

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 18010686  
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**WILLIAM MARTIN SMITH** ) Date Issued: September 20, 2018  
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**OPINION**

Representing the Parties:

For Appellant: William Martin Smith  
For Respondent: Gi Nam, Tax Counsel

J. ANGEJA, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,<sup>1</sup> William Martin Smith (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) in denying appellant’s claim for refund in the amount of \$1,833.71 for the 2013 tax year.

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

**ISSUES**

1. Whether appellant has shown reasonable cause to abate the late payment penalty.
2. Whether appellant has established that interest should be abated.

**FACTUAL FINDINGS**

1. On February 11, 2014, appellant timely filed his California Resident Tax Return for the 2013 tax year. On the return, appellant reported federal adjusted gross income (AGI) of \$140,273, taxable income of \$118,094, tax due of \$11,239, and a total amount due of \$11,239. After two timely payments of \$20 and \$187, appellant had an unpaid balance of

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<sup>1</sup> Unless otherwise indicated, all “Section” or “§” references are to sections of the California Revenue and Taxation Code.

\$11,032 after the due date of the tax return. As herein relevant, the AGI included an Individual Retirement Account (IRA) distribution of \$122,000 and unemployment compensation of \$17,980.

2. Appellant's Federal Wage and Income Transcript shows that the fair market value of appellant's retirement account in 2013 was \$253,406.
3. Appellant and FTB entered into an Installment Agreement, and after a series of payments, appellant satisfied the liability on June 8, 2017. The liability included applicable interest as well as a late payment penalty of \$1,833.71.
4. On July 24, 2017, appellant filed a timely claim for refund, requesting a refund of the penalty and interest. In his claim, appellant asserts that he withdrew \$122,000 from his IRA account because he had an unexpected divorce in 2013, and had to purchase a mobile home. Appellant states that he had no other options because he was unemployed and needed a home. He also contends that the penalty should be abated because he had a good filing and payment history with FTB.
5. On August 29, 2017, FTB denied appellant's claim for refund. This timely appeal followed.

### DISCUSSION

#### Issue 1 - Whether appellant has shown reasonable cause to abate the late payment penalty.

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.

(§ 19132(a)(2)(A).) The second part is a penalty of 0.5 percent per month, or portion of a month (not to exceed 40 months), calculated on the outstanding balance. (§ 19132(a)(2)(B).) Here, there is no dispute that the penalty was properly computed and imposed.

The late payment penalty will 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. (§ 19132(a).) The taxpayer bears the burden of proving that both conditions existed. (*Appeal of Sleight*,

83-SBE-244, Oct. 26, 1983.)<sup>2</sup> Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow*, 82-SBE-274, Nov. 17, 1982.) 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 ordinary business care and prudence. (*Appeal of Curry*, 86-SBE-048, Mar. 4, 1986; *Appeal of Sleight, supra*.)

Undue hardship or inability to pay may constitute reasonable cause "to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship as described in [Treas. Reg. section 1.6161-1(b)] if he paid on the due date." (Treas. Reg. § 301.6651-1(c)(1).)<sup>3</sup> A taxpayer's inability "to pay the tax in spite of the exercise of ordinary business care and prudence in providing for payment of his tax liability" will be determined based on a consideration of "all the facts and circumstances of the taxpayer's financial situation, including the amount and nature of the taxpayer's expenditures in light of the income (or other amounts) he could, at the time of such expenditures, reasonably expect to receive prior to the date prescribed for the payment of the tax." (*Ibid.*) "A taxpayer will be considered to have exercised ordinary business care and prudence if he made reasonable efforts to conserve sufficient assets in marketable form to satisfy his tax liability and nevertheless was unable to pay all or a portion of the tax when it became due." (*Ibid.*)

Treasury Regulation section 1.6161-1(b) defines the term "undue hardship." This regulation requires that the taxpayer show that payment of the tax on the due date would have imposed "undue hardship," which requires more than merely inconveniencing the taxpayer. "It must appear that substantial financial loss, for example, loss due to the sale of property at a sacrifice price, will result to the taxpayer from making payment on the due date . . . ." (Treas. Reg. § 1.6161-1(b).)

As noted above, in order to establish reasonable cause for late payment on the basis of financial difficulties, appellant must show that he exercised ordinary business care and made reasonable efforts to conserve sufficient funds to pay his tax liabilities. Whether payment of the

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<sup>2</sup> Published decisions of the Board of Equalization, designated by "SBE" in the citation, are available on that Board's website at: <http://www.boe.ca.gov/legal/legalopcont.htm>.

<sup>3</sup> Section 19132 is patterned after Internal Revenue Code section 6651. The interpretation and effect given the federal provision by the federal courts and administrative agencies are relevant in determining the proper construction of the California statute. (*Andrews v. Franchise Tax Board* (1969) 275 Cal.App.2d 653, 658.)

tax would result in undue hardship is determined as of the due date for the tax. Thus, for appellant to demonstrate that he had reasonable cause for his late payment of tax, he must show that he made reasonable efforts to conserve sufficient funds to pay the tax by April 15, 2014, but was nevertheless unable to pay the tax by that date without suffering undue hardship.

Here, an individual exercising ordinary business care would have recognized that tax would be owed on his IRA withdrawal in 2013, and taken steps to ensure that he retained sufficient funds to pay the tax that would be owed. There is no evidence that appellant took such steps. Also, appellant has provided no evidence to establish that circumstances beyond his control prevented him from timely paying his tax when due, or that he would have suffered undue hardship had he done so. For example, appellant has provided no documentation or other evidence about his divorce or financial situation, such as bank account information, retirement account statements, or the value of any properties he may have owned. Moreover, we conclude that appellant had the ability to pay the \$11,239 tax liability, considering the \$253,406 in appellant's retirement account, and his receipt of \$17,980 in unemployment compensation during the tax year. Therefore, appellant has failed to establish that he exercised ordinary business care and prudence in providing for the payment of his tax liability.

Also, we acknowledge that appellant may have a history of timely tax payments; however, neither the California Legislature nor FTB have adopted a first-time penalty abatement program, so appellant's alleged history of timely filing and paying California taxes cannot be used as a basis for abatement of the late payment penalty at issue here. Instead, appellant must establish that his failure to timely pay his taxes was due to reasonable cause, which he has failed to do.

Issue 2 - Whether appellant has established that interest should be abated.

Interest is not a penalty. It is compensation for the taxpayer's use of the money, and the law requires respondent to collect interest on past-due taxes. There is no reasonable cause exception to the imposition of interest. (§ 19101(a); *Appeal of Yamachi*, 77-SBE-095, June 28, 1977; *Appeal of Jaegle*, 76-SBE-070, June 22, 1976.) As relevant here, respondent can abate interest when the interest is attributable to unreasonable error or delay by an FTB officer or employee while performing a ministerial or managerial act in his or her official capacity. (§ 19104(a).)

Here, appellant does not allege or prove unreasonable error or delay by an FTB officer or employee. He argues that there is reasonable cause to abate interest, but that is not a basis for abatement. We conclude appellant is not entitled to interest abatement.

HOLDINGS

1. Appellant has failed to establish reasonable cause to abate the late payment penalty.
2. Appellant has failed to establish reasonable cause to abate interest.

DISPOSITION

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

DocuSigned by:  
*Jeff Angeja*  
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Jeffrey G. Angeja  
Administrative Law Judge

We concur:

DocuSigned by:  
*Sara A. Hosey*  
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Sara A. Hosey  
Administrative Law Judge

DocuSigned by:  
*Nguyen Dang*  
4D465973FB44469...  
Nguyen Dang  
Administrative Law Judge