

**OFFICE OF TAX APPEALS
STATE OF CALIFORNIA**

In the Matter of the Appeal of:) OTA Case No. 18010893
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JUDITH COGEN) Date Issued: June 18, 2018
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_____)

OPINION

Representing the Parties:

For Appellant: Richard Lundy, CPA

For Respondent: Gi Nam, Tax Counsel

For Office of Tax Appeals: Sheriene Anne Ridenour, Tax Counsel III

KWEE, Administrative Law Judge: Pursuant to California Revenue and Taxation Code section 19324,¹ Judith Cogen (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in denying appellant’s claim for refund in the amount of \$3,111.69² for the 2014 tax year.

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

ISSUES

1. Whether appellant has demonstrated that her late payment of tax for the 2014 tax year was due to reasonable cause and not due to willful neglect.
2. Whether appellant has established a basis for abatement of interest.

¹ Unless otherwise indicated, all statutory references are to sections of the California Revenue and Taxation Code.

² This amount consists of a late payment penalty of \$2,614.16, and interest of \$497.53.

FACTUAL FINDINGS

1. On September 28, 2015, appellant, a non-resident of California, filed a California income tax return (Form 540NR) for the 2014 tax year, reporting California Adjusted Gross Income (AGI) of \$568,831, itemized deductions of \$75,896, and California taxable income of \$492,935. Appellant's California AGI consisted of \$51,178 in taxable interest; \$5,183 in ordinary dividends; \$432,487 in capital gains; and \$79,983 in income from rental real estate, royalties, partnerships, trusts, etc. Appellant's reported California tax liability was \$57,624, and her tax withholdings were \$24,353. This left a reported balance due of \$33,271, which appellant paid on September 28, 2015, over 5 months after the payment due date of April 15, 2015.
2. On October 19, 2015, FTB sent appellant a Return Information Notice, notifying appellant that FTB had imposed a \$2,661.68 late payment penalty,³ plus interest, and that FTB had decreased her claimed tax withholding payments by \$594 (from \$24,353 to \$23,759), resulting in \$594 in additional tax due.
3. By letter dated December 1, 2015, appellant provided FTB with documentation establishing that the originally reported withholding amount of \$24,353 was correct. FTB accepted appellant's documentation and issued appellant a revised Income Tax Due Notice dated January 26, 2016, determining a late payment penalty of \$2,614.16,⁴ plus interest of \$497.53, for a total balance due of \$3,111.69.
4. On February 9, 2016, appellant paid the \$3,111.69 balance due.

³ This amount represents five percent of the late paid tax of \$33,271, plus a monthly penalty of .5 percent of \$33,271 for each month, or fraction thereof, that it remained unpaid (i.e., April 15, 2015, through September 28, 2015).

⁴ FTB incorrectly under-computed this penalty using a late paid tax amount of \$32,677. The actual late paid tax amount, as self-reported by appellant, was \$33,271. (See footnote 3, *supra*). Although FTB initially determined \$594 in additional tax, FTB did not factor the additional tax into any of its penalty calculations and, in any event, FTB accepted appellant's return as originally filed (i.e., reporting late paid tax of \$33,271). In its opening brief, FTB now contends that FTB's originally determined late payment penalty amount, of \$2,661.68, was correct, and that the amount of penalty at issue is \$2,661.68. Nevertheless, appellant only paid \$2,614.16 in penalties. In a claim for refund the amount refunded cannot exceed the amount of the overpayment. (§ 19301.) Thus, appellant's refund claim correctly identifies the amount at issue as \$2,614.16 in penalty, and \$497.53 in interest, and FTB's NOA denies appellant's claim in the amount of \$2,614.16, plus interest. Therefore, the only issues before us in this appeal relate to whether appellant is entitled to refund of the amounts paid for which a refund was claimed. Those amounts are a late payment penalty of \$2,614.16, plus interest of \$497.53. In reaching our conclusions herein, we offer no opinion on whether FTB may assess an additional penalty for 2014.

5. By letter dated February 12, 2016, appellant requested abatement of the \$2,614.16 penalty, and refund of the \$497.53 in interest. FTB treated appellant's letter as a claim for refund, which FTB denied in a Notice of Action (NOA) dated October 5, 2016.
6. On December 8, 2016, appellant timely appealed the NOA claiming, in pertinent part, that she was entitled to abatement of the penalty and interest because: (1) she was a non-resident of California and her only California source income was from pass-through entities doing business in California; (2) she was not aware of how much California source income she would earn until she received income information from the pass-through entities; and (3) in the four tax years leading up to 2015, she received refunds from FTB because the pass-through entities withheld sufficient income taxes from her income.
7. In exhibits attached to its June 9, 2017, opening brief, FTB provided evidence establishing that appellant received letters dated March 26, 2015, and March 31, 2015, both titled "2014 Estimated K-1 Information" and issued by Edge Principal Investments, LP, and Edge Principal Investments II, LP, respectively.⁵ The letters notify appellant of estimated California source income in the total amount of \$328,583, and an estimated \$24,413 in California tax withholdings. Appellant also received California Form 592-Bs (withholding statements) reporting that appellant received \$328,176 in California source income in 2014, from which \$24,353 of California taxes had been withheld.
8. In a reply brief dated July 21, 2017, appellant contended that her "return is comprised of fifty-two (52) [Schedule] K-1s from Pass-thru entities" for the 2014 tax year, and only 10 of the entities provided her with estimated income statements, while only 16 of the entities provided her with Schedule K-1s by March 31, 2015.

DISCUSSION

Issue 1 - Whether appellant has demonstrated reasonable cause for failing to timely pay her 2014 tax liability.

California imposes a late payment penalty for a taxpayer's failure to pay the amount of tax shown on a return before the due date, unless it is established that the late payment was due to reasonable cause and not due to willful neglect. (§ 19132(a)(1).) The late payment penalty is

⁵ A Schedule K-1 is generally used to report a partner's share of income, deductions, and credits.

the sum of two figures that may not exceed 25 percent of the unpaid tax. (§ 19132(a)(2).) The first addend is five percent of the tax that remained unpaid as of the due date.

(§ 19132(a)(2)(A).) The second addend is .5 percent of the unpaid tax balance per month for each month, or portion of a month, that the tax remains unpaid after the due date, not to exceed 40 months. (§ 19132(a)(2)(B).) For these purposes, the due date for payment of the tax is determined without regard to any extension of time to file the return. (§ 19001.)

A tax determination is generally presumed correct and, therefore, a taxpayer has the burden of establishing reasonable cause. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001 [late-filing penalty]; *Appeal of M.B. and G.M. Scott*, 82-SBE-249, Oct. 14, 1982 [late payment penalty].⁶) In order for a taxpayer to establish that a failure to act was due to reasonable cause, the taxpayer must show that the failure occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances. (*Appeal of Stephen C. Bieneman*, 82-SBE-148, Jul. 26, 1982; *Appeal of Howard G. and Mary Tons*, 1979-SBE-027, Jan. 9, 1979.)

A contention that a taxpayer was unable to obtain the information necessary to timely file a return or pay a tax liability, in absence of evidence establishing the “continuity of [the taxpayer’s] efforts to secure the necessary information,” does not constitute reasonable cause for purposes of penalty relief. (*Beran v. Commissioner* (1980) T.C. Memo. 1980-119.) Examples of circumstances that have been found not to constitute reasonable cause for purposes of abating penalties include: a taxpayer’s discovery of reportable income after the original due date (*Appeal of Elixir Industries*, 83-SBE-248, Dec. 14, 1983); a taxpayer’s difficulty in obtaining necessary information (*Appeal of J.B. and P.R. Campbell*, 85-SBE-112, Oct. 9, 1985); the complexity and problems in accumulating the information necessary to complete a return (*Appeal of Incom International, Inc.*, 82-SBE-053, Mar. 31, 1982); a taxpayer’s difficulty in determining income with exactitude (*Appeal of Roger W. Sleight*, 83-SBE-244, Oct. 26, 1983; *Appeal of Avco Financial Services, Inc.*, 79-SBE-084, May 9, 1979); and the failure of the taxpayer’s accountant

⁶ The Office of Tax Appeals (OTA) is the successor-in-interest to the California State Board of Equalization (BOE) with regard to income tax appeals. Therefore, precedential BOE opinions that were adopted prior to January 1, 2018, may be cited as precedential authority to OTA. (Cal. Code Regs., tit. 18, § 30501(d)(3).) BOE’s precedential decisions, designated by “SBE,” may be found on the BOE’s website: www.boe.ca.gov/legal/legalopcont.htm.

to properly account for income (*Appeal of M.B. and G.M. Scott, supra*).

Appellant argues that her failure to timely pay her 2014 tax liability was due to reasonable cause. In support, appellant provided copies of her California tax returns for 2010 to 2013, showing that she received a refund in each of those years. Appellant contends this overpayment history led her to reasonably believe that her withholdings for 2014 would be sufficient to cover her 2014 tax liability. Nevertheless, each tax year must be examined individually and considered on its own merits. (*Appeal of Helen Cantor, et al.*, 2002-SBE-096, Nov. 13, 2002, fn. 4.) Therefore, the fact that appellant had sufficient tax withholdings in prior years to fully pay her California tax liabilities does not establish reasonable cause for appellant failing to timely pay her taxes during 2014. In this regard, we note that: (1) appellant's 2014 California taxable income was more than five times as great as appellant's California taxable income for the prior four years combined; and (2) during 2014 appellant had no California tax withheld at all from 42 percent of her California source income.

The evidence shows that appellant received two estimated income statements from pass-thru entities by March 31, 2015, that provided appellant with a timely and reasonably accurate notice of her California source income subject to withholding. Appellant's California source income from those two entities totaled \$328,176, and \$24,353 in California tax was withheld from that income, at a tax rate of 7.4 percent. This represented all of appellant's income that was subject to withholding in California. Because appellant ultimately was subject to California tax at a higher tax rate of 11.69 percent, the amount withheld was not sufficient to cover the California tax owed on that income.

Furthermore, appellant admits receiving at least 16 Schedule K-1s by March 31, 2015, and up to 8 additional estimated income statements, for which she provided no information. In total, appellant received an additional \$240,655 in California AGI from up to 50 other pass-thru entities. No California tax whatsoever was withheld from that income. Furthermore, appellant has not shown what attempts, if any, appellant made to obtain the income information directly from those pass-thru entities so that she could make a timely estimate and payment of her California tax liability for 2014.⁷ Therefore, the evidence indicates that appellant's failure to timely pay the tax was the result of her failure to consider California source income timely

⁷ We note that even a limited partner generally has the right to inspect and copy information regarding the financial condition of the partnership. (See Corp. Code, § 15903.04.)

reported to her on estimated income statements and Schedule K-1s, and her failure to consider the effect of income from other entities from which she derived California source income. Appellant has not sustained her burden of proving that her failure to timely pay her tax liability was due to reasonable cause.

For these reasons, we find that appellant has not shown reasonable cause for failing to timely pay her 2014 tax liability.

Issue 2 -Whether appellant established a basis for abatement of interest.

The assessment of interest on a tax deficiency is mandatory. (§ 19101(a); *Appeal of Amy M. Yamachi*, 77-SBE-095, Jun. 28, 1977.) Interest is not a penalty but is simply compensation for a taxpayer’s use of money. (*Appeal of Audrey C. Jaegle*, 76-SBE-070, Jun. 22, 1976.) The FTB’s determination not to abate interest is presumed correct, and the burden is on the taxpayer to prove error. (*Appeal of Michael E. Myers, supra.*) Our jurisdiction in an interest abatement case is limited by statute to a review of the FTB’s determination for an abuse of discretion. (§ 19104(b)(2)(B).) To show an abuse of discretion, a taxpayer must establish that, in refusing to abate interest, the FTB exercised its discretion arbitrarily, capriciously, or without sound basis in fact or law. (*Woodral v. Commissioner* (1999) 112 T.C. 19, 23.) Because the interest abatement provisions were not intended to be routinely used to avoid the payment of interest, interest should be abated only “where failure to abate interest would be widely perceived as grossly unfair.” (*Lee v. Commissioner* (1999) 113 T.C. 145, 149.) That is not the situation here.

Appellant also requests interest abatement on the basis that she “has reasonable cause to hav[e] paid her tax late.” There is no statutory authority to relieve interest based on reasonable cause. (§§ 19104, 19112, 21012.) Appellant offers no other basis for relief of interest.

Therefore, we have no basis to grant interest relief.

HOLDINGS

1. Appellant failed to demonstrate reasonable cause for failing to timely pay her 2014 tax liability.
2. Appellant failed to establish a basis for abatement of interest.

DISPOSITION

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

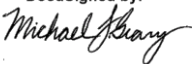
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Andrew J. Kwee
Administrative Law Judge

We concur:

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Sara A. Hosey
Administrative Law Judge

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Michael F. Geary
Administrative Law Judge