

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of:	)	OTA Case No. 18042765
	)	
<b>GUY R. MANCUSO AND</b>	)	Date Issued: December 11, 2018
<b>CARIN H. MANCUSO</b>	)	
	)	
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**OPINION**

Representing the Parties:

For Appellants: Guy R. Mancuso, Taxpayer

For Respondent: David Muradyan, Tax Counsel III

KWEE, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) section 19324, Guy and Carin Mancuso (appellants) appeal an action by the Franchise Tax Board (FTB or respondent) in denying appellants’ claim for refund in the amount of \$3,585.74 for the 2016 tax year.<sup>1</sup> Appellants waived the right to an oral hearing and therefore the matter is being decided based on the written record.

**ISSUES**

1. Whether appellants demonstrated that their late payment of tax was due to reasonable cause and not willful neglect.
2. Whether appellants established a basis for abatement of interest.

**FACTUAL FINDINGS**

1. On December 30, 2016, appellants attempted to make an estimated tax payment for the 2016 tax year in the amount of \$69,184. After electronically submitting the payment request via FTB’s website, appellants printed a payment confirmation. The payment confirmation lists the pertinent financial information provided by appellants including the last four digits of their bank account number (which appellants reported was associated

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<sup>1</sup>The claimed overpayment includes \$2,936.78 for the late payment penalty and \$648.96 in interest.

with a checking account) and the full routing number. FTB's payment system identified the name of the bank associated with the routing number as "UMB Bank, NA." The payment confirmation also stated it may take two business days for the payment to be debited from appellants' bank account.

2. FTB attempted to debit appellants' \$69,184 payment on or around January 3, 2017. FTB was not able to successfully process the payment as requested because the bank information that appellants provided to FTB was invalid, which FTB contends was likely due to the fact that the account was apparently an investment or money market account and not a regular checking or savings account.
3. FTB did not notify appellants that there was an error processing their payment at any time prior to the April 15, 2017, due date. Additionally, appellants did not verify whether the \$69,184 payment was timely debited from their bank account.
4. On August 15, 2017, appellants jointly filed a 2016 California Resident Income Tax Return, reporting \$86,325 in estimated tax payments (including the \$69,184). FTB accepted appellants' return as filed, with the exception that, by Notice of Tax Return Change dated August 30, 2017, FTB notified appellants of an overreported estimated tax payment of \$69,184. Due to the overreported payment, appellants owed \$39,157 in tax. Additionally, FTB assessed a late payment penalty of \$2,936.78, plus interest, for missing the payment due date.<sup>2</sup>
5. Appellants paid the tax, interest, and penalty amount due on September 13, 2017.
6. On October 2, 2017, appellants filed a claim for refund of \$3,585.74, for the interest and penalty, on the basis that they reasonably believed FTB processed their \$69,184 estimated tax payment for 2016 because FTB failed to notify them that the payment was unsuccessful, and they relied on FTB's payment confirmation. In support, appellants attached a copy of the payment confirmation described above, and a letter from Fidelity Brokerage Services LLC, stating that Fidelity Investments did not receive a direct debit presented against appellants' account in the amount of \$69,184 during the period December 30, 2016, through January 30, 2017. The letter also identifies the last four

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<sup>2</sup>This amount represents five percent of the late-paid tax amount of \$39,157 (here, \$1,957.85), plus 0.5 percent of the late-paid tax amount for each of the five months that the payment was late (here, \$978.93).

digits of appellants' Fidelity Investment account, which matches the last four digits of the account number listed on the payment confirmation.

7. FTB denied appellants' claim for refund via notice of action dated October 27, 2017, on the basis that appellants failed to establish reasonable cause.
8. Appellants appealed FTB's decision on January 2, 2018, raising the same arguments. In addition, appellants contend that a reasonable person would have expected to receive notice from FTB of the denied payment, which FTB failed to provide. Furthermore, appellant-husband contends that "thoughts of checking whether or not [the tax payment] was debited from [the bank] account were secondary" to caring for his wife, who underwent surgery for cancer in December 2016, and "required supportive care until mid-March, 2017."<sup>3</sup> Appellant-husband also stated that his wife's continuing care, including surgery, "extended until the late Fall 201[7]."<sup>4</sup>
9. FTB responded by letter dated July 16, 2018, contending that FTB does not accept payment from brokerage accounts or money market accounts and, instead, requires a regular checking or savings account to make a tax payment. FTB further contends that this information is provided on its website, and that appellants had three and a half months to verify the status of their failed payment before the penalty was imposed.

### DISCUSSION

#### Issue 1 - Whether appellants demonstrated reasonable cause for failing to timely pay their 2016 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. (R&TC, § 19132(a)(1).) The late payment penalty is the sum of two figures that may not exceed 25 percent of the unpaid tax. (R&TC,

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<sup>3</sup> Appellants specifically contend they "had no reason to believe that [their] estimated taxes had not been paid" and they would have had "adequate time to correct a denied payment" prior to the due date of January 15, 2017, if FTB had notified them of the "denied" payment. Thus, it appears appellants believe they were assessed the penalty at issue because their fourth quarter estimated tax payment of \$69,184 was not paid by the due date: January 15, 2017. Nevertheless, an estimated tax penalty was not assessed and is not at issue in this appeal. The disputed \$2,661.68 penalty at issue is a late payment penalty, for failing to pay the tax by April 15, 2017.

<sup>4</sup> Appellants wrote: "Fall, 2016." We assume this was a typo. As relevant, appellants also contended that appellant-wife had surgery on December 20, 2016 (which was the penultimate day of Fall, 2016) and was released from the hospital on December 24, 2016.

§ 19132(a)(2).) The first addend is five percent of the tax that remained unpaid as of the due date. (R&TC, § 19132(a)(2)(A).) The second addend is 0.5 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. (R&TC, § 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. (R&TC, § 19001.)

The standard for what constitutes “reasonable cause” is the same regardless of whether the penalty at issue involves a late filing or a late payment. In order for a taxpayer to establish reasonable cause, the taxpayer must show that the failure to timely pay or file 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. (*United States v. Boyle* (1985) 469 U.S. 241, 245-246 (*Boyle*); *Appeal of Stephen C. Bieneman*, 82-SBE-148, July 26, 1982; *Appeal of Howard G. and Mary Tons*, 1979-SBE-027, Jan. 9, 1979.)<sup>5</sup> For example, *Boyle* clarifies that assuming an agent will timely file a return is not reasonable cause because it does not meet the requisite standard of care. (*Boyle, supra*, at p. 251.) The reason is that a taxpayer cannot delegate away their duty under the statute to exercise ordinary business care and prudence, and ordinary business care includes ensuring a return is timely filed and that tax is timely paid.

Under R&TC section 19132, the requisite standard of care is reasonable cause. Appellants contend that their late payment was due to FTB’s failure to notify them that their \$69,184 tax payment was never debited from appellants’ account with Fidelity Investments, because appellants timely scheduled this payment. In this regard, it is undisputed that appellants assumed, without verifying or taking any other action to meet the payment deadline, that FTB timely processed their tax payment. Appellants further assumed that FTB would notify them if the payment was not debited from their bank account. Ultimately, FTB was unable to process the payment, and FTB did not notify appellants of the payment issue until after the due date lapsed. Due to appellants’ reliance on FTB to either process the payment or notify them if the payment was unsuccessful, ten months lapsed from the time of the attempted payment until

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<sup>5</sup> Precedential opinions of the Board of Equalization (BOE or board) 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. The board’s precedential opinions are viewable on their website: <[www.boe.ca.gov/legal/legalopcont.htm](http://www.boe.ca.gov/legal/legalopcont.htm)>.

appellants discovered the payment delinquency. Thus, the facts support appellants' contention that their late payment was due, at least in part, to appellants' reliance on FTB.<sup>6</sup>

Appellants further contend that, considering the payment confirmation, it was reasonable to rely on FTB to process their payment. Nevertheless, this argument fails to consider appellants' obligations under R&TC section 19132. The Legislature has charged taxpayers with an unambiguous, precisely defined duty to timely pay their taxes. (R&TC, § 19132.) That appellants expected FTB to process appellants' payment as requested, pursuant to the payment confirmation,<sup>7</sup> does not relieve appellants of their duty to timely pay their taxes. Here, the evidence indicates that appellants failed to review FTB's payment instructions when they entered a non-qualifying investment account number into the checking account field to pay their 2016 tax liability. Furthermore, the law imposes the duty to pay taxes on the taxpayer; therefore, the standard of ordinary business care and prudence includes taking affirmative measures to ensure the correct bank information is entered when submitting a payment, to read payment instructions, and to confirm whether the tax was timely paid and, if not, to pay the taxes. Additionally, appellants failed to personally take any actions to ensure that their \$69,184 payment was timely processed as scheduled, such as by reviewing bank statements or reviewing account information with FTB. Finally, the law imposes on FTB no corresponding duty (whether fiduciary, agency, or otherwise) to take measures to ensure taxpayers timely meet their payment obligations. Therefore, we find that reliance on FTB to notify a taxpayer if the payment was unsuccessful is not reasonable cause for purposes of penalty abatement.

Appellants alternatively contend reasonable cause exists due to appellant-wife's medical condition. As a preliminary matter, appellants bear the burden of establishing reasonable cause. (*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].) The serious illness of the taxpayer or a member of his immediate family is a circumstance which the courts have acknowledged may constitute reasonable cause for penalty abatement. (*McMahan v.*

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<sup>6</sup> Appellants also contend that appellant-wife was ill during the timeframe to pay the estimated tax payment (January 15, 2017), and she required supportive care into March 2017. Here, we note that FTB did not assess an estimated tax penalty in this appeal. The due date for the taxes at issue was April 15, 2017.

<sup>7</sup> We note here that the confirmation submitted by appellants merely confirms the date and time when appellants submitted a request to FTB to debit the tax payment from their account, using the account information provided by appellants. The confirmation page does not confirm that a payment was successfully debited from their account or that the account information entered was valid.

*Commissioner* (2nd Cir. 1997) 114 F.3d 366, 369 [citing the Internal Revenue Manual].) In order for serious illness to constitute reasonable cause, the illness must continuously prevent the taxpayer from filing a tax return or paying the tax through the date the return was filed or the payment was actually made. (*Appeal of Michael and Diane Halaburka*, 85-SBE-025, Apr. 9, 1985; *Appeal of Kerry and Cheryl James*, 83-SBE-009, Jan. 3, 1983; *Appeal of Allen and Jacqueline Seaman*, 75-SBE-080, Dec. 16, 1975.) Thus, penalty abatement is inapplicable if the difficulties at issue simply caused the taxpayer to sacrifice the timeliness of one aspect of his or her affairs to pursue other aspects. (*Appeal of William and Joy Orr*, 68-SBE-010, Feb. 5, 1968). In summary, a taxpayer's selective inability to perform tax obligations, while participating in regular business activities, does not establish reasonable cause. (*Watts v. Commissioner* (1999) T.C. Memo. 1999-416. Aside from the contentions raised in their appeal letter, appellants failed to provide evidence to support the contention that illness prevented appellants from timely paying their liability during the period at issue. Thus, this unsupported contention is insufficient to carry the burden of proof. (*Appeal of Magidow*, 82-SBE-274, Nov. 17, 1982.)

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

The assessment of interest on a tax deficiency is mandatory. (R&TC, § 19101(a); *Appeal of Amy M. Yamachi*, 77-SBE-095, June 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, June 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. (R&TC, § 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.

Appellants request interest abatement on the basis of reasonable cause. There is no statutory authority to relieve interest based on reasonable cause. (R&TC, §§ 19104, 19112,

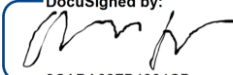
21012.) Appellants offer no other basis for relief of interest. Therefore, we have no basis to grant interest relief.

HOLDINGS

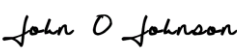
1. Appellants failed to demonstrate reasonable cause for the late payment of tax for the 2016 tax year.
2. Appellants failed to establish a basis for abatement of interest.

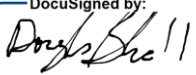
DISPOSITION

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

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Andrew J. Kwee  
Administrative Law Judge

We concur:

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John O. Johnson  
Administrative Law Judge

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Douglas Bramhall  
Administrative Law Judge