

**OFFICE OF TAX APPEALS  
STATE OF CALIFORNIA**

In the Matter of the Appeal of:	)	OTA Case No. 18042735
<b>MARK BRITTON</b>	)	Date Issued: December 12, 2018
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**OPINION**

Representing the Parties:

For Appellant:	Mark Britton
For Respondent:	Eric Brown, Tax Counsel III

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,<sup>1</sup> Mr. Mark Britton (appellant) appeals an action by the Franchise Tax Board (FTB) denying his claim for refund of \$993.73 for the 2014 tax year.<sup>2</sup>

Appellant waived his right to an oral hearing. Therefore, we decide the matter based on the written record.

**ISSUES**

1. Is appellant entitled to abatement of the late-filing penalty?
2. Is appellant entitled to interest abatement?

**FACTUAL FINDINGS**

1. Appellant was a California resident during 2014 until September 25, 2014, when he moved to New Zealand.

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

<sup>2</sup> Appellant’s “Reasonable Cause - Individual and Fiduciary Claim for Refund” states a refund amount of \$993.73, which appears to be the total of the late-filing penalty (\$672.75) and interest (\$320.98). FTB denied appellant’s claim for refund “in the amount of \$672.75.” Below, we treat appellant’s claim as a claim for refund of the penalty and a request for interest abatement.

2. Appellant filed his 2014 California Nonresident or Part-Year Resident Income Tax Return on or about March 1, 2016.
3. A California tax practitioner prepared appellant's original return, which reported California taxable income of \$13,157 and tax due of \$414, and was signed by appellant on February 10, 2016. The return reported no interest, late-filing penalties, or late-payment penalties due. FTB accepted the return as filed and refunded the claimed excess withholding credit of \$334.21 to appellant (\$332 reported as overpaid tax, plus \$2.21 interest).<sup>3</sup>
4. Appellant failed to report \$60,710 in income on his return: \$53,210 paid by appellant's employer and \$7,500 paid by another company, both payments classified on Internal Revenue Service (IRS) Forms 1099 – MISC as “nonemployee compensation.”
5. On September 15, 2017, appellant filed an amended 2014 return, prepared by the same California tax preparer, which reported California taxable income of \$55,518 and was signed by appellant on September 7, 2017. Appellant filed a copy of his 2014 federal return, also signed by appellant on September 7, 2017, with his amended California return. The federal return included a Schedule C, which appellant used to account for the \$60,710 in income from his business providing specialized design services.
6. On October 30, 2017, FTB sent appellant a “Notice of Tax Return Change - Revised Balance,” which informed appellant that the correct tax for 2014 was \$3,437, from which he could deduct withholding of \$746, but to which he must add the \$334.21 previously refunded to him. In addition, the notice informed appellant that FTB had also imposed a late-filing penalty of \$672.75. Appellant paid the entire amount due on November 22, 2017.
7. Subsequently, appellant filed a “Reasonable Cause - Individual and Fiduciary Claim for Refund,” which FTB denied by notice dated December 22, 2017. This timely appeal followed.

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<sup>3</sup> It is not clear why FTB refunded the reported overpayment without first deducting a late-filing penalty.

## DISCUSSION

### Issue 1 - Is appellant entitled to abatement of the late-filing penalty?

With certain limitations not relevant here, section 19131 requires FTB to impose a late-filing penalty when a taxpayer does not file a return on or before its due date, unless the taxpayer shows that the late filing was due to reasonable cause and not due to willful neglect. Generally, for individuals filing on a calendar year basis, the return is due by April 15 of the year following the close of the calendar year. (§ 18566.) For individuals traveling abroad, returns are due by June 15 following the close of the calendar year. (§ 18567.) In addition, section 18567(a) provides that FTB may grant a taxpayer up to six more months to file a tax return, and the corresponding regulation (Cal. Code Regs., tit. 18, § 18567) provides for an automatic six-month extension without a written request. However, if a taxpayer does not file his or her return by the extended due date, in this case by December 15, 2015, no valid extension exists and the late-filing penalty amount is computed by reference to the original due date of the return (June 15, 2015). (*Ibid.*)

The FTB's determination is presumed to be correct, and a taxpayer has the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509, 514; *Appeal of Michael E. Myers*, 2001-SBE-001, May 31, 2001.) Whether appellant timely filed his return and, if he did not, whether his failure to do so was due to reasonable cause and not to his willful neglect, are questions of fact on which appellant has the burden of proof. (*Appeal of La Salle Hotel Company*, 66-SBE-071, Nov. 23, 1966.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Aaron and Eloise Magidow*, 82-SBE-274, Nov. 17, 1982.)

Appellant states he timely filed his 2014 return to report the income reflected on his IRS Form W-2.<sup>4</sup> He explains that he did not report \$60,710 in income from his business because he did not receive the IRS Forms 1099 – MISC because those forms had been mailed to two California addresses after appellant had relocated to New Zealand. Appellant alleges that he learned that the Forms 1099 - MISC had been issued when he received a copy of his IRS transcript, and that he paid the liability in full after receiving FTB's "Notice of Tax Change." In

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<sup>4</sup> Appellant also reported \$125 in interest and \$16 in dividends.

effect, he argues that we should excuse his failure to report the \$60,710 in income because he did not receive the Forms 1099 - MISC.

FTB disputes appellant's contention that he filed a timely return. It asserts that appellant filed his original return late on or about March 1, 2016, and argues that the penalty must be sustained because the evidence does not show that appellant's failure to file timely was due to reasonable cause and not to willful neglect.

Appellant has not alleged that FTB incorrectly calculated the penalty by including the income reported on the Forms 1099-MISC. Furthermore, the evidence would not support such an argument. Appellant certainly knew that he received the income and his obligation to report it was not dependent on his receipt of the Forms 1099-MISC before his return was due. We also note that there is no evidence to support appellant's assertion that he timely filed a return. On the contrary, the original return was not signed by appellant until months after the due date, and he has not made any argument, or provided any evidence, regarding the late-filing penalty, choosing instead to focus on the late reporting of the \$60,710 in business income. Specifically, he has not provided evidence to establish that he filed a timely return, and he has not addressed the evidence that tends to prove otherwise. Thus, the evidence shows that appellant's 2014 return was filed late. Consequently, FTB correctly imposed a late-filing penalty.

Finally, appellant has offered no explanation for his late filing. Thus, he has not shown that his late filing was due to reasonable cause and not willful neglect. Consequently, we find that appellant owes the late-filing penalty.

Issue 2 - Is appellant entitled to interest abatement?

Interest is not a penalty. It is compensation for the taxpayer's use of money. By law, FTB must add interest to past-due taxes, and there is no reasonable cause exception to the imposition of interest. (§ 19101(a); *Appeal of Amy M. Yamachi*, 77-SBE-095, June 28, 1977; *Appeal of Yvonne M. Goodwin*, 97-SBE-003, Mar. 19, 1997.)


As relevant here, FTB 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).) However, appellant does not allege or prove unreasonable error or delay by an FTB officer or employee. Consequently, we find that appellant is not entitled to interest abatement.

HOLDINGS

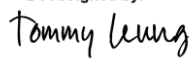
1. Appellant failed to establish that his failure to file a timely 2014 tax return was due to reasonable cause and not to willful neglect. Consequently, he is not entitled to abatement of the late-filing penalty.
2. Appellant is not entitled to interest abatement.

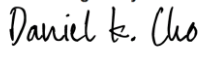
DISPOSITION

We sustain FTB's action denying appellant's claim for refund for the 2014 tax year.

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Michael F. Geary  
Administrative Law Judge

We concur:

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Tommy Leung  
Administrative Law Judge

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Daniel K. Cho  
Administrative Law Judge