

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

In the Matter of the Appeal of: ) OTA Case No. 18073456  
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**M. BENBENIST** )  
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**OPINION**

Representing the Parties:

For Appellant: C. Thomas Mallos, CPA

For Respondent: Eric R. Brown, Tax Counsel III

For Office of Tax Appeals: Tom Hudson, Tax Counsel III

R. TAY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, appellant M. Benbenist appeals an action by respondent Franchise Tax Board (FTB) denying his claim for refund in the amount of \$41,600.79<sup>1</sup> for the 2015 tax year.

Office of Tax Appeals (OTA) Administrative Law Judges Richard Tay, John O. Johnson, and Jeffrey I. Margolis held an oral hearing for this matter in Cerritos, California, on December 17, 2019. At the conclusion of the hearing, the panel closed the record and submitted the matter for decision.

**ISSUES**

1. Whether appellant has shown reasonable cause existed for the late payment of his 2015 tax liability.
2. Whether appellant has shown FTB erred in its assessment of the estimated tax penalty.
3. Whether appellant has shown that he is entitled to interest abatement.

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<sup>1</sup> Both parties agree on the amount of the claim for refund. FTB indicates that this amount consists of a late payment penalty of \$27,253.92, an estimated tax penalty of \$4,825.83, and interest of \$9,521.04.

FACTUAL FINDINGS

1. Appellant filed a timely 2015 California income tax return on October 15, 2016.<sup>2</sup> He reported total tax of \$265,537, and prior payments of \$28,364. Although appellant reported a total amount due of \$242,000 (which includes a self-assessed estimated tax penalty of \$4,827), he made no tax payments with his income tax return and remitted only \$50,000 on October 15, 2016.
2. In November 2016 and January 2017, FTB issued notices to appellant informing him of a balance due for his 2015 income tax return. FTB also informed him that he owed late payment and failure to pay estimated tax penalties. In response to FTB’s notices, appellant applied for an installment payment plan.
3. On March 1, 2017, FTB accepted appellant’s application and agreed to accept payments of \$18,910 on the fifteenth of each month, beginning on April 15, 2017. Appellant made payments until December 28, 2017, when the balance was paid in full.
4. Appellant submitted a claim for refund in the form of a request for penalty and interest abatement, which FTB received on December 15, 2017. Attached to his request, appellant submitted a doctor’s letter, dated March 15, 2017, stating that appellant was under his care since 2011 for asthma, and that appellant underwent a series of surgeries to have a large cancerous tumor removed in November 2011. The doctor stated that appellant’s breathing and sleep had been adversely affected since the surgeries, resulting in “work impairments for long periods in 2015 and 2016.”
5. Appellant’s evidence also showed that he tried numerous medications and treatments in largely unsuccessful attempts to remedy the difficulties he was having with his breathing and sleep during 2015 and 2016. He experienced work impairments during portions of 2015 and 2016 and did not consistently show up at his business during this period. Appellant claimed that he was unable to focus on his “day-to-day life,” and noted that at times he neglected to pay his utility bills, allegedly due to his inability to focus as a result of his health impairments. Despite his difficulties, appellant was able to report a robbery from his business that occurred in late January 2016, and dealt with the insurance issues that arose from the robbery in the months that followed. However, appellant failed to

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<sup>2</sup> Appellant filed on a married filing separately basis.

timely locate and provide his accountant with the Schedules K-1 the accountant needed to prepare his 2015 return.

6. By letter dated April 2, 2018, FTB denied appellant's claim for refund. This timely appeal followed.

### DISCUSSION

FTB's determination is presumed correct and the taxpayer has the burden of proving error. (*Todd v. McColgan* (1949) 89 Cal.App.2d 509; *Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.) In the absence of credible, competent, and relevant evidence showing error in FTB's determination, FTB's determination must be upheld. (*Appeal of Seltzer* (80-SBE-154) 1980 WL 5068.)

#### Issue 1 – Whether appellant has shown reasonable cause existed for the late payment of his 2015 tax liability.

R&TC section 19132 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. Generally, the date prescribed for the payment of the tax is the due date of the return (without regard to extensions of time for filing). (R&TC, § 19001.) Here, FTB properly assessed the late payment penalty because the payment due date was April 15, 2016, and appellant did not completely satisfy his 2015 tax liability until December 28, 2017, approximately one year and eight months after the due date.

The late payment penalty may be abated if the taxpayer establishes that the failure to make a timely tax payment was due to reasonable cause and not due to willful neglect. (R&TC, § 19132 (a)(1).) To establish reasonable cause for the late payment of tax, a taxpayer must show that his or her failure to make a timely payment occurred despite the exercise of ordinary business care and prudence. (*Appeal of Scott* (82-SBE-249) 1982 WL 11906.) The reason for missing the deadline must be such that an ordinarily intelligent and prudent businessperson would have acted similarly under the same circumstances. (*Appeal of Curry* (86-SBE-048) 1986 WL 22783). A taxpayer's failure to timely pay tax because of an oversight does not constitute reasonable cause. (*Appeal of Risser* (84-SBE-044) 1984 WL 16123.)

Illness may establish reasonable cause where the taxpayer presents credible and competent proof that the illness prevented the taxpayer from complying with the law. (*Appeal of*

*Triple Crown Baseball LLC*, 2019-OTA-25P; *Appeal of Seaman* (75-SBE-080) 1975 WL 3564.) To show reasonable cause for late payment on the basis of an illness, a taxpayer must show that the illness continuously prevented the taxpayer from timely paying. (*Appeal of Halaburka* (85-SBE-025) 1985 WL 15809). If the illness simply caused the taxpayer to sacrifice the timeliness of one aspect of the taxpayer's affairs to pursue other aspects, the taxpayer must bear the consequences of that choice. (*Appeal of Orr* (68-SBE-010) 1968 WL 1640.)

We find that appellant's medical condition did not continuously prevent him from making timely payment of his 2015 tax liability. At the hearing, appellant testified that he received timely Schedules K-1, but did not open them or give them to his tax preparer. There is no evidence as to how appellant's medical condition continuously impaired him from doing so. Also, although he experienced work impairments in 2016, appellant has not shown that such impairments continuously prevented him from giving his tax preparer the proper forms to calculate and pay his 2015 tax obligation. Appellant testified to the fact that he attended company meetings and tended to other business matters, such as the robbery from his business that occurred in January 2016. Appellant also answered some emails and returned phone calls during the relevant period. Although the evidence showed that appellant functioned at a lower capacity because of the medical condition, appellant has not shown his medical condition was severe enough at the time his tax payment was due such that he was continuously prevented from making timely tax payments. Indeed, to show reasonable cause existed, appellant must show that the "type of illness or debilitation that might create reasonable cause is one that because of severity or timing makes it virtually impossible for the taxpayer to comply—things like emergency hospitalization or other incapacity occurring around tax time." (*In re Carlson* (7th Cir. 1997) 126 F.3d 915, 923.) Rather, the evidence shows that appellant had some capacity, albeit a decreased capacity, to attend to his business affairs, and sacrificed making a timely tax payment for those business affairs. Thus, appellant has not shown reasonable cause existed to excuse the late payment of his 2015 tax liability.

Issue 2 – Whether appellant has shown FTB erred in its assessment of the estimated tax penalty.

California conforms to Internal Revenue Code (IRC) section 6654 and imposes an estimated tax penalty for the failure to make timely estimated income tax payments. (R&TC, § 19136(a); IRC, § 6654.) The estimated tax penalty is similar to an interest charge and applies from the due date of the estimated tax payment, until the earlier of the date it is paid or the

payment due date. (IRC, § 6654(b)(2).) There is no general reasonable cause exception to the imposition of this penalty; thus, extenuating circumstances are irrelevant. (*Farhoumand v. Commissioner*, T.C. Memo. 2012-131; *Estate of Ruben v. Commissioner* (1960) 33 T.C. 1071, 1072); *Appeal of Weaver Equipment Co.* (80-SBE 048) 1980 WL 4976; see, e.g., Internal Revenue Manual 20.1.3.1.6.1 (December 10, 2013).) Instead, the law allows for abatement of the estimated tax penalty if, by reason of casualty, disaster, or other unusual circumstances, imposition of the penalty would be against equity and good conscience. (IRC, § 6654(e)(3)(A); see also *Appeal of Johnson*, 2018-OTA-119P.) The exception for unusual circumstances is considerably narrower than that for reasonable cause. (IRS Field Service Advisory (June 2, 1994) 1994 WL 1725487.) The IRS has waived the estimated tax penalty in situations where a tax law change, disaster, required accounting method change, or a government action or inaction caused extreme difficulty in estimating the tax. (*Ibid.*)

It is undisputed that FTB properly assessed the estimated tax penalty because appellant did not pay his estimated taxes in a timely manner. We find no evidence in the record showing that appellant qualifies for either of the two statutory exceptions to the imposition of the estimated tax penalty. Thus, we have no legal basis to determine that appellant is entitled to penalty abatement.

### Issue 3 - Whether appellant has shown that he is entitled to interest abatement.

The assessment of interest on a tax deficiency is mandatory, in accordance with R&TC section 19101. (*Appeal of Yamachi* (77-SBE-095) 1977 WL 3905.) Interest is not a penalty but is merely compensation for a taxpayer's use of money. (*Appeal of Jaegle* (76-SBE-070) 1976 WL 4086.) There is no reasonable cause exception to the imposition of interest. (*Appeal of Goodwin* (97-SBE-003) 1997 WL 258474.)

There are two provisions in California law that are under OTA's jurisdiction and that authorize the abatement of interest in specified situations. Under R&TC section 19104, interest may be abated to the extent that it is attributable to an unreasonable error or delay by an FTB employee in the performance of a ministerial or managerial act, but only if no significant aspect of the error or delay can be attributed to the taxpayer. R&TC section 21012 allows interest abatement where a taxpayer's failure to make a timely payment was due to reasonable reliance on FTB's written advice.

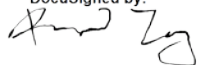
Appellant has not argued, and the evidence does not show, that appellant qualifies under either of these provisions in California law that allow interest abatement. Thus, we find no basis to grant appellant’s request for interest abatement.

HOLDINGS

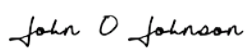
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2. Appellant has not shown FTB erred in its assessment of the estimated tax penalty.
3. Appellant is not entitled to interest abatement.

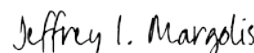
DISPOSITION

FTB’s action is sustained.

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 Richard Tay  
 Administrative Law Judge

We concur:

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 John O. Johnson  
 Administrative Law Judge

DocuSigned by:  
  
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 Jeffrey I. Margolis  
 Administrative Law Judge

Date Issued: 3/16/2020