

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19034551
TIMOTHY A. BELL)
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OPINION

Representing the Parties:

For Appellant: Timothy A. Bell
For Respondent: Diane M. Deatherage, Specialist

R. TAY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) 19324, Timothy A. Bell (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$1,330.45 for the 2016 tax year.

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

ISSUES¹

1. Whether appellant has established that the late filing of his 2016 return was due to reasonable cause.
2. Whether appellant is entitled to interest abatement.
3. Whether FTB properly assessed the collection cost recovery fee.

FACTUAL FINDINGS

1. Appellant filed a California Resident Income Tax Return for 2016 on December 15, 2017.
2. With his 2016 income tax return, appellant remitted a \$3,662 tax payment.

¹ In his opening brief, appellant alleges that FTB violated his rights during the collection of appellant’s outstanding liability for 2016 by bank levy. We do not have jurisdiction over this matter and decline to address it further.

3. On January 16, 2018, FTB issued a notice assessing \$904.50 for the late-filing penalty and interest. The notice, dated March 31, 2018, had a payment deadline of April 19, 2018.
4. FTB imposed a \$317 collection cost recovery fee after appellant failed to remit payment before April 19, 2018.
5. Appellant remitted a \$1,330.45 payment on October 9, 2018 to satisfy his outstanding liability for 2016.
6. Appellant submitted a claim for refund dated October 23, 2018, requesting abatement of the additions to tax for 2016. FTB denied appellant's claim for refund in a notice dated December 14, 2018. This timely appeal followed.

DISCUSSION

Issue 1 – Whether appellant has established that the late filing of his 2016 return was due to reasonable cause.

California imposes a penalty for the failure to file a return on or before the due date, unless it is shown that the late filing is due to reasonable cause and not due to willful neglect. (R&TC, § 19131.) The penalty is computed at five (5) percent of the amount of tax required to be shown on the return for every month that the return is late, up to a maximum of 25 percent. (R&TC, § 19131(a).) For purposes of calculating this penalty, the amount of tax required to be shown on the return is reduced by any timely paid tax amounts, and any credits against the tax, which may be claimed on the return. (R&TC, § 19131(c).) Appellant agrees that the 2016 return was untimely filed and does not contend that FTB erred in its calculation of the late-filing penalty. Rather, appellant contends that reasonable cause existed to excuse the late filing of his return.

The late-filing penalty may be abated if a taxpayer shows that the failure to timely file was due to reasonable cause and not due to willful neglect. (R&TC, § 19131(a).) To establish reasonable cause, a taxpayer must show that his or her failure to timely file occurred despite the exercise of ordinary business care and prudence. (*Appeal of Curry* (86-SBE-048) 1986 WL 22783; *Appeal of Sleight* (83-SBE-244) 1983 WL 15615.)

Appellant argues that he had reasonable cause because he hired a tax preparer and provided the tax preparer with all documents needed to prepare his income tax return. The tax

preparer had filed for appellant in the past, and thus, appellant argues that he justifiably relied on his tax preparer. However, the tax preparer failed to file a timely return on appellant's behalf because of the preparer's workload, and after appellant belatedly discovered the preparer's error, appellant filed a late return on December 15, 2017.

Contrary to his position, appellant's reliance on his tax preparer to file a timely tax return does not constitute reasonable cause. In *United States v. Boyle* (1985) 469 U.S. 241, 251, the court stated, "one does not have to be a tax expert to know that tax returns have fixed filing dates and that taxes must be paid when they are due." The court held that reliance on an agent, such as a tax preparer, cannot function as a substitute for compliance with an unambiguous statute. (*Ibid.*) It is the non-delegable responsibility of the taxpayer, and not that of the tax preparer, to timely file the return. (*Id.* at p. 250.) Accordingly, the error of appellant's tax preparer does not constitute reasonable cause, and appellant provides no other reasons that show reasonable cause existed to excuse the late filing of his return.

Appellant also argues that the late-filing penalty should be abated because the Internal Revenue Service (IRS) abated his federal failure-to-file penalty for the 2016 tax year. However, appellant's federal transcript does not indicate that the penalty was abated for reasonable cause. Additionally, the IRS's May 22, 2018 letter regarding the abatement does not state that the IRS abated the penalty due to reasonable cause. Rather, the penalty may have been abated due to the IRS first-time abate program, which allows for abatement of a penalty based on a taxpayer's history of compliance. FTB does not have a comparable program. 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, e.g., Assembly Bill No. 1777 (2013-2014 Reg. Sess.)) Consequently, appellant has not provided any other grounds to justify abatement of the late-filing penalty.

Issue 2 - Whether appellant is entitled to interest abatement.

If any amount of tax is not paid by the due date, interest is required to be imposed from the due date until the date the taxes are paid. (R&TC, § 19101(a).) Imposition of interest is mandatory, and it can only be abated in certain limited situations when authorized by law. (*Appeal of Yamachi* (77-SBE-095) 1977 WL 3905.) Interest is not a penalty imposed on a taxpayer, it is merely compensation for the use of money, and there is no reasonable cause exception to the imposition of interest. (*Appeal of Jaegle* (76-SBE-070) 1976 WL 4086; *Appeal*

of Goodwin (97-SBE-003) 1997 WL 258474.) The Office of Tax Appeals has jurisdiction to determine whether FTB's failure to abate interest under R&TC section 19104 was an abuse of discretion; if so, we may order an abatement of interest. (R&TC, § 19104(b)(2)(B); *Appeal of Teichert* (99-SBE-006) 1999 WL 1080256.)

Appellant requests that we grant interest abatement because his tax preparer failed to file a timely return on his behalf. However, there is no provision under the law to grant interest relief on these grounds. To obtain relief from interest, a taxpayer must qualify under the waiver provisions of R&TC sections 21012, 19112, or 19104. (*Appeal of Balch*, 2018-OTA-159P.) The relief of interest under R&TC section 21012 is not relevant here, because FTB did not provide appellant with any written advice. Appellant has not alleged extreme financial hardship to be relieved of interest under R&TC section 19112, and OTA does not have the authority to review FTB's determination on such grounds. (*Appeal of Moy*, 2019-OTA-057P.) Lastly, 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, nor does the record reflect, any such errors or delays. Appellant has not alleged any other grounds to justify relief of interest, and we find none in the record before us.

Issue 3 - Whether FTB properly assessed the collection cost recovery fee.

R&TC section 19254 states that FTB shall impose a collection cost recovery fee if FTB mails a notice advising the taxpayer that a continued failure to pay amounts due may result in collection actions, which include imposition of a collection cost recovery fee. There is no reasonable cause defense to the imposition of the fee; thus, our inquiry is limited to determining whether FTB complied with the statutory notice requirements for imposing the collection cost recovery fee.

Here, FTB issued a notice, dated March 31, 2018, which informed appellant that failure to pay the liability may result in collection action and imposition of a collection cost recovery fee. The collection cost recovery fee was required to be imposed by R&TC section 19254 because appellant failed to pay the amount due after receiving the notice. Appellant did not make payment by April 19, 2018, and thus, FTB properly imposed the collection cost recovery fee. FTB has no authority to abate or modify this fee, and appellant has not shown that the fee was imposed for any invalid or improper reason.

HOLDINGS

1. Appellant has not established that the late filing of his 2016 return was due to reasonable cause.
2. Appellant is not entitled to interest abatement.
3. FTB properly assessed the collection cost recovery fee.

DISPOSITION

FTB’s action is sustained.

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 Richard Tay
 Administrative Law Judge

We concur:

DocuSigned by:

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 Linda C. Cheng
 Administrative Law Judge

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 Daniel K. Cho
 Administrative Law Judge

Date Issued: 1/28/2020