26, 1983.[6]) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of ordinary business care and prudence. (*Appeal of Robert T. and M.R. Curry*, 86-SBE-048, Mar. 4, 1986; *Appeal of Roger W. Sleight*, *supra*.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Id*.) The taxpayer must present credible and competent proof that illness or other personal difficulty continuously prevented the taxpayer from timely making a payment. (*Appeal of Kerry and Cheryl James*, 83 SBE 009, Jan. 3, 1983; *Appeal of Allen L. and Jacqueline M. Seaman*, 75-SBE-080, Dec. 16, 1975.)

Respondent asserts that it imposed a late payment penalty for the 2014 tax year pursuant to section 19132 because respondent did not receive payment for $7,766 of appellants' self-assessed 2014 liability until June 15, 2015, two months after the due date of April 15, 2015. Appellants have not disputed the late filing, nor offered an explanation as to why they paid their tax liability late. Appellants argue that they did not receive a notice from respondent informing them of their liability. Appellants assert that respondent failed to send notices to their correct address of 20 years. Appellants also assert that had they received actual notice of the proposed late payment penalty earlier, they would have promptly paid it and no additional penalties or interest would have accrued. However, this does not explain appellants' failure to timely pay their tax liability. Appellants' failure to timely pay their tax appears to have been due to appellants' own conduct, prior to any notice of the late penalty being mailed. Therefore, appellants have failed to establish reasonable cause for the late payment of tax.

Issue 2 - Whether interest may be abated?

The imposition of interest on a tax deficiency is mandatory. (Section 19101(a).) Interest is not a penalty but is compensation for a taxpayer's use of money that should have been paid to the state. (*Appeal of Amy M. Yamachi*, 77-SBE-095, June 28, 1977.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Audrey C. Jaegle*, 76-SBE-070, June 22, 1976.)

[6] Pursuant to the Office of Tax Appeals Rules for Tax Appeals, California Code of Regulations, tit. 18, § 30501(d)(3), precedential opinions of the State Board of Equalization (BOE) that were adopted prior to January 1, 2018, may be cited as precedential authority to the Office of Tax Appeals unless a panel removes, in whole or in part, the precedential status of the opinion. BOE's precedential opinions are available for viewing on the BOE's website: http://www.boe.ca.gov/legal/legalopcont.htm#boeopinion.

To obtain relief from interest, appellants must show that they qualify under the provisions of sections 19104, 21012, or 19112. Section 19104 provides for interest abatement when the interest is attributable to any "unreasonable error or delay" by an officer or employee of the FTB in performing a ministerial or managerial act. However, an unreasonable error or delay by the FTB can be taken into account only if no significant aspect of the error or delay is attributable to the taxpayer *and* the error or delay occurred *after* respondent contacted the taxpayer in writing about the underlying deficiency or payment. (Section 19104(b)(1).) In *Appeal of Michael and Sonia Kishner*, 99-SBE-007, Sept. 29, 1999, the California State Board of Equalization (BOE) adopted language from Treasury Regulation § 301.6404-2(b)(2), in defining a "ministerial act" as:

> A procedural or mechanical act that does not involve the exercise of judgment or discretion, and that occurs during the processing of a taxpayer's case after all prerequisites to the act, such as conferences and review by supervisors, have taken place. A decision concerning the proper application of federal tax law (or other federal or state law) is not a ministerial act.

When a California statute is substantially identical to a federal statute (such as the interest abatement statute in this case), we consider law interpreting the federal statute as highly persuasive. (*Douglas v. State of California* (1942) 48 Cal.App.2d 835.) In this regard, Treasury Regulation § 301.6404-2(b)(1) defines a "managerial act" as:

> … an administrative act that occurs during the processing of a taxpayer's case involving the temporary or permanent loss of records or the exercise of judgment or discretion relating to management of personnel. A decision concerning the proper application of federal tax law (or other federal or state law) is not a managerial act.

Here, a RIN reflecting the late payment penalty and interest due from appellants was sent to appellants' last-known address; the one shown on appellant's 2014 return. Any notice shall be sufficient if it is mailed to a taxpayer's last-known address. (Section 18416(b).) It is well settled that respondent's mailing of a notice to the taxpayer's last-known address is considered sufficient notification even if the notice never actually reaches the taxpayer. (*Appeal of Yvonne M. Goodwin*, 97-SBE-003, Mar. 19, 1997; *Appeal of Jon W. and Antoinette O. Johnston*, 83-SBE-238, Oct. 26, 1983.) The last-known address is the address that appears on the taxpayer's last return filed with respondent, unless the taxpayer has provided to respondent clear and concise written or electronic notification of a different address, or respondent has an address it

has reason to believe is the most current address for the taxpayer. (Section 18416(c).)

If prior to mailing a notice the taxing agency becomes aware that the address last known to the agency may be incorrect, the taxing agency has an obligation to exercise reasonable diligence to ascertain the taxpayer's correct address. (*Follum v. Commissioner* (2d Cir. 1997) 128 F.3d 118, 119–20; *Wallin v. Commissioner* (9th Cir. 1984) 744 F.2d 674, 676.) The proper inquiry for reasonable diligence examines the facts the taxing agency knew or should have known at the time it sent the notice. (*Terrell v. Commissioner* (5th Cir. 2010) 625 F.3d 254, 260.) What the taxing agency knew or should have known is determined by taking into consideration all of the relevant facts and circumstances. (*Mulder v. Commissioner* (5th Cir. 1988) 855 F.2d 208, 211.)

Here, appellants' last-known address was the address reflected on their 2014 tax return as received by the FTB. On appeal, respondent determined and acknowledged that it did not perform a reasonably diligent search to locate a more current address for appellants after its initial notice to appellants was returned as undeliverable and has agreed to abate the $7.48 of interest that accrued from the date of respondent's first notice to appellants (August 19, 2015) until the date respondent mailed Intent to Offset Federal Payments Notice to appellants' correct address on March 2, 2016.

Further abatement of interest is unwarranted. The relief of interest under section 21012 is not relevant here, as respondent did not provide appellants with any written advice. Neither is section 19112 applicable. That section requires a taxpayer to make a showing of extreme financial hardship caused by a significant disability or other catastrophic circumstance. However, there is no evidence of these circumstances in the record.

HOLDINGS

1. Appellants have failed to establish reasonable cause for the late payment of tax.
2. Respondent agreed to abate interest in the amount of $7.48 for the period from August 19, 2015 until March 2, 2016, and to refund the collection cost recovery fee of $226.00. Appellants have not established a basis for any additional abatement.

DISPOSITION

Respondent's action in denying appellants' claim for refund is modified, as conceded by respondent on appeal, to refund the collection cost recovery fee of $226.00 and interest of $7.48. Respondent's denial of appellants' claim for refund is otherwise sustained.

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Douglas Bramhall
Administrative Law Judge

We concur:

DocuSigned by:
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Jeffrey G. Angeja
Administrative Law Judge

DocuSigned by:

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Andrew J. Kwee
Administrative Law Judge