

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

In the Matter of the Appeal of: ) OTA Case No. 18083629  
**KELLI ANNE HORNACHEK** )  
 ) Date Issued: October 28, 2019  
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**OPINION**

Representing the Parties:

For Appellant: Kelli Anne Hornachek

For Respondent: Nancy E. Parker, Tax Counsel IV

J. LAMBERT, Administrative Law Judge: Pursuant to Revenue and Taxation Code (RT&C) section 19324, Kelli Anne Hornachek (appellant) appeals an action by respondent Franchise Tax Board (FTB) in denying a claim for refund of a late payment penalty of \$2,165.00<sup>1</sup> and interest of \$428.71 for taxable year 2016.

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

**ISSUES**

1. Whether appellant has shown reasonable cause for the late payment of tax.
2. Whether appellant has shown that interest may be abated.
3. Whether appellant has shown that FTB should be estopped from denying the claim for refund.

**FACTUAL FINDINGS**

1. Appellant timely filed her 2016 California income tax return on August 28, 2017, reporting a total tax liability of \$44,500. However, appellant did not pay all of the tax

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<sup>1</sup> Appellant’s claim for refund requested a refund of \$2,165. However, the amount of the late payment penalty is \$2,312.66. Because we are sustaining FTB in denying the claim for refund, we do not address this discrepancy further.

owed by April 15, 2017. A tax balance of \$30,835 was due (after withholdings) on that date, which Appellant satisfied by making a payment of \$33,000 on August 19, 2017 (\$2,165 of which was applied as an estimated tax payment towards appellant's 2017 tax year).

2. FTB imposed a late payment penalty of \$2,312.66, plus interest of \$428.71.
3. Appellant filed a claim for refund, which FTB denied. This timely appeal followed.

### DISCUSSION

#### Issue 1 - Whether appellant has shown reasonable cause for the late payment of tax.

R&TC section 19001 provides that the personal income tax “shall be paid at the time and place fixed for filing the return (determined without regard to any extension of time for filing the return).” 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 due date of the return. The late payment penalty may be abated if a taxpayer shows that the failure to make a timely payment of tax and to timely file was due to reasonable cause. (R&TC, § 19132(a).) To establish reasonable cause, a taxpayer must show that his or her failure to timely pay tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Curry* (86-SBE-048) 1986 WL 22783.)

Appellant argues that she has reasonable cause for her failure to timely pay tax because she was unaware that she was receiving payment from a “Death Benefit Agreement.” Appellant contends that she did not know whether payments related to the death benefit and a Schedule K-1 for a trust would be taxable. Appellant asserts that she met with a tax preparer, H&R Block, on April 1, 2017, but the tax preparer could not discern whether the payment was taxable. As a result, appellant contends, the tax preparer refused to file her tax return and told her to pick up her paperwork on April 12, 2017. Appellant provides emails between herself and her tax preparer in support. Appellant asserts that the tax law surrounding the death benefit has changed significantly since the original agreement was written two decades ago. Appellant also asserts that she was out of the country from mid-April through May of 2017. Appellant states that upon her return in June, she hired another tax preparer, a CPA, and that they both called FTB, and were advised that abatement of the penalties and interest would be approved and that appellant should not make an overpayment. However, appellant provides no documentary proof or other

evidence to corroborate her recollection of this conversation. Appellant asserts that she has a good filing history and that she paid the tax as soon as possible, in August of 2017.

Appellant does not provide any evidence of actions that she personally took to ensure that timely payment was made by April 15, 2017, other than working with a tax preparer two weeks before the deadline. Taxpayers do not exercise ordinary business care and prudence when they fail to acquaint themselves with the requirements of California tax law. (*Appeal of Diebold, Inc.* (83-SBE-002) 1983 WL 15389.) As to appellant's contentions that the death benefit tax law is complex and that her tax preparer did not return her paperwork until just before the deadline, complexity and problems in accumulating the necessary information and/or documents to complete a return does not constitute reasonable cause for the failure to pay any tax due. (*Appeal of Campbell* (85-SBE-112) 1985 WL 15882.) Appellant did not meet with a tax preparer until April 1, 2017, so it is not unreasonable that a complex tax issue may not be resolved after only two weeks. The emails provided indicate that appellant was providing tax information to H&R Block even as of April 12, 2017. As such, appellant did not exercise ordinary business care and prudence by waiting until only two weeks before the deadline to present a complicated tax issue to her tax preparer, H&R Block.

Appellant asserts that it was the fault of her tax preparer in refusing to file her return after working on it for 11 days and presents email exchanges that took place in April 2017 to show that she exercised ordinary business care and prudence by regularly communicating with her tax preparer. However, appellant's reliance on a professional to prepare her return does not abrogate her legal obligation to timely pay her tax liability. Taxpayers have a personal and nondelegable duty to make required tax payments. (*Appeal of Boehme* (85-SBE-134) 1979 WL 4224; *U.S. v. Boyle* (1985) 469 U.S. 241, 247 & 251 (*Boyle*); *Miller v. Commissioner*, T.C. Memo. 2016-73.) It requires no special training or effort to ascertain a deadline and make sure that it is met. (*Boyle, supra*, 469 U.S. at p. 252.)

Moreover, the courts have applied *Boyle* to late payments, even in circumstances where a taxpayer acted prudently in dealing with its agent or employee. (See, e.g., *Kimdun Inc. v. United States* (C.D. Calif. 2016) 202 F.Supp.3d 1136, 1144-1146 [finding that reliance on payroll service to make payments was not sufficient to establish reasonable cause under *Boyle*, despite a third-party outside payroll service's embezzlement of money that was intended to pay the employment tax obligations]; *Conklin Bros. of Santa Rosa Inc. v. United States* (9th Cir. 1993)

986 F.2d 315 [finding that reliance on taxpayer’s controller to make payments was not sufficient to establish reasonable cause, despite the controller’s alleged intentional concealment of her failure to make payroll tax payments].) Appellant had a personal and non-delegable obligation to pay tax by the due date. (*Appeal of Boehme, supra.*) Therefore, appellant has not established reasonable cause for the failure to timely pay tax based on any reliance on her tax preparer.

Regarding appellant’s reference to her history of compliance, we note that the Internal Revenue Service (IRS) administers a program called “First Time Abate” through which the IRS abates first-time timeliness penalties if a taxpayer has timely filed returns and paid taxes due for the preceding three years. In this case, the IRS abated appellant’s penalty based on the first-time abate program. However, FTB has no such program, and California law allows abatement only on a showing that the failure to pay was due to reasonable cause.<sup>2</sup> As the evidence shows that appellant’s failure to pay was not due to reasonable cause, there is no basis to abate the penalty.

Issue 2 - Whether appellant has shown that interest should be abated.

The imposition of interest on a tax deficiency is mandatory. (R&TC, § 19101(a).) Interest is not a penalty but is compensation for a taxpayer’s use of money that should have been paid to the state. (*Appeal of Yamachi* (77-SBE-095) 1977 WL 3905.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Moy*, 2019-OTA-052P.)

To obtain relief from the imposition of interest, under the facts presented, a taxpayer must qualify per the waiver provisions of R&TC sections 21012, 19112, or 19104. The relief of interest under R&TC section 21012 is not relevant here, as FTB did not provide appellant any written advice. R&TC section 19112 requires a taxpayer to make a showing of extreme financial hardship caused by significant disability or other catastrophic circumstance. However, there is no evidence of these circumstances in the record and, in any event, OTA has no statutory authority to determine whether R&TC section 19112 applies because the waiver of interest pursuant to that section is solely at FTB’s discretion.

R&TC section 19104 provides for interest abatement when the interest is attributable to any “unreasonable error or delay” by an officer or employee of the FTB in performing a ministerial or managerial act. However, an unreasonable error or delay by the FTB can be taken

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<sup>2</sup>The California Legislature has considered and declined to adopt bills that would change California law to allow a first-time abatement for taxpayers with a history of filing and payment compliance. (See Assem. Bill No. 1777 (2013-2014 Reg. Sess.))

into account only if no significant aspect of the error or delay is attributable to the taxpayer and the error or delay occurred after FTB contacted the taxpayer in writing about the underlying deficiency or payment. (R&TC, § 19104(b)(1).)

Appellant contends that FTB employees told her and her CPA over the phone that the penalty and interest would be waived. Appellant has not presented any substantiating evidence and FTB has no record of such a representation by an FTB employee. As stated below, appellant has not established detrimental reliance on any alleged advice by FTB that caused any delays. Furthermore, the alleged representation occurred after appellant already was late in making her payment. R&TC section 19104(b)(1) provides that, “an error or delay shall be taken into account only if no significant aspect of that error or delay can be attributed to the taxpayer involved . . . .” In this case, any alleged delays are attributed to appellant, as she untimely paid her tax as of the due date. Therefore, we find that FTB did not abuse its discretion in denying appellant’s request for abatement of interest.

Issue 3 - Whether appellant has shown that FTB should be estopped from denying the claim for refund.

Appellant contends that she and her CPA called FTB on several occasions, and that they were told that abatement of the penalties and interest would be approved and that appellant should not make an overpayment. Appellant provided a fax transmission page dated October 23, 2017, to show that she was communicating with an FTB employee. We construe appellant’s allegations as constituting an argument that she detrimentally relied on advice from FTB employees and that, as a result, FTB should be estopped from denying the claim for refund. Equitable estoppel, however, is applied against the government only in rare and unusual circumstances when its application is necessary to prevent a grave injustice. (See *Appeal of Smith* (91-SBE-005) 1991 WL 280345.) The four elements of equitable estoppel are: (1) the government agency must be apprised of the facts; (2) the government agency must intend that the inaccurate representation shall be acted upon; (3) the relying party must be ignorant of the facts; and (4) the relying party must have detrimentally relied upon the representation of the government agency. (*Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 725; *Appeal of Campbell* (79-SBE-035) 1979 WL 4076; *Appeal of Western Colorprint* (78-SBE-071) 1978 WL 3544.) A taxpayer has the burden of proving that all of the elements of equitable estoppel are present. (*Appeal of Western Colorprint, supra*; *Appeal of U.S. Blockboard Corporation* (67-

SBE-038) 1967 WL 1380.) Where one of these elements is missing, there can be no estoppel. (*Hersch v. Citizens Savings & Loan Assn.* (1983) 146 Cal.App.3d 1002, 1010.)

Here, however, FTB has no record of an employee making a representation that the penalty and interest would be abated. Additionally, reliance on an informal opinion of an FTB employee is not a sufficient basis to create an estoppel argument against FTB. (*Appeal of Western Colorprint, supra.*) This is because the subject of the conversation between appellant and FTB's employee is unknown, and there is no evidence that FTB was fully apprised of all the facts or that appellant was given incorrect or misleading advice. (*Appeal of Western Colorprint, supra.*) Appellant's fax transmission page also does not establish such a representation, as it is only indicated that appellant would be sending a copy of trust documents, including a Schedule K-1.

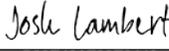
Furthermore, detrimental reliance is only present if FTB's actions cause a taxpayer to take action which leads to an increased tax liability. (*Appeal of Lopert* (82-SBE-011) 1982 WL 11689.) Here, appellant did not suffer a detriment because she untimely paid the tax that she properly owed, and the events she alleges resulted from her detrimental reliance occurred after she had untimely paid her tax. (See *La Societe Francaise de Bienfaisance Mutuelle v. Cal. Employment Com.* (1943) 56 Cal.App.2d 534, 555.) Appellant does not allege, and has not proven, that any representations were made to her by FTB prior to the April 15, 2017 date that her payment was due, much less the content of those representations. Appellant's fax transmission page was dated several months after the payment deadline had passed. At that point in time, the payment was already late, and the penalty and interest were due. Accordingly, appellant's allegation that she relied on FTB employees' representations is not sufficient to establish that FTB should be estopped from denying the claim for refund.

HOLDINGS

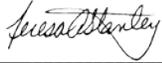
1. Appellant has not shown that she is entitled to abatement of the penalty imposed for her late payment of tax.
2. Appellant has not shown that interest should be abated.
3. Appellant has not shown that FTB should be estopped from denying the claim for refund.

DISPOSITION

FTB’s action is sustained.

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 Josh Lambert  
 Administrative Law Judge

We concur:

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 Teresa A. Stanley  
 Administrative Law Judge

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 Sara A. Hosey  
 Administrative Law Judge