

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19105398
P. LEWIS)
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OPINION

Representing the Parties:

For Appellant: Dennis Sherk

For Respondent: David Muradyan, Tax Counsel III

C. AKIN, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, P. Lewis (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant’s claim for refund of \$49,716.87¹ for the 2017 tax year.

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

ISSUES

1. Whether appellant has established reasonable cause for abatement of the late-payment penalty.
2. Whether appellant has established a basis for abatement of the underpayment of the estimated tax penalty (estimated tax penalty).

FACTUAL FINDINGS

1. On December 27, 2017, a payment of \$600,000 was attempted from appellant’s JPMorgan Chase Bank account using FTB’s Web Pay system. Appellant received an instant automated email from FTB’s Web Pay system, confirming that FTB received the “payment request.” The email included a disclaimer: “If you have insufficient funds, the

¹This amount is comprised of a late-payment penalty of \$43,221, and an underpayment of estimated tax penalty of \$6,495.87.

banking information you entered is incorrect, or your account is closed, your financial institution may reject your request.” Additionally, the email directed appellant to: “Allow up to 2 business days from the payment date for your bank account to reflect your payment.”

2. On December 29, 2017, appellant’s requested payment was returned because the account used was a non-transaction account.²
3. On April 15, 2018, appellant made an extension payment to FTB of \$14,957.
4. On August 10, 2018, appellant timely filed his 2017 California Resident Income Tax Return (Form 540) within the extension period, reporting total tax of \$634,504. Appellant reported estimated tax payments of \$614,957, withholding credits of \$19,455, and excess SDI of \$92, for total payments of \$634,504. Appellant self-assessed an estimated tax penalty of \$972, which he remitted to FTB on August 14, 2018.
5. On August 23, 2018, FTB sent appellant a Notice of Tax Return Change – Revised Balance reflecting a balance due of \$659,127. The notice stated that FTB’s records did not show the same amount of payments received as appellant claimed in his tax return. Specifically, FTB’s records only reflected estimated tax payments of \$14,957. The notice also indicated that FTB had imposed an underpayment penalty of \$44,995, an estimated tax penalty of \$6,495 (increased from \$972 as self-assessed by appellant), and interest of \$8,608.³
6. On September 6, 2018, appellant paid the \$659,127 balance due.
7. By letter dated November 1, 2018, appellant requested waiver of the penalties. The letter explained that on December 27, 2017, Fortem Financial made a payment of \$600,000 on behalf of appellant to pay his California estimated taxes, but that appellant later received a letter from FTB stating the payment was never received. Appellant also provided:
 - (i) a letter from Charles Schwab & Co. confirming cash balances in appellant’s accounts on December 27, 28, and 29, 2017, in excess of the \$600,000 attempted payment; and
 - (ii)

² A non-transaction account is typically one that does not allow debits to (i.e., withdrawals of cash or other payments from) the account.

³ Appellant concedes that he is responsible for and must pay any interest charged by FTB. As such, interest will not be addressed further in this opinion.

- the FTB Web Pay – Confirmation reflecting the attempted payment of \$600,000 from appellant’s JPMorgan Chase Bank account on December 27, 2017.⁴
8. FTB treated the November 1, 2018 letter as a claim for refund for \$51,490,⁵ which FTB denied on December 18, 2018, stating that appellant had not demonstrated reasonable cause for the abatement of penalties.
 9. On February 15, 2019, appellant filed an amended return (Form 540X), reducing total tax from \$634,504 to \$610,847. Appellant explained in a statement filed with the amended return that he was amending his return in part because his tax preparer did not pick up the Schedule K-1 figures and the partner’s basis correctly.
 10. FTB processed the amended return and on July 25, 2019, sent appellant a Notice of Tax Return Change – Refund. The notice indicated that appellant would receive a refund of \$26,775⁶ and set forth a revised late-payment penalty of \$43,221 (reduced from \$44,995, as reflected in FTB’s previous notice). The notice continued to reflect an estimated tax penalty of \$6,495.
 11. Appellant then submitted a second claim for refund on FTB Form 2917, Reasonable Cause – Individual and Fiduciary Claim for Refund, seeking abatement of the penalties. Appellant explained that his stockbroker set up the estimated tax payment of \$600,000 on December 27, 2017, and that he was unaware the payment had not been processed. Appellant stated that when he received the August 23, 2018 notice from FTB in September 2018, he immediately paid the balance due.
 12. FTB again denied appellant’s claim for refund, stating that appellant had not demonstrated reasonable cause for the abatement of penalties.
 13. This timely appeal followed.

⁴ Appellant does not explain why this confirmation letter is from Charles Schwab & Co. rather than JP Morgan Chase Bank; however, we note that, the last three digits of the account per the Charles Schwab & Co. letter is the same as that reflected on the FTB Web Pay – Confirmation. As such, we will accept this letter as evidence that appellant had sufficient funds in the account(s) to make the requested payment of \$600,000 on December 27, 2017.

⁵ This amount equals the \$44,995 late-payment penalty and \$6,495 estimated tax penalty, as reflected on FTB’s Notice of Tax Return Change – Revised Balance dated August 23, 2018.

⁶ The refund of \$26,775 was issued to appellant by FTB on July 19, 2019.

DISCUSSION

Issue 1. Whether appellant has established reasonable cause for abatement of the late-payment penalty.

R&TC section 19132(a)(1)(A) provides that a late-payment penalty shall be imposed when a taxpayer fails to pay the amount shown as due on the return on or before the date prescribed for payment. However, the late-payment penalty will not apply if the taxpayer establishes that the failure to make a timely payment of tax was due to a reasonable cause and not due to willful neglect.⁷ (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*.) 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 Friedman, supra*; *Appeal of Risser* (84-SBE-044) 1984 WL 16123.)

Appellant contends that upon learning that his company was going to be sold in 2017, he acted responsibly by contacting his tax preparer and stockbroker. Appellant states that his tax preparer advised him that he needed to make a \$600,000 estimated tax payment and that he notified and directed his stockbroker to make this payment to FTB in December 2017. Appellant states he had confidence that the estimated taxes would be paid as directed because his stockbroker had been taking care of his investments for a few years and had previously followed through with appellant's prior requests. Appellant further states that he was unaware that the \$600,000 payment had not been made and that he immediately paid the \$600,000 after receiving the August 23, 2018 notice from FTB. Appellant also alleges that it was his tax preparer's decision to file the tax return during the extension period instead of on or before April 15, 2018. Appellant contends that the nonpayment of the \$600,000 would have been discovered by him earlier and paid on time had the tax preparer filed his return by April 15, 2018. Appellant claims he had reasonable cause to rely on his stockbroker and tax preparer, behaved responsibly, and

⁷ FTB does not assert the late payment was due to willful neglect. As such willful neglect will not be discussed further in this opinion.

was not behaving badly. As such, appellant asserts that the penalties should be abated based on reasonable cause.

We, however, do not agree that appellant has established reasonable cause for abatement of the late-payment penalty. Appellant's financial institution returned appellant's attempted web payment of \$600,000 to FTB on December 27, 2019, because the account designated for payment was a non-transaction account, which did not permit debits to be made from it. Appellant's attempt, either directly or indirectly through his stockbroker who was acting at his direction,⁸ to pay his taxes using an account that does not permit debits or payments to be made from it, is a clear error, oversight, or mistake. It is well established that an oversight or error, by itself, does not constitute reasonable cause for the abatement of the late-payment penalty.

(Appeal of Friedman, supra; Appeal of Risser, supra.)

Additionally, when determining whether a taxpayer's failure to make a timely payment of tax was due to reasonable cause, the focus is not solely on initial error or mistake that caused the nonpayment, but also the taxpayer's subsequent action or inaction. "We 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.)* Here, appellant's taxes remained unpaid until September 6, 2018, a period of more than nine months from the attempted estimated tax payment on December 27, 2017. While appellant states that the "broker had control over the brokerage account where the money was supposed to be taken out of," there is no argument or evidence in the record to show that appellant did not also have access to either (or both) online account information and/or monthly statements relating to this bank or brokerage account that was held in his name. We believe that an ordinarily prudent taxpayer exercising due care and diligence would have monitored his account to ensure the scheduled tax payment had in fact been made and should have become aware of the non-payment of the taxes before a full nine months passed.

⁸ Appellant specifically states, "When the company was sold in December of 2017 [he] notified his broker and explained to the broker that he needed to make an estimated tax payment to the state for \$600,000.00." Appellant does not argue, and there is no evidence in the record to establish, that he intended the stockbroker to make the payment from an account other than the one used (i.e., appellant's JPMorgan Chase account) or that the stockbroker even had access to a "transaction" account that would have processed the attempted web payment to FTB. Additionally, even if the stockbroker mistakenly used appellant's JPMorgan Chase account for the attempted web payment to FTB, appellant had reason to know of this error as the specific account used for the attempted payment, including the last four digits of the account number, was reflected on both the email confirmation FTB sent directly to appellant's email address and the FTB Web Pay – Confirmation, which appellant acknowledges was provided to him by his stockbroker.

Likewise, lack of notice from FTB and/or bank of a failed payment does not negate appellant's duty of prudence and due care to verify that his scheduled payment was successful. (*Appeal of Scanlon, supra.*)

Appellant also asserts that he received a "letter" from his broker "showing the money going to web pay" and that he "had reasonable cause to rely on the information given to him by the broker." However, the "letter" appellant is referring to is the FTB Web Pay – Confirmation. This confirmation merely indicates that the payment had been requested or scheduled, not that the payment had been successfully made or processed. The confirmation specifically instructs appellant: "Allow up to 2 business days from the payment due date for your bank account to reflect your payment." Had appellant checked his account shortly after the two business days had passed, he would have discovered that the \$600,000 payment had not been debited from his account. We similarly find appellant's argument that the non-payment could have been discovered sooner and the tax paid on time had appellant's tax preparer filed his tax return on or before April 15, 2018, to be without merit. This argument again ignores that appellant himself could have discovered the non-payment had he simply checked his bank or brokerage account.

In addition, it is well-settled law that a taxpayer's reliance on a tax preparer or agent to timely file his or her taxes does not constitute reasonable cause because taxpayers have a personal, non-delegable obligation to file their taxes by the due date. (*U.S. v. Boyle* (1985) 469 U.S. 241, 247 & 251 (*Boyle*)). The nondelegable duty relating to late filing in *Boyle* also applies in the late-payment penalty context. (*Appeal of Berolzheimer* (86-SBE-172) 1985 WL 22860.) Appellant had a personal and non-delegable duty to ensure timely payment of his taxes and cannot delegate that duty to his stockbroker and/or tax preparer.

Issue 2. Whether appellant has established a basis for 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 year. (R&TC, § 19136.1; IRC, §6654(c)(2).) The estimated tax penalty is similar to an interest charge in that it is calculated by applying the applicable interest rate to the underpayment of estimated tax. (*Appeal of Saltzman*, 2019-OTA-070P; IRC, § 6654(a).)

Appellant attempted to make an estimated tax payment of \$600,000 on December 27, 2017, but the requested payment was returned two days later. Appellant did not pay the balance due until September 2018 after being notified of the nonpayment by FTB. Appellant does not dispute the imposition or computation of the estimated tax penalty. Instead, appellant argues that the penalty amount should be refunded because he relied on his stockbroker to make the timely estimated tax payment and his tax preparer to file a timely return by April 15, 2018. These are reasonable cause arguments. However, there is no general reasonable cause exception to the estimated tax penalty.⁹ (*Appeal of Saltzman, supra*; *Appeal of Johnson*, 2018-OTA- 119P; *Farhoumand v. Commissioner* (2012) T.C. Memo. 2012-131.) Accordingly, appellant has failed to establish a basis on which to waive the estimated tax penalty.

HOLDINGS

1. Appellant has not established reasonable cause for abatement of the late-payment penalty.
2. Appellant has not established a basis for abatement of the estimated tax penalty.

DISPOSITION

FTB's denial of appellant's claim for refund is sustained.

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Cheryl L. Akin

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Cheryl L. Akin
Administrative Law Judge

We concur:

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Sheriene Anne Ridenour

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Sheriene Anne Ridenour
Administrative Law Judge

DocuSigned by:

Tommy Leung

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Tommy Leung
Administrative Law Judge

Date Issued: 4/16/2020

⁹The estimated tax penalty will not apply only under limited circumstances, such as where it is established that the failure to timely pay the estimated tax payment was due to reasonable cause and the taxpayer either retired after reaching age 62 or 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.