

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18011252
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DENNIS M. ROMERO AND CYNTHIA L.) Date Issued: July 15, 2019
ROMERO)
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OPINION

Representing the Parties:

For Appellants: Tax Appeals Assistance Program (TAAP)¹

For Respondent: Anne Mazur, Specialist

For the Office of Tax Appeals: Sarah Fassett, Tax Counsel

N. ROBINSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Dennis M. Romero and Cynthia L. Romero (appellants) appeal an action by the Franchise Tax Board (FTB) denying appellants’ claim for refund of \$481.01 for the 2015 tax year.

Appellants waived their right to an oral hearing; therefore, the matter is being decided based on the written record.

ISSUES

1. Whether appellants are liable for the late payment penalty.
2. Whether appellants are entitled to interest abatement.

FACTUAL FINDINGS

1. Appellants timely filed a 2015 joint tax return on October 12, 2016. The return indicated a tax due of \$5,042. Appellants paid their full tax liability on October 15, 2016.
2. FTB processed the return and accepted it as filed but imposed a late payment penalty of \$403.36, plus interest of \$77.65. Appellants paid \$481.01 on December 8, 2016.

¹ Appellants filed their own appeal letter. Subsequent representation was provided by TAAP.

3. On December 12, 2016, FTB received appellants' Reasonable Cause – Individual and Fiduciary Claim for Refund (Form 2917), requesting a refund of the late payment penalty and interest paid.
4. By notice dated January 3, 2017, FTB denied appellants' claim for refund.
5. Appellants timely appealed FTB's denial of their claim for refund.

DISCUSSION

Issue 1: Whether appellants are liable for the late payment penalty.

R&TC 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 original due date of the return.² The late payment penalty has two parts. The first part is 5 percent of the unpaid tax. (R&TC, § 19132(a)(2)(A).) The second part is a penalty of 0.5 percent per month, or portion thereof, calculated on the outstanding balance. (R&TC, § 19132(a)(2)(B).) The aggregate amount of the penalty may not exceed 25 percent of the total unpaid tax. (R&TC, § 19132(a)(3).) Appellants failed to make payment of the amount shown as due on their return by the April 15, 2016 due date so the penalty was properly imposed.

The late payment penalty may be abated if the taxpayer shows that the failure to make a timely payment of tax was due to reasonable cause and was not due to willful neglect. (R&TC, § 19132 (a)(1).)³ Reasonable cause exists if it is shown that the taxpayer acted as an ordinarily intelligent and prudent businessperson would have acted under similar circumstances. (*Appeal of Tons* (79-SBE-027) 1979 WL 4068.) The burden of proof is on the taxpayer to show reasonable cause. (*Appeal of Sleight* (83-SBE-244) 1983 WL 15615; *Appeal of Scott* (82-SBE-249) 1982 WL 11906.)

Reasonable cause does not include a taxpayer's discovery of reportable income after the original due date (*Appeal of Elixir Industries* (83-SBE-248) 1983 WL 15619); a taxpayer's difficulty in obtaining necessary information (*Appeal of Campbell* (85-SBE-112) 1985 WL 4076); a taxpayer's difficulty in determining or estimating income with exactitude (*Appeal of*

² An individual taxpayer must pay his/her tax liability on the due date of the return, without regard to extensions. FTB automatically grants a six-month extension to file a tax return, but timely payment is due on the original due date for filing the tax return, which, for individual taxpayers, is generally on the 15th day of April of the year following the close of the calendar year. (See R&TC, §§ 19001 and 18566.)

³ FTB did not raise willful neglect as an issue in this appeal, so we address only the question of reasonable cause.

Sleight, supra, 1983 WL 15615; *Appeal of Avco Financial Services, Inc.* (79-SBE-084) 1979 WL 4125); or, the failure of the taxpayer's accountant to properly account for income in a timely manner (*Appeal of Scott, supra*, 1982 WL 11906).

Appellants claim their late payment was attributable to reasonable cause and not due to willful neglect. Appellants advance several reasons for their late payment: (1) they have a history of timely filing and payment with FTB; (2) they experienced an unanticipated one-time increase in their 2015 income from an inheritance; (3) they assumed, just as in past years, their estimated payments and withholding would satisfy their tax liability; (4) their certified public accountant (CPA) did not review their tax documents for return preparation until October of 2016; and (5) they ultimately made a full payment of tax, interest and late payment penalty.

While appellants' filing and payment history is commendable, it does not rise to the level of reasonable cause. We acknowledge that the Internal Revenue Service has enacted a program called First Time Abate, under which it abates federal penalties for late payment and late filing if a taxpayer has timely filed returns and paid taxes due for the previous three years. But, even if a taxpayer falls within the parameters for First Time Abate, there is no corollary program in California law. Neither the California Legislature nor FTB have adopted a comparable penalty abatement program, so appellants' history of timely filing and paying California taxes cannot be used as a basis for abatement of appellants' late payment penalty and thus cannot be considered reasonable cause.

Appellants' other contentions are equally devoid of reasonable cause. Appellants have not shown that they made any effort to estimate their 2015 income before the original filing and payment due date. They simply assumed that the estimated payments and withholding they had made would cover their tax liability until their CPA discovered in October of 2016 that additional tax was due. Regardless of whether appellants possessed timely information to accurately know their precise income, difficulty in obtaining information is not reasonable cause to pay tax late.⁴ (*Appeal of Campbell, supra*, 1985 WL 4076.)

⁴ Appellants had access to some information to assist them in making estimates of tax due before April 2016. Appellants received an annuity payment of \$78,518 in 2015 and attached a Form 1099R to their 2015 return showing that a taxable distribution occurred. The Form 1099R showed federal withholding but not state withholding. Appellant presumably would have received this Form 1099R on or before February 1, 2016, the deadline established for payers to furnish this information to taxpayers.

Appellants failed to meet their burden of proving that the failure to make a timely payment was the result of reasonable cause, and that the late payment occurred despite the exercise of ordinary business care and prudence.

Issue 2: Whether appellants are entitled to interest abatement.

In appellants' claim for refund, appellants requested abatement of the late payment penalty and interest. The circumstances justifying abatement of interest are very narrow.

If any amount of tax is not paid by the due date, interest is required to be imposed from the due date until the date the taxes are paid. (R&TC, § 19101(a).) Interest also accrues on any unpaid penalty amount if the penalty is not paid within 15 days of any notice and demand for payment. (R&TC, § 19101(c)(2)(A).) Imposition of interest is mandatory and there is no reasonable cause exception to the imposition of interest. (*Appeal of Goodwin* (97-SBE- 003) 1997 WL 258474; *Appeal of Yamachi* (77-SBE-095) 1977 WL 3905.)

Although there are circumstances where interest may be abated, appellants' request for interest abatement does not specify any legal basis for the Office of Tax Appeals to grant this proposed remedy, and we are not aware of any that would apply to the facts presented here. Thus, appellants are not entitled to interest abatement.

HOLDINGS

1. Appellants are liable for the late payment penalty imposed for tax year 2015.
2. Appellants are not entitled to interest abatement.

DISPOSITION

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

DocuSigned by:
Neil Robinson
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Neil Robinson
Administrative Law Judge

We concur:

DocuSigned by:
Tommy Leung
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Tommy Leung
Administrative Law Judge

DocuSigned by:
Daniel K. Cho
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Daniel Cho
Administrative Law Judge, on behalf of
Douglas Bramhall
Administrative Law Judge