

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

In the Matter of the Appeal of:	)	OTA Case No. 18093734
<b>MICHELLE MARSCHALL</b>	)	Date Issued: October 30, 2019
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**OPINION**

Representing the Parties:

For Appellant: Michelle Marschall

For Respondent: David Muradyan, Tax Counsel III

For Office of Tax Appeals: Matthew D. Miller, Tax Counsel III

D. BRAMHALL, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Michelle Marschall (appellant) appeals an action by the respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$637.86 for the 2011 tax year, \$685.78 for the 2012 tax year, and \$374.40 for the 2013 tax year.

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

**ISSUES**

1. Whether appellant has established reasonable cause for abatement of the late-filing penalty imposed under R&TC section 19131 for the 2012 tax year.
2. Whether appellant has established reasonable cause for abatement of the late-payment penalty imposed under R&TC section 19132 for the 2013 tax year.
3. Whether appellant has established that she is entitled to abatement of the estimated tax penalty for the 2013 tax year.
4. Whether appellant has established that she is entitled to abatement of interest for the 2011, 2012, and 2013 tax years.

FACTUAL FINDINGS2011 Tax Year

1. Appellant filed a timely 2011 California tax return on which she claimed the head of household filing status, and reported taxable income of \$38,688, total tax of \$708, and an overpayment of \$428, which respondent refunded.
2. Appellant's 2011 tax return was prepared by Marla Cunningham of Cunningham's Tax Service in El Cajon, California.
3. The Internal Revenue Service (IRS) audited appellant's 2011 federal tax return, and on January 14, 2014 the IRS provided respondent with a federal report regarding changes made to appellant's 2011 federal tax return. To the extent applicable under California law, respondent made adjustments to appellant's 2011 California taxable income following the federal changes reflected in the federal report and on November 6, 2014, respondent issued a Notice of Proposed Assessment (NPA) proposing the following adjustments, based upon the federal report: 1) denying of appellant's claimed head of household status and changing her filing status to single; and 2) increasing appellant's taxable income by \$24,792 (i.e., from \$38,688 to \$63,480). These adjustments resulted in increasing appellant's tax by \$3,280 (i.e., from \$708 to \$3,988), plus applicable interest. Appellant did not protest the NPA or remit payment. As appellant did not timely protest the NPA, the proposed assessment became a final liability.

2012 Tax Year

4. Appellant filed an untimely 2012 California tax return on April 15, 2014, on which she reported taxable income of \$48,327, an underpayment of estimated tax penalty of \$35, and a total amount due of \$1,526. Appellant did not remit payment with her return.
5. The 2012 tax return was prepared by Cecilia Castillo of Taxes & More in Chula Vista, California.
6. Respondent accepted appellant's return as filed and imposed a late-filing penalty of \$372.75 (i.e., \$1,491.00 × 25 percent), plus applicable interest.

2013 Tax Year

7. Appellant filed a timely 2013 California tax return on which she reported taxable income

of \$46,416 an underpayment of estimated tax penalty of \$8, and a total amount due of \$560. Appellant did not remit payment with her return.

8. The 2013 tax return was prepared by Cecilia Castillo in Chula Vista, California.
9. Respondent accepted appellant's return as filed; however, because appellant did not remit the balance due with her return, respondent imposed a late-payment penalty of \$111.81, plus applicable interest.

2011, 2012 and 2013 Tax Years

10. After appellant's liabilities for the 2011, 2012 and 2013 tax years were paid in full<sup>1</sup>, appellant submitted a letter requesting a refund of penalties and interest, as well as an FTB form 3701, "Request for Abatement of Interest."
11. Respondent treated appellant's requests as a claim for refund, which it denied on June 28, 2018. This timely appeal followed.

DISCUSSION

1. Whether appellant has established reasonable cause for abatement of the late-filing penalty imposed under R&TC section 19131 for the 2012 tax year.

Respondent's determinations are presumed correct, and appellant bears the burden of proving error. (*Appeal of Brockett* (86-SBE-109) 1986 WL 22731; *Todd v. McColgan* (1949) 89 Cal.App.2d 509.) In the absence of uncontradicted, credible, competent, and relevant evidence showing that respondent's determinations are incorrect, they must be upheld. (*Appeal of Seltzer* (80-SBE-154) 1980 WL 5068.) Unsupported assertions are not sufficient to satisfy an appellant's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

R&TC section 19131 provides that a late-filing penalty shall be imposed when a taxpayer fails to file a tax return on or before its due date, unless the taxpayer establishes that the late filing was due to reasonable cause and was not due to willful neglect. The late-filing penalty is calculated as 5 percent of the tax due for each month that a valid tax return is not filed after it is due (determined without regard to any extension of time for filing the return), not to exceed 25 percent of the tax. (Rev. & Tax. Code, § 19131, subd. (a).) Here, appellant filed her 2012 return

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<sup>1</sup> According to FTB account transcripts, payments were made by earnings withholding between October 9, 2017 and April 3, 2018, making taxpayers' claim timely (within one year of the date of payment pursuant to R&TC section 19306.

on April 14, 2014, 12 months after the due date of April 15, 2013. Therefore, respondent properly calculated appellant's late-filing penalty of \$372.75 (i.e., \$1,491.00 × 25 percent.)

Each taxpayer has a personal, non-delegable obligation to file a tax return by the due date. (*Appeal of Boehme* (85-SBE-134) 1979 WL 4224; *Appeal of Miller* (86-SBE-057) 1986 WL 22789.) The burden is on the taxpayer to establish reasonable cause for the untimely filing. (*Appeal of Scott* (82-SBE-249) 1982 WL 11906.) To establish reasonable cause, a taxpayer “must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinarily intelligent and prudent businessman to have so acted under similar circumstances.” (*Appeal of Tons* (79-SBE-027) 1979 WL 4068.) Ignorance of the law does not excuse compliance with statutory requirements. (*Appeal of Diebold, Inc.* (83-SBE-002) 1983 WL 15389.)

In her submissions to FTB, appellant asserted that her tax preparer for the 2011, 2012 and 2013 tax years was convicted and sentenced for preparing false tax returns. She also stated that she hired her tax preparer's services in good faith, and she signed the documents with the understanding that everything was true and correct. Appellant has provided inadequate evidence to establish that she acted reasonably in filing her 2012 California tax return 12 months past the due date. While she contends that her tax preparer, Marla Cunningham, pleaded guilty to filing fraudulent tax returns during 2010, 2011 and 2012, the years for which she was responsible for filing appellant's tax returns, the evidence presented by her shows the fraudulent activity as occurring from 2008 through 2010. Further Ms. Cunningham did not prepare appellant's 2012 return; Cecilia Castillo prepared appellant's 2012 tax return. Moreover, even if appellant's return was filed by a tax preparer guilty of filing fraudulent returns, appellant has not demonstrated the connection between hiring a fraudulent preparer and the untimely filing of a return. Appellant had a personal, nondelegable obligation to file a return by the due date, (*Appeal of Boehme, supra*; *Appeal of Miller, supra*). The Supreme Court noted in *United States v. Boyle* (1985) 469 U.S. 241, that “It requires no special training or effort to ascertain a deadline and *make sure that it is met.*” (Emphasis added.) Appellant has not presented evidence of any efforts on her part to ensure that her 2012 return was timely filed. We find that appellant failed to exercise the ordinary care and prudence that an ordinarily intelligent and prudent businessperson would have exercised under similar circumstances. (*Appeal of Tons, supra.*)

Accordingly, appellant has failed to establish reasonable cause for abatement of the late-filing penalty imposed under R&TC section 19131 for the 2012 tax year.

2. Whether appellant has established reasonable cause for abatement of the late-payment penalty imposed under R&TC section 19132 for the 2013 tax year.

The late-payment penalty will 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. (Rev. & Tax. Code, § 19132, subd. (a).) The taxpayer bears the burden of proving that both conditions existed. (*Appeal of Sleight* (83-SBE-244) 1983 WL 15615.)

To establish reasonable cause for the late payment of tax, a taxpayer must show that her failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Sleight, supra*; *Appeal of Curry* (86-SBE-048) 1986 WL 22783.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Curry, supra*; see also *Appeal of Scott* (82-SBE-249) 1982 WL 11906.) A failure to pay will be considered due to reasonable cause if the taxpayer makes a satisfactory showing that she exercised ordinary business care and prudence in providing for the payment of their tax liability and was nevertheless either unable to pay the tax or would suffer undue hardship if she paid on the due date. (Treas. Reg. § 301.6651-1(c)(1); *Nasir v. C.I.R.* (2011) 102 T.C.M. (CCH) 558.) The failure to timely remit the balance due on a tax liability caused by an oversight does not, by itself, constitute reasonable cause. (*Appeal of Risser* (84-SBE-044) 1984 WL 16123.)

Appellant has provided no argument or evidence establishing that she acted reasonably in paying her 2013 tax liability past the due date, and without willful neglect. Instead, appellant only contends that the late-payment penalty should be abated for the same reasons appellant provided for abatement of the late-filing penalty – that she was relying on a preparer who was convicted of preparing fraudulent returns. Therefore, appellant has failed to establish reasonable cause for abatement of the late-payment penalty imposed under R&TC section 19132 for tax year 2013.

3. Whether appellant has established that she is entitled to abatement of the underpayment of estimated tax penalty for the 2013 tax year.

R&TC section 19136 incorporates by reference Internal Revenue Code (IRC) section 6654, which imposes an underpayment of estimated tax penalty upon an individual for failing to timely make estimated income tax payments. (Rev. & Tax. Code, § 19136, subd. (a); Int.Rev. Code, § 6654.) There is no reasonable cause exception for the underpayment of estimated tax penalty. (Int.Rev. Code, § 6654; Rev. & Tax. Code, § 19136; *Farhoumand v. C.I.R.* (2012) 103 T.C.M. (CCH) 1722; *Appeal of Weaver Equipment Co.* (80-SBE-048) 1980 WL 4976.) IRC section 6654(e)(3) provides limited exceptions to the imposition of the penalty if either of the following conditions are satisfied: (1) “by reason of casualty, disaster, or other unusual circumstances the imposition of [the penalty] would be against equity and good conscience”; or (2) the underpayment was due to reasonable cause and not to willful neglect, *and* the taxpayer retired at the age of 62 or older in the year at issue or the prior year, or, alternatively, she became disabled in the tax year for which the estimated tax payments were required to be made or in the preceding tax year.

Appellant does not dispute the calculation of the underpayment of estimated tax penalty imposed for the 2013 tax year, which was in fact self-assessed. Instead, appellant contends that the underpayment of estimated tax penalty should be abated for the same reasons appellant provided for abatement of the late-filing and late-payment penalties. As noted above, there is no reasonable cause exception for the underpayment of estimated tax penalty. (*Farhoumand v. C.I.R., supra.*) Appellant offered no other argument or evidence to support her failure to make timely estimated tax payments for the 2013 tax year. The burden in this appeal is on appellant, and she has not demonstrated that she is eligible for the relief provided by IRC section 6654(e)(3). Therefore, appellant has not shown that the underpayment of estimated tax penalty for tax year 2013 should be abated.

4. Whether appellant has established that she is entitled to abatement of interest for the 2011, 2012, and 2013 tax years.

Under California law, taxes are due and payable as of the original due date of the taxpayer’s return without regard to the extension to file the return. (Rev. & Tax. Code, §§ 18567, subd. (b); 19001.) If tax is not paid by the original due date, or if FTB assesses

additional tax and that assessment becomes due and payable, R&TC section 19101 requires the charging of interest on the resulting balance due. Interest is not a penalty but is simply compensation for a taxpayer's use of money after the due date of the tax. (*Appeal of Jaegle* (76-SBE-070) 1976 WL 4086.) The imposition of interest is mandatory. (*Appeal of Yamachi* (77-SBE-095) 1977 WL 3905; *Appeal of Jaegle, supra.*) There is no reasonable cause exception to the imposition of interest. (*Appeal of Jaegle, supra.*)


To obtain relief from the imposition of interest, under the facts presented, a taxpayer must establish eligibility for waiver or abatement of interest under provisions of R&TC sections 21012 or 19104. The relief of interest under R&TC section 21012 is not relevant here, as FTB did not provide appellant any written advice. Under R&TC section 19104, FTB is authorized to abate interest if there has been an unreasonable error or delay in the performance of a ministerial or managerial act by an employee of FTB. Such abatement can only occur if no significant aspect of the error or delay can be attributed to the taxpayer, and after FTB first contacts the taxpayer in writing with respect to the deficiency or payment. (Rev. & Tax. Code, § 19104, subd. (b)(1).) Appellant does not allege that FTB committed an error or delay in this matter or provide any basis for which an abatement of interest may occur in this appeal. Therefore, appellant has not met her burden of showing error in FTB's determination not to abate interest.

HOLDINGS


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- 2. Appellant has failed to establish reasonable cause for abatement of the late-payment penalty imposed under R&TC section 19132 for the 2013 tax year.
- 3. Appellant has failed to establish that she is entitled to abatement of the underpayment of estimated tax penalty for the 2013 tax year.
- 4. Appellant has failed to establish that she is entitled to abatement of interest for the 2011, 2012, and 2013 tax years.

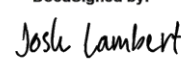
DISPOSITION

Respondent’s action is sustained.

DocuSigned by:  
  
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 Douglas Bramhall  
 Administrative Law Judge

We concur:

DocuSigned by:  
  
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 Linda C. Cheng  
 Administrative Law Judge

DocuSigned by:  
  
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 Josh Lambert  
 Administrative Law Judge