

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
DAVID G. MARSCHALL AND
ELIZABETH V. MARSCHALL

) OTA Case No. 18042963
)
) Date Issued: September 3, 2019
)
)
)

OPINION

Representing the Parties:

For Appellants: David G. Marschall and Elizabeth V. Marschall

For Respondent: Samantha Q. Nguyen, Tax Counsel

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

N. ROBINSON, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, David G. Marschall and Elizabeth V. Marschall (appellants) appeal an action by the Franchise Tax Board (FTB) denying their claim for refund of \$690¹ for the 2012 tax year.

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

ISSUES

1. Whether appellants have shown that the late-filing of their 2012 return was due to reasonable cause and not due to willful neglect such that the late-filing penalty imposed for that year may be abated.
2. Whether appellants are entitled to an abatement of the collection cost recovery fee.
3. Whether interest may be abated.
4. Whether the late-filing penalty, collection cost fee, and interest should be abated based on the doctrine of equitable estoppel.

¹ As discussed below, the refund claim amount of \$690 consists of a revised late-filing penalty of \$496 and a collection cost recovery fee of \$194. Appellants’ claim for refund also includes interest in addition to the \$690 amount. The total interest paid was \$204.03 according to appellants’ opening brief.

FACTUAL FINDINGS

1. Appellants did not file a timely 2012 California income tax return.
2. The FTB obtained information that appellant-husband received income from Cypress Ventures LLC in an amount sufficient to require the filing of a 2012 return.
3. The FTB issued appellant-husband a Request for Tax Return (Request) dated June 17, 2014, requesting him to respond by July 23, 2014, by filing a 2012 return or explaining why a 2012 return was not required.
4. After appellant-husband failed to respond to the Request by the due date, the FTB issued to appellant-husband a Notice of Proposed Assessment (NPA) dated August 25, 2014. The NPA proposed a tax liability of \$5,672.82 based on an estimated California adjusted gross income of \$86,367.00 before deductions, a taxable income of \$82,526.00, and proposed a late-filing penalty of \$1,418.20, plus interest.
5. Appellant-husband did not protest the NPA and the proposed assessment became final. The FTB issued appellant-husband an Income Tax Due Notice dated January 9, 2015, for the 2012 balance due. After appellant-husband failed to pay the 2012 balance due, the FTB issued him a Final Notice Before Levy and Lien dated February 13, 2015, which states that the FTB would take collection action, including the imposition of a collection fee, if appellant-husband did not remit payment of the balance due within 30 days.
6. On March 15, 2015, appellants filed a joint 2012 California Nonresident or Part-Year Resident Income Tax Return, reporting federal adjusted gross income of \$1,005,628, total taxable income of \$848,079, and total tax of \$8,030. After subtracting California income tax withholdings of \$6,046, appellants self-assessed tax due of \$1,984. Appellants remitted payment of \$1,984 when they filed their 2012 return.
7. The FTB accepted appellants' 2012 return as filed. The FTB reduced the late-filing penalty to \$496 and imposed a collection cost recovery fee of \$194. Appellants satisfied the 2012 balance due, including total interest charged of \$204.03, with overpayment transfers of \$33.11 and \$584.74 from appellants' 2015 and 2016 accounts, respectively, and a bill payment of \$201.05 on October 3, 2017.
8. Appellants filed a claim for refund dated May 13, 2017, for the 2012 tax year, requesting a waiver of the penalties and interest. Appellants contended that they were not aware of their tax obligations resulting from an investment in a partnership. In addition, appellants

asserted that a representative at the FTB informed appellant-husband in March 2015 that if he paid the outstanding tax liability, she would waive the fees and penalties. In a letter dated December 15, 2017, the FTB denied appellants' claim for refund for the 2012 tax year in the amount of \$690.²

9. Appellant timely filed this appeal.

DISCUSSION

Issue 1 – Whether appellants have shown that the late-filing of their 2012 return was due to reasonable cause and not due to willful neglect such that the late-filing penalty imposed for that year may be abated.

R&TC section 19131 imposes a late-filing penalty when a taxpayer fails to file a return on or before the due date. The late-filing penalty is computed at 5 percent of the amount of tax due, after allowing for timely payments, for every month that the return is late, up to a maximum of 25 percent. (R&TC, § 19131, subd. (a).)

The late-filing penalty, however, may be abated if the taxpayer establishes that the failure to file a timely return was due to reasonable cause and not due to willful neglect. (R&TC, § 19131, subd. (a).) The taxpayer bears the burden of proving both conditions have been met. (*Appeal of Tons* (79-SBE-27) 1979 WL 4068.) To establish reasonable cause for the failure to timely file a return, the taxpayer must show that the failure to timely file a return occurred despite the exercise of ordinary business care and prudence or that such cause existed as would prompt an ordinarily intelligent and prudent businessperson to have so acted under similar circumstances. (*Ibid.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

Each taxpayer has a personal, non-delegable obligation to file his or her tax return by the due date. (*Appeal of Boehme* (85-SBE-134) 1979 WL 4224.) Ignorance of a filing requirement or a misunderstanding of the law generally does not excuse a late-filing. (*Appeal of Diebold, Inc.* (83-SBE-002) 1983 WL 15389.)

It is undisputed that appellants had a 2012 filing requirement and they failed to timely file their 2012 return on or before the April 15, 2013 due date. After appellants filed their 2012

² Appellants' claim for refund did not specify an amount sought. The FTB's denial letter specified an amount of \$690, which represents the \$496 late-filing penalty and the \$194 collection cost recovery fee, but does not include interest.

return, reporting a tax due of \$1,984, the FTB revised the late-filing penalty to \$496, which is 25 percent of \$1,984. It does not appear that appellants willfully neglected to file a timely 2012 return. The issue remains whether the late-filing of appellants' 2012 return was due to reasonable cause. Appellants essentially argue that they are entitled to an abatement of the late-filing penalty because they were not aware of their California tax obligations due to an investment in a partnership. They do not describe what efforts, if any, they took to ensure compliance with their tax obligations. Taxpayers bear the responsibility of having knowledge of the tax laws and ignorance of the law does not excuse noncompliance with the legal duty of filing a timely return and does not constitute reasonable cause for abatement of the late-filing penalty. Appellants have therefore failed to meet their burden of proving that their failure to timely file a 2012 return was due to reasonable cause and not due to willful neglect.

Issue 2 – Whether appellants are entitled to an abatement of the collection cost recovery fee.

R&TC section 19254, subdivision (a), provides that, if a taxpayer fails to pay a liability for taxes, penalties, interest, or other liability, a collection cost recovery fee shall be imposed if the FTB has mailed a notice for payment that advises that the continued failure to pay the amount due may result in a collection action, including the imposition of a collection cost recovery fee. There is no reasonable cause exception or any other provision in the statute allowing for relief from the imposition of the collection cost recovery fee. (*Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.)

The FTB properly imposed a collection cost recovery fee under R&TC section 19254 because appellants failed to pay their 2012 balance due by the deadline set forth in the February 13, 2015 Final Notice Before Levy and Lien, which advised that the FTB would take collection action, including the imposition of a collection fee, if appellant-husband did not remit payment of the balance due within 30 days, i.e., March 13, 2015. Appellants did not pay the assessed amount due by March 13, 2015. Instead, appellants filed their 2012 return on March 15, 2015, and remitted payment of their reported tax liability of \$1,984 with their return. Once a collection cost recovery fee is properly imposed, there is no statutory provision that authorizes the abatement of the collection cost recovery fee for any reason, including reasonable cause. Appellants are therefore not entitled to an abatement of the collection cost recovery fee.

Issue 3 – Whether interest may be abated.

The burden is on the taxpayer to prove the FTB erred in imposing interest. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Myers, supra.*) Interest abatement provisions are not intended to be used routinely to avoid the payment of interest and abatement should be ordered only “where failure to abate interest would be widely perceived as grossly unfair.” (*Lee v. Commissioner* (1999) 113 T.C. 145, 149.)

Interest shall be imposed on a tax liability and a late-filing penalty pursuant to R&TC section 19101. The imposition of interest is mandatory. (*Appeal of Yamachi* (77-SBE-095) 1977 WL 3558; *Appeal of Jaegle* (76-SBE-070) 1976 WL 4086). Interest is not a penalty but rather compensation for a taxpayer’s use of money after it should have been paid to the state. (*Appeal of Jaegle, supra.*) There is no reasonable cause exception to the imposition of interest. (*Ibid.*) An abatement of interest should be ordered only “ ‘where failure to abate interest would be widely perceived as grossly unfair.’ ” (*Lee v. Commissioner, supra*, 113 T.C. at p. 149.)

The FTB may abate interest on a deficiency “to the extent that interest is attributable in whole or in part to any unreasonable error or delay by an officer or employee of the [FTB] (acting in his or her official capacity) in performing a ministerial or managerial act.” (R&TC, § 19104, subd. (a)(1).) The Office of Tax Appeals (OTA) has “jurisdiction over the appeal to determine whether the [FTB’s] failure to abate interest under [R&TC section 19104] was an abuse of discretion.” (R&TC, § 19104, subd. (b)(2)(B).)³ Appellants allege that the interest at issue is attributable in whole or in part to unreasonable error or delay by an officer or employee of the FTB when performing a ministerial or managerial act.

³To give the State Board of Equalization (BOE) jurisdiction over interest abatement appeals, the California Legislature expressly added such language to R&TC section 19104. Specifically, R&TC section 19104, subdivision (b)(2)(B), provides: “The [BOE] shall have jurisdiction over the appeal to determine whether the [FTB’s] failure to abate interest under this section was an abuse of discretion, and may order an abatement.” It is only on this limited basis that the BOE was given the jurisdiction to review interest assessed. R&TC section 20, subdivision (b), provides, “Unless the context requires otherwise, as used in this code or any other code, ‘board’ with respect to an appeal, means the [OTA].” Accordingly, the OTA has statutory jurisdiction to review the FTB’s interest abatement determinations pursuant to R&TC section 19104 under an abuse of discretion standard.

Unlike R&TC section 19104, neither R&TC section 19112 nor R&TC section 21012 expressly provides the OTA with jurisdiction to review the FTB’s determination with respect to the abatement of interest. Regardless, the evidence does not show that appellants suffered extreme financial hardship, as required by R&TC section 19112. Nor does the record show that the late filing of the return of tax was due to reasonable reliance on written advice from the FTB, as required by R&TC section 21012. While appellants assert that an FTB representative assured them that penalties and fees (or interest) would be waived if they promptly filed their return and paid the outstanding liability, this alleged advice was not reduced to writing and did not occur until years after the return was due, and therefore could not have contributed to the late filing of the return.

In appellants' July 19, 2018 reply brief, appellants allege that appellant-husband was told by an FTB customer service representative that if the outstanding liabilities were paid immediately, interest and penalties would be waived. Months after this conversation and the payment of the underlying tax, however, appellants continued to receive notices that interest, penalties and a collection cost recovery fee were unpaid. Appellants attempted to correspond with the FTB while interest accrued, but these attempts were abandoned after the FTB employees allegedly failed to return calls as promised or telephone wait times were unreasonably long. Similar contentions were made in appellants' November 5, 2018 supplemental brief.

Although appellants attempt to provide more specific information in their supplemental brief by stating that the conversation with the FTB about the waiver of interest and penalties occurred in March 2015, this information does not pinpoint a date on which this conversation occurred. In its brief, the FTB states that it has no documentation of the March 2015 conversation, so there is not any corroborating evidence in the record that the March 2015 conversation took place. Appellants fail to state any other dates when they attempted to contact the FTB. Even if appellants' representations are accurate, they do not show that the FTB abused its discretion by failing to abate interest that was legally charged. Based on our review of the record, the FTB did not abuse its discretion in denying appellants' interest abatement request.

Issue 4 – Whether the late-filing penalty, collection cost recovery fee, and interest should be abated based on the doctrine of equitable estoppel.

Appellants contend that the late-filing penalty, collection cost recovery fee, and interest should be abated because they relied to their detriment on a representative of the FTB who informed appellant-husband in March 2015 that she would waive the penalties and interest if appellants filed a 2012 return and remitted the balance due immediately.

Equitable estoppel may be raised as a defense against the government only in rare and unusual circumstances and when its application is necessary to prevent manifest injustice. (See *Appeal of Smith* (91-SBE-005) 1991 WL 280345.) The four elements of equitable estoppel are: (1) the government agency must be shown to have been aware of the actual facts; (2) the government agency must be shown to have made an incorrect or inaccurate representation to the relying party and intended that its incorrect or inaccurate representation would be acted upon by the relying party or have acted in such a way that the relying party had a right to believe that the representation was so intended; (3) the relying party must be shown to have been ignorant of the

actual facts; and (4) the relying party must be shown to have detrimentally relied upon the representations or conduct of the government agency. (*Appeal of Western Colorprint* (78-SBE-071) 1978 WL 3544.) Where one of these elements is missing, there can be no estoppel. (*Hersch v. Citizens Savings & Loan Assn.* (1983) 146 Cal.App.3d 1002, 1011.) The burden of proving estoppel is on the party asserting estoppel. (*Appeal of Campbell* (79-SBE-035) 1979 WL 4076.)

Detrimental reliance is present only where the FTB's action causes the taxpayer to take action that leads to an increased tax liability. (*Appeal of Lopert* (82-SBE-011) 1982 WL 11689.) If the taxpayer would have the same tax liability in spite of the alleged action of the FTB, then equitable estoppel does not apply.

Here, the late-filing penalty, the collection cost recovery fee, and the accrued interest were caused by the appropriate application of tax law and not by appellants' reliance on any erroneous advice or promise on the part of a representative of the FTB. Appellants have not shown any detrimental reliance because their 2012 balance due was not increased by their decision to pay their 2012 tax liability in March 2015. Appellants simply contend that their decision to file their 2012 return and pay their tax liability was prompted by an FTB representative's purported oral promise to waive the late-filing penalty, collection cost recovery fee, and interest. There is no manifest injustice when taxpayers eventually file their delinquent return and pay their delinquent tax liability. Furthermore, appellants' action of remitting the return and paying the outstanding tax liability promptly at the alleged advice of the FTB's representative did not result in the increase of the amount of the late-filing penalty, collection cost recovery fee, or interest (and in fact, the payment reduced the amount of interest accruing). Based on the foregoing, we conclude that the doctrine of equitable estoppel is not applicable in this matter. Purported oral advice from the FTB's representative that a taxpayer promptly file a return and pay amounts that are overdue does not constitute grounds under which penalties, fees, or interest may be abated on appeal.

HOLDINGS

1. Appellants have not shown that the late-filing of their 2012 return was due to reasonable cause and not due to willful neglect.
2. Appellants are not entitled to an abatement of the collection cost recovery fee.
3. Appellants have not shown that they qualify for interest abatement.
4. The late-filing penalty, collection cost fee, and interest should not be abated based on the doctrine of equitable estoppel.

DISPOSITION

The FTB's action denying appellants' claim for refund is sustained in full.

DocuSigned by:
Neil Robinson
8A2E23444DB4A6...
Neil Robinson
Administrative Law Judge

We concur:

DocuSigned by:
John O Johnson
873D9797B9E64E1...
John O. Johnson
Administrative Law Judge

DocuSigned by:
Kenneth Gast
FD75A3138CB34C2...
Kenneth Gast
Administrative Law Judge