

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

In the Matter of the Appeal of: ) OTA Case No. 18073506  
**ELAINE TURNER** )  
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**OPINION**

Representing the Parties:

For Appellant: Melissa Gonzalez, Tax Appeals Assistance Program (TAAP)

For Respondent: Gregory W. Heninger, Program Specialist II

S. BROWN, Administrative Law Judge: This appeal is made pursuant to section 19324 of the Revenue and Taxation Code (R&TC) from the actions of respondent Franchise Tax Board (FTB) in denying appellant’s claims for refund of \$2,093.66,<sup>1</sup> \$759.15,<sup>2</sup> and \$536.13<sup>3</sup> for tax years 2002, 2003, and 2004, respectively.

Appellant waived her right to an oral hearing and therefore this appeal is being decided based on the written record.

**ISSUES**

1. Whether appellant has shown that the late filing of her 2002 and 2004 California returns was due to reasonable cause and not due to willful neglect.
2. Whether appellant has demonstrated that the demand penalties for the 2002 and 2004 tax years should be refunded.

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<sup>1</sup> This amount consists of a late-filing penalty of \$249.75, a notice and demand penalty (demand penalty) of \$249.75, a filing enforcement cost recovery fee (filing enforcement fee) of \$108.00, an amnesty penalty of \$66.34, and interest of \$1,419.82.

<sup>2</sup> This amount consists of a late-payment penalty of \$142.50, a collection cost recovery fee (collection fee) of \$101.00, a lien fee of \$15.00, and interest of \$500.65.

<sup>3</sup> This amount consists of a late-filing penalty of \$100.00, a demand penalty of \$35.50, a filing enforcement fee of \$120.00, two installment agreement fees of \$34.00 each, and interest of \$212.63.

3. Whether appellant has demonstrated reasonable cause for the late payment of tax for the 2003 tax year.
4. Whether appellant has shown that the 50 percent interest-based amnesty penalty imposed for the 2002 tax year should be refunded.
5. Whether appellant has demonstrated that the filing enforcement fees imposed for the 2002 and 2004 tax years should be refunded.
6. Whether appellant has shown that the collection fee imposed for the 2003 tax year should be refunded.
7. Whether appellant has shown that the lien fee imposed for the 2003 tax year should be refunded.
8. Whether appellant has shown that the two installment agreement fees imposed for the 2004 tax year should be refunded.
9. Whether appellant has shown that interest should be refunded.

#### FACTUAL FINDINGS

##### *2002 Tax Year*

1. Appellant had not filed a 2002 California income tax return by the due date.
2. Having received information that appellant received sufficient wages to trigger the 2002 filing requirement,<sup>4</sup> FTB issued a notice dated December 29, 2003, demanding that appellant file a return or explain why no return was required.
3. When appellant neither filed a return nor otherwise responded to the demand, FTB issued a Notice of Proposed Assessment (NPA) on March 8, 2004, based on the wage information received.
4. The NPA set forth a total tax of \$999.00, a late-filing penalty of \$249.75, a demand penalty of \$249.75, and a filing enforcement fee of \$108.00, plus applicable interest.
5. Appellant failed to protest the NPA and thus the proposed assessment became a final assessment. Thereafter, FTB instituted collection action.
6. Appellant failed to apply for the amnesty program by March 31, 2005, and therefore, FTB imposed an amnesty penalty of \$66.34.

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<sup>4</sup> For 2002, appellant's estimated income of \$33,723 was based on a Form W-2, which showed that appellant received \$33,723 in wages during the tax year.

7. Appellant later filed a 2002 California return on July 8, 2008, reporting a tax due of \$999, which was the same amount of total tax shown on the NPA.
8. FTB accepted the total tax liability shown on the return and withdrew the NPA tax liability. However, because the tax shown on the return was the same amount of tax shown on the NPA, no adjustments were made to the penalties and fee imposed on the NPA.
9. Appellant subsequently paid the amounts in full and filed a claim for refund, which FTB denied. In response, appellant filed this timely appeal.

#### *2003 Tax Year*

10. Appellant filed a timely 2003 California return on March 11, 2004, reporting a taxable income of \$25,010 and a tax due of \$570. No payment was made with the return.
11. FTB accepted the return as filed and imposed a late-payment penalty,<sup>5</sup> plus applicable interest.
12. Subsequently, FTB instituted collection action and imposed a collection fee of \$101 and a lien fee of \$15, plus applicable interest.<sup>6</sup>
13. Appellant subsequently paid the amounts in full and filed a claim for refund, which FTB denied. In response, appellant filed this timely appeal.

#### *2004 Tax Year*

14. Appellant had not filed a 2004 California income tax return by the due date.
15. Having received information from the Internal Revenue Service (IRS) that appellant received sufficient income to trigger the 2004 filing requirement,<sup>7</sup> FTB issued a notice

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<sup>5</sup> The late-payment penalty accrued to \$142.50 after appellant failed to pay her 2003 tax for more than 40 months.

<sup>6</sup> On July 21, 2004, and October 5, 2004, FTB issued to appellant notices that summarized her then-unpaid liabilities for the 2002 and 2003 tax years and indicated that failure to pay could result in collection action, including a collection fee and filing of a tax lien on her property. On April 6, 2005, FTB issued to appellant a Tax Lien Notice and a Notice of State Tax Lien, which listed the unpaid tax liabilities, penalties, interest, and collection fees for the 2002 and 2003 tax years.

<sup>7</sup> For 2004, appellant's estimated income of \$17,517 is based on information from the IRS that appellant filed a 2004 federal return with a California address, wherein appellant reported a federal adjusted gross income of \$17,517.

- dated January 13, 2006, demanding that appellant file a return or explain why no return was required.
16. When appellant neither filed a return nor otherwise responded to the demand, FTB issued an NPA on March 20, 2006, based on the income information received from the IRS.
  17. The March 20, 2006 NPA set forth a total tax of \$142.00, a late-filing penalty of \$100.00, a demand penalty of \$35.50, and a filing enforcement fee of \$120.00, plus applicable interest.
  18. Appellant failed to protest that NPA and thus the proposed assessment became a final assessment.
  19. Afterwards, FTB instituted collection action, during which time appellant entered into installment payment agreements for which FTB imposed two installment agreement fees of \$34 each.<sup>8</sup>
  20. Appellant subsequently paid the amounts in full and filed a claim for refund, which FTB denied. In response, appellant filed this timely appeal.
  21. In response to a request from the Office of Tax Appeals for additional briefing, FTB provided documentation showing that appellant also failed to file a tax return for 2001.<sup>9</sup> On February 10, 2003, FTB issued a Request for Tax Return to appellant for the 2001 tax year. Appellant did not timely respond to that demand, so FTB issued an NPA to appellant for that year on April 21, 2003.

### DISCUSSION

Issue 1: Whether appellant has shown that the late filing of her 2002 and 2004 California returns was due to reasonable cause and not due to willful neglect.

Taxpayers have a personal, non-delegable obligation to file their income tax return by the due date. (*Appeal of Boehme* (85-SBE-134) 1979 WL 4224.) California imposes a penalty for failure to file a return by its due date, unless the failure to file was due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) The late-filing penalty is computed at 5 percent of

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<sup>8</sup> On October 12, 2016 and January 17, 2017, FTB issued Installment Agreement Acceptance notices, which indicated that FTB had approved appellant's requests to make monthly payments and to modify the monthly payment due to satisfy the balances due for the appeal years.

<sup>9</sup> While the 2001 tax year is not at issue on appeal, the prior NPA issued for that year is important when analyzing whether the demand penalty for 2004 was properly imposed, as discussed below.

the tax due, after allowing for timely payments, for every month elapsing from the due date of the return (without regard to any extension) to the filing date, up to a maximum of 25 percent. (R&TC, § 19131.)

The burden is on the taxpayer to prove that reasonable cause prevented the taxpayer from timely filing the return. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Beadling* (77-SBE-021) 1977 WL 3831.) 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 businessperson to have so acted under similar circumstances. (*Appeal of Tons* (79-SBE-027) 1979 WL 4068.) 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.) Illness may constitute reasonable cause for abatement of the late-filing penalty if the illness continuously prevented the taxpayer from filing a timely return. (See *Appeal of Seaman* (75-SBE-080) 1975 WL 3564.) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

Appellant's 2002 return was due on April 15, 2003, but not filed until July 8, 2008. The 2004 return was due on April 15, 2005, but not filed until August 12, 2008.

Appellant asserts that during the years at issue, she was unable to timely file her returns due to illness. Specifically, appellant contends that she suffered from an illness leading to prolonged periods of extreme distress, and that her illness deteriorated to such an extent that she was subsequently hospitalized four separate occasions. Appellant further asserts that due to her illness she was unable to effectively manage her day-to-day life and her financial affairs. Appellant concedes, however, that she "lacks tangible evidence to support her claims," but contends that her inability to obtain such records is not due to any fault or willful neglect on her part, as the records to substantiate her claims no longer exist. With her appeal, appellant provides a sworn declaration, wherein appellant asserts under penalty of perjury that during the period of 2002, 2003, and 2004 she suffered from an illness and was admitted to the hospital on four separate occasions.

FTB, in turn, contends that appellant has not provided any proof of her alleged medical condition and that her unsupported assertions are not sufficient to carry her burden of proof.

Here, other than the unsupported statements in her declaration, appellant has not provided any evidence (medical records, third-party declarations, etc.) demonstrating the existence or severity of her condition or otherwise demonstrating that her health or other personal difficulties prevented her from timely filing returns for tax years 2002 or 2004. As noted above, appellant's unsupported assertions are not sufficient to satisfy her burden of proof. (*Appeal of Magidow, supra.*) Hence, appellant has not established that she had reasonable cause for failing to timely file her returns.

Issue 2: Whether appellant has demonstrated that the demand penalties for the 2002 and 2004 tax years should be refunded.

California imposes a penalty for the failure to file a return or provide information upon FTB's demand to do so, unless reasonable cause prevented the taxpayer from responding to the demand. (R&TC, § 19133.) The demand penalty is computed at 25 percent of the amount of the taxpayer's total tax liability, which is determined without regard to payments or credits. (*Ibid.*; see, e.g., *Appeal of Malakoff* (83-SBE-140) 1983 WL 15525.)

The burden is on the taxpayer to prove that reasonable cause prevented the taxpayer from responding to a demand. (*Appeal of James* (83-SBE-009) 1983 WL 15396.) Illness may constitute reasonable cause if the illness continuously prevented the taxpayer from filing a timely return or complying with the demand. (See *Appeal of Halaburka* (85-SBE-025) 1985 WL 15809.) Unsupported assertions are not sufficient to carry a taxpayer's burden of proof. (*Appeal of Magidow, supra.*)

FTB's demand for the 2002 tax year was issued on December 29, 2003, and it gave appellant until January 28, 2004, to either file a return, explain why no return was required, or request additional time to file. FTB's demand for the 2002 tax year is not subject to the provisions of California Code of Regulations, title 18, section 19133<sup>10</sup> because that regulation became operative on December 23, 2004, which is prior to the issuance of both the December 29, 2003 demand and the March 9, 2004 NPA for the 2002 tax year. Accordingly, appellant must show reasonable cause for not filing her 2002 return during the period from December 29, 2003, to January 28, 2004.

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<sup>10</sup> Subsequent regulatory references are to sections of title 18 of the California Code of Regulations.

Effective December 23, 2004, FTB can only impose a demand penalty (under R&TC, § 19133) on individual taxpayers if the taxpayer fails to respond to a current demand and FTB issued an NPA under the authority of R&TC section 19087(a) after the taxpayer failed to timely respond to a request for tax return or a demand “at any time during the four-taxable-year period preceding the taxable year for which the current Demand for Tax Return is issued.” (Cal. Code Regs., tit. 18, § 19133(b); operative Dec. 23, 2004.) For individual taxpayers, FTB will impose the demand penalty upon a late or unfiled return if the taxpayer fails to respond to a demand for a tax return, and if FTB has issued an NPA in response to the taxpayer’s failure to respond to a similar demand during the four-taxable-year period preceding the year at issue. (Cal. Code Regs., tit. 18, § 19133(b).) Here, appellant failed to file a 2001 tax return in response to FTB’s demand for one, and FTB issued an NPA to appellant for that year on April 21, 2003. Accordingly, FTB’s assessment of the demand penalty is proper; hence, to justify abatement, appellant must show reasonable cause for not filing her 2004 return.

Similar to the argument appellant made above in relation to the late-filing penalties, appellant contends that she was not able to respond to FTB’s demands due to the effects of her illness.

Other than the unsupported statements appellant makes in her declaration, appellant has not provided any evidence (medical records, third-party declarations, etc.) demonstrating the existence or severity of her condition or otherwise demonstrating that her health or other personal difficulties prevented her from timely responding to FTB’s demand. Appellant’s unsupported assertions are not sufficient to satisfy her burden of proof. (*Appeal of Magidow, supra.*) Thus, appellant has not established that she had reasonable cause for failing to timely file either her 2002 or 2004 returns. Accordingly, we have no basis to abate the demand penalties for the 2002 or 2004 tax years.

Issue 3: Whether appellant has demonstrated reasonable cause for the late payment of tax for the 2003 tax year.

R&TC section 19132(a)(1)(A) imposes a late-payment penalty when a taxpayer fails to pay the amount shown as due on the return by the date prescribed for payment of that tax. Generally, the date prescribed for payment of the tax is the due date of the return (without regard to extensions of time for filing). (R&TC, § 19001.) The late-payment penalty does not apply when the failure to pay is due to reasonable cause and not due to willful neglect. The taxpayer

bears the burden of proving reasonable cause, which means that the taxpayer must show that his/her failure to pay the tax in a timely manner occurred despite the exercise of ordinary business care and prudence. (*Appeal of Scott* (82-SBE-249) 1982 WL 11906.)

As indicated above, appellant filed a timely 2003 return, but no payment was made with the return. Similar to the argument appellant made above in relation to the late-filing penalties, appellant contends that she was not able to pay her 2003 tax in a timely manner due to the effects of her illness. However, other than the unsupported statements appellant makes in her declaration, appellant has not provided any evidence (medical records, third-party declarations, etc.) demonstrating the existence or severity of her condition or otherwise demonstrating that appellant's health or other personal difficulties prevented her from timely paying her 2003 tax. Again, appellant's unsupported assertions are not sufficient to satisfy her burden of proof. (*Appeal of Magidow, supra.*) Thus, appellant has not demonstrated that she had reasonable cause for her late payment of tax for the 2003 taxable year.

Issue 4: Whether appellant has shown that the 50-percent interest-based amnesty penalty imposed for the 2002 tax year should be refunded.

R&TC sections 19730 through 19738 set forth the tax amnesty program for taxpayers subject to the Personal Income Tax Law and the Corporation Tax Law. The amnesty program was conducted during the period beginning February 1, 2005, and ending March 31, 2005, and applied to tax liabilities for taxable years prior to January 1, 2003. (R&TC, § 19731.) The amnesty program provided an opportunity for a taxpayer to identify and pay unpaid tax obligations and, in return, obtain a waiver of penalties and fees that might otherwise have been imposed. However, if a taxpayer underpaid his or her taxes during a period prior to January 1, 2003, and failed to participate in the amnesty program, R&TC section 19777.5 imposed an amnesty penalty. Pursuant to R&TC section 19777.5(a)(1), a 50-percent interest-based amnesty penalty (“amnesty penalty”) applied to a taxpayer's past due liabilities if the liabilities were eligible for the 2005 amnesty program but the taxpayer did not participate in that program. The penalty is equal to 50 percent of the interest that accrued on the balance due as of March 31, 2005, from the original due date of the tax to March 31, 2005. Under R&TC section 19777.5(d)<sup>11</sup> and (e), once an amnesty penalty is assessed as a final liability and has been

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<sup>11</sup> R&TC section 19777.5(d) provides that the protest procedures that are applicable to deficiency assessments are not available for a taxpayer's dispute of the amnesty penalty.

paid, a taxpayer may file a refund claim only on the limited grounds that the amount paid to satisfy the penalty “was not properly computed by the Franchise Tax Board.” The amnesty provisions give FTB no discretion to determine whether the amnesty penalty should be imposed and provide no exceptions for taxpayers who may have acted in good faith or had reasonable cause for failing to participate in the amnesty program.

Here, appellant had unpaid liabilities for the 2002 tax year but did not participate in the amnesty program, and as a result an amnesty penalty of \$66.34 was imposed. Appellant has not alleged or provided evidence demonstrating that the amnesty penalty was improperly calculated—and we find no such evidence in the appeal record. Accordingly, there is no legal basis for a refund of the amnesty penalty.

Issue 5: Whether appellant has demonstrated that the filing enforcement fees imposed for the 2002 and 2004 tax years should be refunded.

If FTB mails a demand for a tax return to a taxpayer, a filing enforcement fee is required to be imposed when the taxpayer fails or refuses to file the return within the 25-day period. (R&TC, § 19254.) Once properly imposed, there is no provision in the R&TC that would relieve the imposition of the filing enforcement fee for any circumstances, including reasonable cause.

We find that because appellant failed to file a 2002 tax return within 25 days of FTB’s December 29, 2003 demand, the filing enforcement fee for the 2002 tax year was properly imposed. Accordingly, we have no basis upon which to provide relief from the filing enforcement fee for the 2002 tax year.

Similarly, because appellant failed to file a 2004 tax return within 25 days of FTB’s January 13, 2006 demand, the filing enforcement fee for the 2004 tax year was properly imposed. Accordingly, we have no basis upon which to provide relief from the filing enforcement fee for the 2004 tax year.

Issue 6: Whether appellant has shown that the collection fee imposed for the 2003 tax year should be refunded.

When a taxpayer fails to pay a tax after proper notice, R&TC section 19254(a)(1) directs FTB to impose a collection fee on the taxpayer for the actual cost of collecting the tax when the taxpayer fails to pay tax due and FTB has mailed a notice for payment that advises that continued failure to pay may result in collection action. Once the fee is properly imposed, there is no language in the statute that will relieve the fee under any circumstances, including for reasonable cause. (See *Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.) Here, appellant failed to timely pay the tax due for the 2003 tax year and received notices from FTB indicating that the collection fee would be imposed. Accordingly, the collection fee was properly imposed, and we have no basis upon which to provide relief from the collection fee.

Issue 7: Whether appellant has shown that the lien fee imposed for the 2003 tax year should be refunded.

R&TC section 19221 provides for the imposition of a lien fee on a taxpayer. R&TC section 19221(a) provides that any amount due from a taxpayer shall become an enforceable state tax lien if the taxpayer fails to pay the amount due at the time it becomes due and payable. Government Code section 7174 allows FTB to collect the various fees associated with recording and releasing the state tax lien. Once the fee is properly imposed, there is no language in the statute that will relieve the fee under any circumstances, including for reasonable cause. Here, FTB issued notices to appellant indicating that failure to pay the liabilities for the 2003 tax year could result in collection action including the filing of a tax lien. Later, FTB properly imposed the lien fee after starting collection action. Hence, we find that the lien fee was properly imposed. Accordingly, we have no basis upon which to provide relief from the lien fee.

Issue 8: Whether appellant has shown that the two installment agreement fees imposed for the 2004 tax year should be refunded.

R&TC section 19591 provides that fees shall be imposed on FTB's provision of installment payment programs. Once the fee is properly imposed, there is no language in the statute that will excuse the fee under any circumstances, including for reasonable cause. Here, appellant requested and entered into an installment payment agreement; FTB's October 12, 2016 and January 17, 2017 Installment Agreement Acceptance notices each state that FTB would add

an additional \$34.00 fee to establish the installment agreement. There is no evidence that the installment agreement fees were improperly imposed. Accordingly, we have no basis upon which to provide a refund of the installment agreement fees.

Issue 9: Whether appellant has shown that interest should be refunded.

Interest must be assessed from the date a tax payment is due through the date that it is paid. (R&TC, § 19101.) Imposition of interest is mandatory; it is not a penalty, but is compensation for appellant's use of money after it 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 Jaegle* (76-SBE-070) 1976 WL 4086.)

Under R&TC section 19104, FTB is authorized to abate or refund interest if there has been an unreasonable error or delay in the performance of a ministerial or managerial act by an employee of FTB. Here, appellant has not alleged, and the record does not reflect, any such errors or delays.

Under R&TC section 19112, FTB may grant a waiver of interest when it determines that an individual or fiduciary demonstrates inability to pay that interest solely because of extreme financial hardship caused by significant disability or other catastrophic circumstance. However, the Office of Tax Appeals has not been granted review authority by the California Legislature over FTB's determinations pursuant to R&TC section 19112. Accordingly, we do not have jurisdiction to review interest abatement arguments based on financial hardship under R&TC section 19112. (*Appeal of Moy*, 2019-OTA-057P.)

HOLDINGS

FTB’s denials of appellant’s claims for refund are sustained.

DISPOSITION

FTB’s denials of appellant’s claims for refund are sustained.

DocuSigned by:  
*Suzanne B. Brown*  
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Suzanne B. Brown  
Administrative Law Judge

We concur:

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*John O Johnson*  
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John O. Johnson  
Administrative Law Judge

DocuSigned by:  
*Richard I. Tay*  
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Richard I. Tay  
Administrative Law Judge

Date Issued: 1/24/2020