

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:)	OTA Case No. 18011288
)	Date Issued: March 28, 2019
WALTER PARNG)	
)	
)	

OPINION

Representing the Parties:

For Appellant:	Walter Parng Constance Parng
For Respondent:	Eric A. Yadao, Tax Counsel III Ciro Immordino, Tax Counsel IV

N. DANG, Administrative Law Judge: Pursuant to Revenue and Taxation Code section 19324,¹ Walter Parng (appellant) appeals an action by the Franchise Tax Board (FTB or respondent) denying his claim for refund for the 2014 tax year of \$42,118.59.²

Office of Tax Appeals (OTA) Administrative Law Judges Nguyen Dang, Kenneth Gast, and Douglas Bramhall, held an oral hearing for this matter in Los Angeles, California, on February 21, 2019. At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

ISSUES

1. Whether the section 19131 (late-filing) penalty amount was properly computed.
2. Whether appellant has established that the late-filing penalty should be abated.
3. Whether appellant has established that interest should be relieved.

¹ Unless otherwise indicated, all undesignated statutory “section” or “§” references are to sections of the Revenue and Taxation Code.

² This amount includes a \$1,131.68 underpayment of estimated tax penalty. Via email dated March 20, 2017, appellant confirmed that he does not dispute this penalty.

FACTUAL FINDINGS

1. On April 23, 2015, appellant made a late payment of \$166,541 for the 2014 tax year.
2. On March 16, 2016, appellant late filed his 2014 California Resident Income Tax Return, reporting a total tax liability of \$231,329, California income tax withheld of \$71,834, and estimated tax and other payments of \$166,541.³
3. On March 23, 2016, respondent issued to appellant a Notice of Tax Return Change, imposing a late-filing penalty of \$39,488.50, an underpayment of estimated tax penalty of \$1,131.68, and additional interest of \$1,038.52.
4. Via letter dated April 1, 2016, appellant requested abatement of the late-filing penalty and interest.
5. On August 31, 2016, appellant paid the additional penalties and interest in full.
6. Thereafter, respondent treated appellant's April 1, 2016 request for penalty and interest abatement as a timely claim for refund, and on October 21, 2016, issued to appellant a Notice of Action denying his claim.
7. At the oral hearing, appellant further argued that the late-filing penalty was improperly computed.⁴

DISCUSSION

Issue 1 – Whether the late-filing penalty amount was properly computed.

Generally, returns filed on a calendar year basis are required to be filed on or before April 15th. (§ 18566.) California imposes a penalty for the failure to file a return on or before the due date, unless it is shown that the late filing was due to reasonable cause and not due to willful neglect. (§ 19131.) The penalty is computed at five percent of the amount of tax required to be shown on the return for every month that the return is late (determined without regard to any extension of time for filing), up to a maximum of 25 percent. (§ 19131(a).) For purposes of calculating this penalty, the amount of tax required to be shown on the return is reduced by any *timely tax payments and any credits* against the tax which may be claimed on the return. (§ 19131(c).)

³ Appellant's timely payments for the 2014 tax year totaled \$73,375. This included an overpayment of \$1,541 for his 2013 tax year, which was credited to his 2014 tax year liability.

⁴ Appellant however, does not dispute that his return was late-filed.

The \$39,488.50 penalty at issue was computed by applying a 25-percent penalty rate to appellant's \$231,329 reported total tax liability, less his \$73,375 *timely* tax payments. FTB determined that the maximum penalty rate of 25-percent was applicable here, because appellant's 2014 return was late-filed over five months past the April 15, 2015 due date and not within the six-month automatic extension period.

Appellant disputes the computation of the penalty amount, asserting that the term "any credits" as contained within section 19131(c) includes untimely payments which are made before the filing of the return. Thus, appellant contends that FTB improperly computed the penalty amount because it failed to consider his untimely April 23, 2015 payment. Appellant also contends that the penalty amount is unduly harsh, given his good filing history and the fact that his 2014 tax liability was paid only eight days late.

Appellant's contention that his untimely April 23, 2015 payment should be considered a "credit" for purposes of section 19131(c), is unpersuasive. We recognize that while the Personal Income Tax Law contains many different types of credits, it does not expressly provide any general definition of what a "credit" is. However, payments and credits are implicitly distinguished by the fact that generally, credits are amounts which, upon the meeting of certain statutory requirements, are subtracted from the tax liability in computing the tax or refund due, and payments are amounts remitted by the taxpayer which are applied to the tax liability due for a particular tax year. Appellant's untimely payment was not a credit in the former sense, because it did not reduce the amount of tax he was required to pay; instead, it merely paid the tax liability stated on the return. Accordingly, we must reject appellant's contention.

Further, we recognize that while application of the penalty may appear harsh in this case, appellant's delinquent filing is not excused by the fact that he paid the liability only eight days late, or by his alleged good filing history. The law expressly provides that where both the late-filing and late-payment penalties might apply, only the greater of the two penalties will be imposed. (§ 19132(b).) And in appellant's situation, where the filing of the return was significantly more delinquent than the payment of tax, the much larger late-filing penalty was correctly imposed.

For all the above reasons, we find that the penalty amount was properly computed.

Issue 2 – Whether appellant has established that the late-filing penalty should be abated.

Appellant argues that the late-filing penalty should be abated based on reasonable cause and the absence of willful neglect because he did as any reasonable businessperson would do and relied upon a tax professional to file his return. Appellant also contends that upon discovering that his return was not filed, he immediately took steps to ensure that it was promptly filed. Finally, appellant contends that because the Personal Income Tax Law is generally patterned after the Internal Revenue Code, the penalty should be waived pursuant to the Internal Revenue Service’s (IRS’s) First-Time Penalty Abatement (FTA) policy.⁵

The late-filing penalty shall not apply if a taxpayer establishes that the failure to file a return within the prescribed deadline was due to reasonable cause and not willful neglect. (§ 19131(a).) The standard of reasonable cause requires the taxpayer to establish that the failure to timely file occurred despite the exercise of ordinary business care and prudence. (*United States v. Boyle* (1985) 469 U.S. 241, 246.)⁶ On the other hand, willful neglect means a conscious, intentional failure or reckless indifference. (*Id.* at p. 245.)

Based on the record before us, which is absent of any evidence or allegations that appellants acted intentionally or recklessly, we conclude that there is no willful neglect.

Regarding reasonable cause, we note that every taxpayer has a personal, non-delegable duty to timely file a tax return, and thus, a taxpayer’s reliance on an agent in this respect does not constitute reasonable cause for a late-filing. (*United States v. Boyle, supra*, 469 U.S. at p. 252.) Therefore, given that appellant had a non-delegable duty to ensure that his return was timely filed, it was incumbent upon appellant to *personally* verify that his return was filed prior to the due date for the return. For example, this might entail obtaining an electronic postmark or certificate of mailing indicating that appellant’s return had been sent to FTB, or confirming receipt of his return through FTB’s website or by contacting FTB directly. Appellant has not shown that he took any of these actions, or any similar action to ensure that his return was timely filed. And appellant’s alleged actions *after* the due date of the return, are not relevant to

⁵ The FTA policy allows the IRS to administratively waive the late-filing penalty where the taxpayer has a clean compliance history for the preceding three years.

⁶ Because the relevant language of section 19131 pertaining to the reasonable cause exception is patterned after Internal Revenue Code section 6651, the federal courts’ interpretation of the “reasonable cause” standard is persuasive authority in determining the proper construction of these California statutes. (*Andrews v. Franchise Tax Bd.* (1969) 275 Cal.App.2d 653, 658; *Rihn v. Franchise Tax Bd.* (1955) 131 Cal.App.2d 356, 360.)

establishing that he acted with due care in attempting to timely file. Finally, administrative waiver under the FTA policy is inapplicable here, and California law does not provide for any first-time penalty abatement.⁷

Based on the foregoing, appellant has not established that abatement of the penalty is warranted.

Issue 3 – Whether appellant has established that interest should be relieved.

Appellant does not dispute the imposition or calculation of interest, but rather, contends that it should be abated for the same reasons described above in Issue 2.

Generally, FTB may abate or waive interest only under limited circumstances, such as when the accrual of interest is attributable in whole or in part to an unreasonable error or delay committed by an officer or employee of the FTB in the performance of a ministerial or managerial act and certain other conditions are met under section 19104, or where the taxpayer demonstrates an inability to pay interest due solely to an extreme financial hardship caused by significant disability or other catastrophic circumstance. (§ 19112.)

Appellant does not allege any of the above circumstances warranting abatement or waiver of interest. Regarding appellant’s reasonable cause arguments, we note that there is no reasonable cause exception to the imposition of interest. (*Appeal of John M. Shubert*, 79-SBE-161, Sept. 25, 1979.)⁸ Accordingly, interest relief is not warranted.

HOLDINGS

1. The late-filing penalty amount was properly computed.
2. Appellant has not established that abatement of the late-filing penalty is warranted.
3. Appellant has not established that interest should be relieved.

⁷ The California Legislature has previously considered and declined to adopt bills that would allow a first-time abatement for taxpayers with a history of filing and payment compliance. (See, for example, Assembly Bill No. 1777 (2013-2014 Reg. Sess.))

⁸ Precedential decisions of the Board of Equalization, designated by “SBE” in the citation, are available on its website at: <<http://www.boe.ca.gov/legal/legalopcont.htm>>.

DISPOSITION

Respondent's action is sustained.

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Nguyen Dang
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Nguyen Dang
Administrative Law Judge

We concur:

DocuSigned by:
Douglas Bramhall
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Douglas Bramhall
Administrative Law Judge

DocuSigned by:
Kenneth Gast
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Kenneth Gast
Administrative Law Judge