

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18010855
ROBERT HAMILTON)
) Date Issued: March 21, 2019
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OPINION

Representing the Parties:

For Appellant: Robert Hamilton

For Respondent: Gi Nam, Tax Counsel

For Office of Tax Appeals: Linda Frenklak, Tax Counsel IV

A. ROSAS, Administrative Law Judge: Under Revenue and Taxation Code section 19324,¹ appellant Robert Hamilton (Hamilton) appeals respondent Franchise Tax Board’s (FTB) action denying his \$771.24² claim for refund for the 2001 tax year. He waived his right to an oral hearing; therefore, we decide this matter based on the written record.

ISSUES

1. Has Hamilton shown reasonable cause for the late payment of his 2001 tax liability?
2. May the collection cost recovery fee (CCR Fee) be abated?
3. May the lien fee be abated?
4. May the installment agreement fee be abated?
5. Is Hamilton entitled to waiver of interest?

¹ Statutory references are to the California Revenue and Taxation Code, unless otherwise noted.

² This amount consists of a late-payment penalty (\$101.75), a collection cost recovery fee (\$170), a lien fee (\$23), an installment agreement fee (\$20), and interest (\$456.49). FTB also imposed an amnesty penalty (\$35.35), but it is not part of Hamilton’s refund claim.

FACTUAL FINDINGS

1. Hamilton timely filed his 2001 return and reported \$407 as additional tax due.
2. FTB accepted Hamilton's 2001 return as filed. He did not pay the reported tax due on or before April 15, 2002, and FTB imposed a \$101.75 late-payment penalty.
3. FTB issued a Past Due Notice dated November 9, 2004, and a Final Notice dated December 15, 2004; both informed Hamilton that if he did not pay the balance due, FTB may impose collection fees, contact third parties, file state tax liens, and take other collection actions.
4. In a 2010 Installment Agreement Acceptance letter, FTB approved Hamilton's request for an installment agreement for 2001. The letter informed him that he must pay \$25 by the 28th of each month beginning September 28, 2010, that FTB would impose a \$20 installment agreement fee, and that FTB may charge a CCR Fee if he cancelled the installment agreement.
5. FTB soon imposed the \$20 installment agreement fee.
6. Near the end of 2010, FTB issued a Temporary Deferral Notice. It stated that, in response to Hamilton's financial hardship information, FTB would delay collection action for six months but interest and penalties would continue to accrue.
7. FTB later started involuntary collection action. FTB received \$1,090.24 from Hamilton's employer between December 10, 2015, and April 7, 2016, which satisfied his 2001 balance due. On unspecified dates, FTB imposed a \$170 CCR Fee and a \$23 lien fee.
8. On November 3, 2016, FTB received Hamilton's undated letter, requesting a refund of the penalty, fees, and interest collected for his 2001 account. FTB treated his letter as a refund claim and denied it.
9. Hamilton filed this timely appeal.

DISCUSSION

Issue 1 - Has Hamilton shown reasonable cause for the late payment?

The law requires FTB to impose a late-payment penalty when a taxpayer fails to pay the amount of tax due by the due date, unless the taxpayer establishes that the late payment was due to reasonable cause and not willful neglect. (§ 19132.) The taxpayer bears the burden of proving both conditions existed. (*Appeal of Friedman*, 2018-OTA-077P, July 20, 2018.) The

taxpayer must show that the failure to timely pay the amount due occurred despite exercising ordinary business care and prudence. (*Ibid.*) The reason for not timely paying the tax due must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*)

Regarding financial difficulties, section 19132(a)(1) is substantially similar to Internal Revenue Code (IRC) section 6651(a)(2), the federal late-payment penalty statute. Both statutes use the same wording for the reasonable cause exception. Given this similarity, the federal authority interpreting IRC section 6651(a)(2) is “highly persuasive.” (See *Appeal of Kishner*, 99-SBE-007, Sept. 29, 1999.) Federal authorities have held that financial difficulties may constitute reasonable cause to abate the late-payment penalty.³ (*Van Camp & Bennion v. United States* (9th Cir. 2001) 251 F.3d 862, 868; *East Wind Industries, Inc. v. United States* (3d Cir. 1999) 196 F.3d 499, 507; *Fran Corp. v. United States* (2d Cir. 1999) 164 F.3d 814, 819.)

When Hamilton did not pay the tax on or before April 15, 2002 (the tax return’s original due date), FTB properly assessed the late-payment penalty. (§ 19132(a).) Hamilton has the burden of proving that he diligently attempted to conserve enough assets in a marketable form to satisfy his tax liability but still could not pay the tax, in whole or in part, when it became due. In 2010, FTB approved Hamilton’s request for an installment agreement and deferred collection action due to his financial hardship information. But to decide if he had reasonable cause for not timely paying his 2001 tax liability, we must look at his financial situation in early 2002, when his 2001 tax liability became due.

On appeal, Hamilton’s reason for his inability to pay his tax liability due is his claim of financial hardship. However, he has not introduced any evidence showing that on or before April 15, 2002, his financial difficulties prevented him from paying his 2001 balance due. Hamilton has not offered any detailed information about his financial circumstances on or before the payment deadline. Instead, Hamilton only argues—without support—that he lacked the means to pay his 2001 tax liability because he was homeless and unemployed.

³ Treasury Regulation section 301.6651-1(c)(1) states in pertinent part: “In determining whether the taxpayer was unable to pay the tax in spite of the exercise of ordinary business care and prudence in providing for payment of his tax liability, consideration will be given to 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.”

FTB indicated in its brief that it would consider additional information that supported Hamilton's position on appeal. Despite OTA offering Hamilton an opportunity to file a reply brief, he did not do so. Thus, Hamilton has not shown that his financial difficulties amounted to reasonable cause sufficient to abate the late-payment penalty.

Issue 2 – May the CCR Fee be abated?

If a taxpayer “fails to pay any amount of tax, penalty, addition to tax, interest, or other liability . . . a collection cost recovery fee shall be imposed if the [FTB] has mailed a notice to that person for payment that advises that continued failure to pay the amount due may result in a collection action, including the imposition of a collection cost recovery fee.” (§ 19254(a).) Once properly imposed, neither the reasonable cause exception nor any other provision in the statute allows for relief from the CCR Fee. (*Appeal of Myers*, 2001-SBE-001, May 31, 2001.)

FTB imposed the CCR Fee after providing Hamilton proper notice in the Past Due Notice (2004), the Final Notice (2004), and the Installment Agreement Acceptance letter (2010). No statutory authority allows granting him relief from this fee.

Issue 3 - May the lien fee be abated?

When a taxpayer fails to pay a tax liability by the due date, “the amount thereof, (including any interest, additional amount, addition to tax, or penalty, together with any costs that may accrue in addition thereto) shall thereupon be a perfected and enforceable state tax lien.” (§ 19221(a).) Government Code section 7174(d) authorizes FTB to collect the various fees associated with the recording and releasing of a state tax lien. Once FTB properly imposes the lien fee, the statute (§ 19221) does not permit abatement for any reason.

FTB issued Hamilton the December 24, 2010 Temporary Deferral Notice. Later, FTB properly imposed the lien fee after starting involuntary collection action. No statutory authority allows granting him relief from this fee.

Issue 4 - May the installment agreement fee be abated?

FTB may execute an installment agreement with a taxpayer that allows the taxpayer to make monthly installment payments. (§ 19008.) When FTB approves an installment agreement, the law authorizes FTB to charge an installment agreement fee for the costs incurred in the collecting the taxpayer's liability. (§§ 19590, 19591.) In its 2010 Installment Agreement

Acceptance letter, FTB informed Hamilton that it approved his request for an installment agreement and that it would add a \$20 installment agreement fee to his 2001 balance due. Thus, FTB properly imposed this fee, and no statutory authority allows granting him relief.

Issue 5 – Is Hamilton entitled to waiver of interest?

Tax is due on the original due date of the return without regard to any filing extension. (§ 18567.) If a taxpayer does not pay the tax by the original due date, or if FTB assesses additional tax, the law provides for charging interest on the balance due. (§ 19101.) Imposing interest is mandatory, and FTB cannot abate interest except where authorized by law. (*Appeal of Balch*, 2018-OTA-159P, Oct. 9, 2018, at p. 7.) Interest is not a penalty; it is compensation for the use of money. (*Ibid.*)

To obtain interest waiver or abatement, a taxpayer must qualify under sections 19104, 19112, or 21012. Based on the evidence and Hamilton’s arguments, sections 19104 and 21012 do not apply. Section 19112 provides that interest may be waived for any period for which FTB determines that an individual “demonstrates [an] inability to pay that interest solely because of extreme financial hardship caused by significant disability or other catastrophic circumstance.” This statutory language requires that Hamilton show an inability to pay the interest, which means that the interest must be unpaid. But he already paid the interest. In addition, he failed to establish an inability to pay the interest due “solely because of extreme financial hardship”

Thus, Hamilton did not show that he qualifies for an interest waiver.

HOLDINGS

1. Hamilton has not shown reasonable cause for the late payment of tax due.
2. The collection cost recovery fee may not be abated.
3. The lien fee may not be abated.
4. The installment agreement fee may not be abated.
5. Hamilton is not entitled to waiver of interest.

DISPOSITION

We sustain FTB's action in full.

DocuSigned by:
Alberto T. Rosas
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Alberto T. Rosas
Administrative Law Judge

We concur:

DocuSigned by:
Teresa A. Stanley
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Teresa A. Stanley
Administrative Law Judge

DocuSigned by:
Jeffrey I. Margolis
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Jeffrey I. Margolis
Administrative Law Judge