

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:
VICTORIA C. DE LARWELL

) OTA Case No. 18124120
)
) Date Issued: December 11, 2019
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)
)

OPINION

Representing the Parties:

For Appellant: Victoria C. De Larwell

For Respondent: Leoangelo C. Cristobal, Tax Counsel

A. ROSAS, Administrative Law Judge: Under Revenue and Taxation Code (R&TC) section 19324, appellant Victoria C. De Larwell appeals respondent Franchise Tax Board’s action denying appellant’s \$12,010.05¹ claim for refund for the 2017 tax year. Appellant waived the right to an oral hearing; therefore, we decide this matter based on the written record.

ISSUES

- 1. Has appellant shown reasonable cause for the late payment of the 2017 tax liability?
- 2. Is appellant entitled to waiver of interest?

FACTUAL FINDINGS

- 1. On March 22, 2018, appellant timely filed a 2017 California Resident Income Tax Return, which reported \$186,742 as additional tax due.
- 2. On April 9, 2018, appellant sold some securities from a T.D. Ameritrade (Ameritrade) account, thus having the liquidity necessary “in order to pay the tax in full.”
- 3. On Monday, April 16, 2018, at 12:35 p.m., appellant attempted to make a payment of \$186,742 using respondent’s Web Pay system. Appellant received an instant automated email from respondent’s Web Pay, confirming that respondent received the “payment request.” The email included a disclaimer: “If [. . .] the banking information you entered

¹ This amount consists of a late-payment penalty of \$11,204.52 and interest of \$805.53.

- is incorrect, [. . .] your financial institution may reject your request.” Appellant admits that she made “an honest mistake” and “inadvertently wrote the wrong T.D. Ameritrade account number when entering the data for payment.”
4. Appellant’s scheduled payment of \$186,742 was not transferred from the T.D. Ameritrade account to respondent on April 16, 2018. Unaware of the problem, appellant did not attempt to resubmit the payment on Tuesday, April 17, 2018.
 5. The relevant statement reporting period for the Ameritrade account at issue is April 1 through April 30, 2018.
 6. On or before May 22, 2018, appellant became aware that the scheduled payment had not been processed. On May 22, 2018, appellant once again attempted to make a payment of \$186,742 using respondent’s Web Pay system, but this time the Ameritrade account number was entered correctly, and respondent received the payment.
 7. At the end of May, respondent issued a Notice of State Income Tax Due indicating that appellant owed a penalty of \$11,204.52 and interest of \$805.53 by June 14.
 8. Appellant timely paid the penalty and interest in full. And then, in July 2018, appellant filed a Claim for Refund, seeking a refund of the penalty and interest.²
 9. In October 2018, respondent wrote to appellant and denied the claim for refund.
 10. Appellant filed this timely appeal.

DISCUSSION

Issue 1 - Has appellant shown reasonable cause for the late payment of the 2017 tax liability?

California law imposes a late-payment penalty when a taxpayer fails to pay the amount shown as due on the return by the date prescribed for the payment of the tax. (R&TC, § 19132.) Generally, the date prescribed for the payment of tax is the due date of the return, without regard to extensions of time for filing. (R&TC, § 19001.) For tax year 2017, tax payments received by Tuesday, April 17, 2018, were considered timely because April 15 fell on a Sunday and April 16 was a holiday in Washington, D.C. Here, respondent properly proposed the late-payment penalty because appellant did not remit the additional tax of \$186,742 until May 22, 2018.

² In the Claim for Refund, appellant stated she was seeking a refund “because had [appellant] received a notification that [respondent] didn’t receive [appellant’s] taxes on April 16, 2018, [appellant] would have paid the taxes earlier, instead of 36 days later.”

The late-payment penalty may be abated if a 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).) The taxpayer bears the burden of proving both conditions existed. (*Appeal of Friedman* (2018-OTA-077P).) The taxpayer must show that the failure to timely pay the amount due occurred despite exercising ordinary business care and prudence. (*Appeal of Friedman, supra; Appeal of Moren* (2019-OTA-176P).) The reason for not timely paying the tax due must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Friedman, supra; Appeal of Moren, supra.*)

Appellant admits that she made “an honest mistake” and wrote the wrong Ameritrade account number. But while the facts here begin when appellant “inadvertently wrote the wrong T.D. Ameritrade account number,” the facts do not end there. Appellant selectively focuses on language from respondent’s Opening Brief stating that “[a]n ordinarily intelligent and prudent person would have made sure their bank account information was correct before submitting an online payment.” But appellant ignores the rest of respondent’s paragraph, which reads as follows: “Even after considering you made an honest mistake with the bank account number, you failed to exercise ordinary business care and prudence when you failed to ensure the electronic payments were successfully accepted and withdrawn from your account.”

Thus, when a taxpayer attempts to show that the failure to make a timely payment of tax was due to reasonable cause and was not due to willful neglect, the focus is not solely on the occurrence of an error or mistake, but also on the taxpayer’s subsequent action or inaction. And in looking past the initial mistake, which any normal person could have made, “[w]e would expect reasonably prudent taxpayers exercising due care and diligence to monitor their bank account and quickly ascertain whether a scheduled electronic payment from their account to FTB was in fact paid.” (*Appeal of Scanlon* (2018-OTA-075P) 2018 WL 6377619 at p. *3.)

Here, appellant should have verified that she was using the proper Ameritrade account number. A taxpayer error attributable to an oversight, even an innocent oversight, generally will not constitute reasonable cause for penalty abatement purposes. (See *Appeal of Friedman, supra; Appeal of Risser* (84-SBE-044) 1984 WL 16123.)

But it is also important to examine appellant’s other action or inaction, not just the entry of the wrong account number. First, appellant chose to attempt to make her payment on April 16, one day prior to the deadline for that year. On the one hand, an ordinarily intelligent

and prudent businessperson may very likely wait until the deadline, or close to it, to pay taxes—after all, why would a businessperson want to pay the government any sooner than is absolutely necessary? Such a businessperson knows that the longer those funds stay in the businessperson’s account, the more interest the businessperson can potentially earn. On the other hand, such an ordinarily intelligent and prudent businessperson knows that when you wait to the last minute, there are significant risks.³

Second, appellant attempted an electronic payment at 12:35 p.m. on April 16 and still had over twenty-four hours to verify if the electronic payment went through before the close of business on April 17. Appellant self-describes as “[b]eing a novice on the internet.” Even if appellant did not possess the computer skills necessary to query her bank or Ameritrade accounts online to determine whether the electronic payment of \$186,742 had gone through, she could have obtained the necessary information by telephone on Monday, April 16. But appellant did not do so.

Similarly, an ordinarily intelligent and prudent businessperson may have called Ameritrade the very next day—during the final deadline of Tuesday, April 17—to verify if the electronic payment had gone through. But appellant did not do that either.

If the attempted payment had gone through on either April 16 or April 17, it would have appeared on the April 1 through April 30 statement. An ordinarily intelligent and prudent businessperson would have reviewed the monthly statement as soon as possible, or, at the very least, would have checked the balance on that statement and noticed that the account balance was \$186,742 higher than it should have been. Here, appellant did not establish when she received her Ameritrade statement, or that she reviewed the statement as soon as receiving it. To the contrary, the evidence shows that although the statement period ended on April 30, appellant did not correct the problem (by rendering payment) until May 22.

Appellant argues that, essentially, respondent shares some of the blame “because had [appellant] received a notification that [respondent] didn’t receive [appellant’s] taxes on April 16, 2018, [appellant] would have paid the taxes earlier, instead of 36 days later.” We disagree that respondent should have done something differently. The law does not place responsibility on the tax agency to notify a taxpayer prior to proposing a late-payment penalty.

³ For example, some inherent risks include, but are not limited to, these potential problems that a taxpayer may not be able to rectify in time: the check getting lost in the mail, there being insufficient funds in taxpayer’s account, the taxpayer’s account being closed, or, as here, the taxpayer entering the incorrect bank information.

(R&TC, § 19132.) An ordinarily intelligent and prudent businessperson knows what financial resources are available, when bills are due and payable, and whether these bills have been paid.

Lastly, appellant alleges that the “honest mistake” resulted in a “financial hardship.” We find this argument to be baseless and without merit. The facts here do not begin to rise to the level and category of financial difficulties that may constitute reasonable cause to abate the late-payment penalty.⁴ (*Van Camp & Bennion v. United States* (9th Cir. 2001) 251 F.3d 862, 868.)

Therefore, we hold that appellant has not satisfied her burden of proving reasonable cause by a preponderance of the evidence.

Issue 2 – Is appellant entitled to waiver of interest?

Tax is due on the original due date of the return without regard to any filing extension. (R&TC, § 18567.) If a taxpayer does not pay the tax by the original due date, or if respondent assesses additional tax, the law provides for charging interest on the balance due. (R&TC, § 19101.) Imposing interest is mandatory, and respondent cannot abate interest except where authorized by law. (*Appeal of Balch* (2018-OTA-159P) 2018 WL 6493198 at p. *7.) Interest is not a penalty; it is compensation for the use of money. (*Ibid.*) To obtain interest waiver or abatement, a taxpayer must qualify under R&TC sections 19104, 19112, or 21012. Based on the evidence and appellant’s arguments, none of these statutory sections apply.

Therefore, appellant did not show entitlement to a waiver of interest.

⁴Treasury Regulation section 301.6651-1(c)(1) states in pertinent part: “In determining whether the taxpayer was unable to pay the tax in spite of the exercise of ordinary business care and prudence in providing for payment of his tax liability, consideration will be given to all the facts and circumstances of the taxpayer’s financial situation, including the amount and nature of the taxpayer’s expenditures in light of the income (or other amounts) he could, at the time of such expenditures, reasonably expect to receive prior to the date prescribed for the payment of the tax.”

HOLDINGS

1. Appellant has not shown reasonable cause for the late payment of tax due.
2. Appellant is not entitled to waiver of interest.

DISPOSITION

We sustain respondent's action in full.

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Alberto Rosas

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Alberto T. Rosas
Administrative Law Judge

We concur:

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Neil Robinson

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Neil Robinson
Administrative Law Judge

DocuSigned by:

Josh Lambert

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Josh Lambert
Administrative Law Judge