

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 18053160
ARTHUR D. FULTON)
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OPINION

Representing the Parties:

For Appellant: Marlon Osorio, TAAP¹

For Respondent: Eric A. Yadao, Tax Counsel III

For Office of Tax Appeals: Carissa Eclarin, Graduate Student Assistant

D. BRAMHALL, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, Arthur D. Fulton (appellant) appeals an action by the respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$1,710.96² for the 2016 tax year.

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

ISSUES

1. Has appellant shown reasonable cause to abate the late payment penalty?
2. Has appellant shown that he is entitled to abatement of the underpayment of estimated tax penalty?

¹ Appellant filed the appeal letter. Subsequent representation was provided by Jordan Acosta, Ruben Alvarez, and Marlon Osorio of the Tax Appeal Assistance Program (TAAP).

² This amount consists of a late payment penalty of \$1,535.00 and an estimated tax penalty of \$175.96.

FACTUAL FINDINGS

1. Appellant filed his 2016 return on October 15, 2017, reporting a tax liability of \$27,413 and total payments of \$27,779. Appellant self-assessed an underpayment of estimated tax penalty in the amount of \$92 and reported an overpayment of \$274.
2. Appellant submitted a check dated January 17, 2017 to FTB with a numeric designation of “\$15,000” but a written designation of “fifteen and no/100’s”.
3. In addition to other earlier payment amounts, FTB credited appellant’s 2016 tax year account with a \$15.00 estimated payment, effective January 15, 2016.
4. FTB issued a Notice of Tax Return Change – Revised Balance (Notice) dated February 21, 2018, advising appellant that his timely payments only totaled \$12,794.00 of the \$27,413.00 total tax liability. FTB also imposed a late payment penalty of \$1,535.00 and increased the estimated tax penalty to \$175.96, for a revised balance due of 16,850.82.³
5. Appellant paid the \$16,850.82 balance with two checks dated February 26, 2018. One check was for \$15,000 and the second check was for \$1,850.82.
6. Thereafter, appellant filed FTB Form 2917, Reasonable Cause – Individual and Fiduciary Claim for Refund, requesting FTB to refund the \$1,535.00 late payment penalty and \$175.95 estimated tax payment.⁴
7. By a letter dated March 23, 2018, FTB denied appellant’s claim for refund based on its view that the information that the appellant provided did not constitute reasonable cause for the abatement of the estimated tax and late payment penalty.
8. This timely appeal followed.

DISCUSSION

Issue 1 – Has appellant shown reasonable cause and not willful neglect to abate the late payment penalty?

R&TC section 19001 generally provides that the personal income tax imposed “shall be paid at the time and place fixed for filing the return (determined without regard to any extension

³ The notice provides for a revised remaining tax liability of \$14,619 plus a late payment penalty of \$1,535 plus an estimated tax penalty of \$175.96 plus interest and fees of \$520.86 for a total revised balance due of \$16,850.82.

⁴ It appears that appellant submitted two different FTB Form 2917s dated February 26, 2017 and February 23, 2018 which contained substantially similar arguments.

of time for filing the return).” R&TC section 19132 provides that a late payment penalty is imposed when the 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 has two parts. The first part is 5 percent of the unpaid tax. (R&TC, § 19132(a)(2)(A).) The second part is a penalty of 0.5 percent per month, or portion of a month (not to exceed 40 months), calculated on the outstanding balance. (R&TC, § 19132(a)(2)(B).) Here, it is established that appellant failed to timely pay tax in the amount of \$14,985 by April 18, 2017, and, therefore, the penalty was properly imposed.

The late payment penalty may be abated if the taxpayer can show that the failure to make a timely tax payment was due to reasonable cause and was not due to willful neglect.⁵ (R&TC, § 19132(a)(1).) To establish reasonable cause for the late payment of tax, the taxpayer must show that their failure to make a timely tax payment of the proper amount occurred despite the exercise of ordinary business care and prudence. (*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. (*Ibid.*) 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 stated that he sent FTB a check dated January 17, 2017 for which FTB credited his account \$15 rather than \$15,000. While the amount of the check numerically stated \$15,000, the text on the check was missing the word “thousand.” Instead, the written portion stated “fifteen and no/100s.”⁶ Appellant did not request a refund of the \$520.86 interest and fees payment because he conceded that FTB did not have access to the \$15,000.00 payment during the intervening period. However, appellant asserted that he had made the proper payment and thus should not be penalized. Appellant also contends that he has shown reasonable cause because the error he made when scribing his check to FTB was a rare occurrence and an ordinary and prudent businessperson, even when exercising care, is likely to make the same minor error

⁵ Thus, in order to provide grounds for abating the penalty, the taxpayer must show both the existence of reasonable cause and the absence of willful neglect. As we find that appellant has not demonstrated the existence of reasonable cause, we do not address whether appellant has shown a lack of willful neglect.

⁶ In relevant part, FTB's processes for cashiering is to adhere to the written portion of the check when the numerical portion of the check indicates a different amount. FTB followed its cashiering processes when it redeemed appellant's written check in the amount of "fifteen and no/100s"; i.e., \$15.00. We find no fault in FTB's cashiering policy of defaulting to cashiering only the written, as opposed to numeric, check instruction when the amounts conflict.

on occasion. He further argues that he remitted the original check in time and had the means to pay the total tax liability. Finally, appellant argues that the check also shows his intent to pay \$15,000 because he drafted the number fifteen, followed by a comma and three zeroes in the numerical values section of the check made to FTB. Appellant contends that the error occurred when FTB inaccurately only credited appellant an amount of \$15.⁷

Appellant has not shown that his failure to make a timely payment occurred despite exercising ordinary business care and prudence. Appellant does not describe what efforts, if any, he took to ensure that the \$15,000 payment was in fact processed by April 18, 2017. A reasonably prudent taxpayer exercising due care and diligence would monitor his or her bank account and ascertain whether a payment from the account to FTB was in fact processed. Had appellant exercised ordinary business care and prudence, he would have noticed that his check was not processed as a \$15,000 payment. Appellant did not notice the error until FTB sent a Notice dated February 21, 2018, which was more than 10 months after payment was due and more than a year after appellant wrote his check. Appellant's error is a mere oversight that does not constitute reasonable cause for abating the late payment penalty. Further, R&TC section 19132 provides, "[u]nless it is shown that the failure is due to reasonable cause and not due to willful neglect, a penalty. . . is hereby imposed." The phrase "hereby imposed" delineates a consequence for non-compliance and a penalty shall be imposed in the absence of reasonable cause and not willful neglect.

Issue 2 - Has appellant shown he is entitled to abatement of the estimated tax penalty?

Except as otherwise provided, R&TC section 19136 conforms to Internal Revenue Code (IRC) section 6654 and imposes a penalty for the underpayment of estimated tax where the taxpayer's installment tax payments are less than the amounts due at the end of the installment periods. For California purposes, installment tax payments are due on April 15, June 15, and January 15 of the following tax year. (R&TC, § 19136.1; IRC, § 6654(c)(2).) This penalty is

⁷ Appellant additionally argues that R&TC section 19132 does not *require* the FTB to impose the late payment penalty, and, relying on *Coastside Fishing Club v. California Fish & Game Commission*, states that "[t]he word 'shall' in a statute does not necessarily denote a mandatory requirement; it may be construed as directory or permissive." (*Coastside Fishing Club v. California Fish & Game Commission* (2013) 215 Cal.App.4th 397.) Here, the FTB has already imposed the late payment penalty and has denied a claim for refund that requested abatement of that penalty. Our role in this appeal is limited to determining whether appellant has shown a reasonable cause for the late payment of tax that generated the penalty.

similar to an interest charge, which applies from the installment due date to the earlier of April 15 of the following tax year or the date on which the underpayment is paid. (IRC, § 6654(b)(2).)


Appellant reported income but no withholding, and appellant does not protest the imposition or computation of the penalty. Instead, appellant argues that the penalty amount should be refunded based on the clerical mistake related to the check amount, a reasonable cause argument. However, there is no general reasonable cause exception to the estimated tax penalty.⁸ (*Farhoumand v. Commissioner* (2012) T.C. Memo. 2012-131; *Appeal of Weaver Equipment Company* (80-SBE-048) 1980 WL 4976.) Accordingly, appellant has failed to establish a basis on which to waive the penalty for underpayment of estimated tax.

HOLDINGS

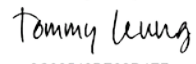
1. Appellant has not shown reasonable cause to abate the late payment penalty.
2. Appellant is not entitled to abatement of the estimated tax penalty.

DISPOSITION

FTB’s action in denying appellant’s claim for refund for the 2016 tax year is sustained.

DocuSigned by:

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 James S. Whitehouse,
 Staff Services Analyst, on behalf of:
 Douglas Bramhall
 Administrative Law Judge

We concur:

DocuSigned by:

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 Tommy Leung
 Administrative Law Judge

DocuSigned by:

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 Daniel K. Cho
 Administrative Law Judge

Date Issued: 12/31/2019

⁸ The estimated tax penalty will not apply only under limited circumstances, such as where it is established that either: the failure to timely pay the estimated tax payment was due to reasonable cause and the taxpayer retired after reaching age 62; or the taxpayer became disabled in the tax year for which the estimated payments were required to be made or in the previous year. (IRC, § 6654(e)(3)(B).) Appellant has not alleged disability or that he is over age 62; therefore, we do not discuss this further.