OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 18010690
WILLIAM C. HARRISON AND ANGIE HARRISON	)

OPINION

Representing the Parties:

For Appellant: William C. Harrison
Angie Harrison

For Respondent: Brian Werking, Tax Counsel

M. GEARY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, appellants William C. Harrison (William Harrison) and Angie Harrison appeal actions by respondent Franchise Tax Board (FTB) denying: (1) appellant William Harrison's claims for refund of $853.79 for the 2012 taxable year and $205.56 for the 2013 taxable years; (2) appellant Angie Harrison's claim for refund of $517.31 for the 2013 taxable year; and (3) both appellants' claim for refund of $942.26 for the 2014 taxable year.

Appellants waived their right to an oral hearing. Therefore, we decide the matter based on the written record.

ISSUES

1. Should the late-filing penalties be abated?
2. Did FTB properly impose a demand penalty[1] on William Harrison for the 2012 taxable year; and, if it did, is William Harrison entitlement to abatement of that penalty?
3. Are appellants entitled to abatement of the collection cost recovery fees imposed on William Harrison for the 2012 taxable year and on Angie Harrison for the 2013 taxable

[1] FTB is authorized by R&TC section 19133 (as implemented by California Code of Regulations, title 18, section 19133) to impose a demand penalty, sometimes called a notice and demand penalty, when a taxpayer fails to timely respond to a "Demand for Tax Return" issued by FTB after a taxpayer fails to file a return.

year, or the filing enforcement cost recovery fee imposed on William Harrison for the 2012 taxable year?

4. Are appellants entitled to abatement of the installment agreement fee imposed on William Harrison in 2013 and on appellants in 2014?
5. Are the appellants entitled to abatement of interest?
6. Are appellants entitled to abatement of the 2014 estimated tax penalty?

FACTUAL FINDINGS

Regarding William Harrison's liability for the 2012 and 2013 taxable years[2]

1. On February 2, 2012, FTB sent appellant a "Request for Tax Return" (Request). The Request instructed appellant to file a 2010 California income tax return (return), provide evidence that he had already filed one, or provide information to show that he was not required to file one, by March 7, 2012.
2. Appellant did not respond to FTB's Request by March 7, 2012.
3. On April 2, 2012, FTB sent appellant a "Notice of Proposed Assessment" (NPA) for $546 tax (after deducting allowed exemption credits), a late-filing penalty of $136.50, and accrued interest for the 2010 taxable year.
4. FTB received information that showed appellant earned sufficient income during the 2012 taxable year to require him to file a return.
5. FTB's records indicated that appellant had not filed a 2012 return. On May 26, 2015, FTB sent to appellant a "Demand for Tax Return" (Demand), which instructed appellant to file his 2012 return, provide a copy of his 2012 return if he had already filed one, or provide information to show that appellant had no 2012 filing requirement, by July 1, 2015. The Demand also informed appellant that a failure to timely respond would result in FTB's imposition of a demand penalty assessed at 25 percent of the total tax, without regard to payments.
6. FTB had not proposed an assessment of tax against appellant under the authority of R&TC section 19087(a), after he had failed to timely respond to a Request or Demand, at any time during the four-taxable-year period preceding the 2012 taxable year.

[2] All references to "appellant" in paragraphs 1-15, inclusive, are to William Harrison.

7. On July 27, 2015, FTB sent appellant an NPA for the 2012 taxable year for $1,303 tax (based on estimated income totaling $43,490), a late-filing penalty of $325.75, a demand penalty of $325.75, a $79 filing enforcement fee, and accrued interest. The notice also informed appellant that he still was required to file a return.
8. Appellant did not respond to the NPA. Consequently, on December 8, 2015, FTB sent appellant an "Income Tax Due Notice," which described the amounts due for the 2012 taxable year and indicated that failure to pay the amount in full within 30 days may result in FTB taking collection action. An FTB Form 1140, which was included with the "Income Tax Due Notice," explained that such collection action could include imposition of filing enforcement and collection cost recovery fees.[3]
9. Appellant did not timely pay the amount due for 2012. As a result, FTB began collection actions and imposed a $226 collection cost recovery fee.
10. Appellant began making payments against his 2012 liability on or about January 21, 2016.
11. Appellant filed his 2012 return on or about March 1, 2016, reporting taxable income of $32,831 and tax due of $878. FTB accepted the return and adjusted the liabilities accordingly. FTB approved appellant's plan to pay the liability in installments and imposed a $34 installment agreement fee.
12. In several letters appellant asked FTB to abate or relieve the 2012 penalties and interest. After appellant paid the 2012 liability in full on or about May 1, 2017, FTB treated appellant's letters as a timely claim for refund.
13. On June 6, 2017, FTB denied the claim for refund for the 2012 taxable year. This timely appeal followed.
14. In appellant's 2013 return, filed on or about March 3, 2016, he reported taxable income of $26,008 and tax due of $439. FTB accepted the return as filed and imposed a late-filing penalty of $135.
15. Appellant paid his 2013 liability in full on June 3, 2016. FTB treated appellant's earlier letter(s) as a timely request for refund of the 2013 penalty and interest. By "Notice of

[3] FTB did not provide a copy of the Form 1140, but the Income Tax Due Notice states that Form 1140 was attached, and appellant has not argued otherwise.

Action" (NOA) dated December 13, 2016, FTB denied the claim. This timely appeal followed.

Regarding appellant Angie Harrison's liability for the 2013 taxable year[4]

16. FTB received information that showed appellant earned sufficient income during the 2013 taxable year to require her to file a return.
17. FTB's records indicated that appellant had not filed a 2013 return. On January 28, 2015, FTB sent appellant a Request, which instructed appellant to file her 2013 return, provide a copy of her 2013 return if one had already been filed, or provide information to show that appellant had no 2013 filing requirement, by March 4, 2015.
18. Appellant did not respond to FTB's Request by March 4, 2015.
19. On March 30, 2015, FTB sent appellant an NPA for the 2013 taxable year for $6,719 tax (based on estimated income totaling $103,465), a late-filing penalty of $1,679.75, and accrued interest, all due and payable by May 29, 2015. The notice also informed appellant that she still was required to file a return.
20. Appellant did not respond to the NPA. Consequently, on August 11, 2015, FTB sent appellant an "Income Tax Due Notice" and an FTB Form 1140, which described the 2013 amounts due and indicated that failure to pay the amount in full within 30 days may result in FTB taking collection action, including imposition of filing enforcement and collection cost recovery fees.[5]
21. Appellant did not timely pay the entire amount due. FTB began collection actions and imposed a $226 collection cost recovery fee.
22. Appellant began making payments toward her liability on January 21, 2016.
23. On or about March 3, 2016, appellant filed her 2013 return, which reported taxable income of $33,714 and tax due of $913. FTB accepted the return as filed and reduced the tax and late-filing penalty accordingly. Appellant paid her 2013 liability in full on March 10, 2016.

[4] All references to "appellant" in paragraphs 15-22, inclusive, are to Angie Harrison.

[5] FTB did not provide a copy of the Form 1140, but the Income Tax Due Notice states that Form 1140 was attached, and appellant has not argued otherwise.

24. By letter dated April 18, 2016, appellant asked FTB to abate the penalty, collection cost recovery fee, and interest. FTB treated appellant's request as a claim for refund. By an NOA dated November 14, 2016, FTB denied the claim. This timely appeal followed.

Regarding appellants' liability for the 2014 taxable year

25. FTB received information that showed Angie Harrison earned sufficient income during the 2014 taxable year to require her to file a return.
26. On January 12, 2016, FTB sent Angie Harrison a Demand, again asking her to provide a copy of her 2014 return if one had already been filed, file her return, or provide information to show that she had no 2014 filing requirement, by February 17, 2016.
27. On February 18, 2016, FTB received Angie Harrison's response, which explained that she had started a business, was having difficulty with her financial data, and hoped to file her 2014 return by March 31, 2016. She did not file the return by that date.
28. On April 25, 2016, FTB sent Angie Harrison an NPA for $16,893 tax (based on estimated income of $212,418), a late-filing penalty of $4,218.75, a demand penalty of $4,218.75, a $79 filing enforcement fee, and accrued interest. The NOA also informed Angie Harrison that the payment was due by June 24, 2016, unless she filed her 2014 return or a protest by that date, and that she must file a return, even if she paid the assessment.
29. Appellants filed a joint return for the 2014 taxable year on or about July 21, 2016, reporting taxable income of $64,512 and a tax due of $866. FTB accepted the return as filed, reduced the previously imposed penalties accordingly, and imposed an estimated tax penalty of $18.99.
30. FTB granted appellants' request to make installment payments and added an additional $34 installment agreement fee.
31. Appellants paid the entire 2014 liability by March 18, 2017. FTB treated William Harrison's earlier letters as a timely request for abatement and refund of penalties, fees and interest imposed for 2014. By an NOA dated June 6, 2017, FTB denied the request. This timely appeal followed.
32. On appeal, FTB has agreed to abate the 2014 demand penalty and the 2014 filing enforcement fee.

DISCUSSION

Issue 1 – Should the late-filing penalties be abated?

Individual returns filed on a calendar year basis are due by April 15 following the close of the taxable year. (R&TC, § 18566.) R&TC section 19131 requires FTB to impose a late-filing penalty when a taxpayer does not file its return on or before its due date, unless the taxpayer shows that the late filing was due to reasonable cause and not due to willful neglect; however, if the return is not filed within six months of the original due date, no valid extension exists and the late-filing penalty amount is computed by reference to the original due date of the return. (*Ibid*.)

To establish reasonable cause, the taxpayer must show the failure to timely file occurred despite the exercise of "ordinary business care and prudence." (*Appeal of Friedman* (2018-OTA-077P).) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Magidow* (82-SBE-274) 1982 WL 11930.) Whether a taxpayer timely filed a return and, if not, whether the failure to do so was due to reasonable cause and not to willful neglect are questions of fact on which taxpayer has the burned of proof. (*Appeal of La Salle Hotel Company* (66-SBE-071) 1966 WL 1412.)

FTB imposed late-filing penalties on William Harrison for the 2012 and 2013 taxable years. William Harrison states that he went through a long and difficult proceeding for the dissolution of his former marriage between 2009 and 2012, which involved a custody battle that disrupted his personal and business life, that he had problems with his bookkeeper, including turnover in that position and the difficulty he had finding enough time to spend with the bookkeeper to get the taxes done, and that he and his wife took on the responsibility of caring for her mother, who was ill and required constant care. William Harrison alleges that these circumstances combined to constitute reasonable cause for his failure to file his return by the due date. Finally, appellant states that the Internal Revenue Service (IRS) abated "some penalties," and he at least suggests that this circumstance supports his request for relief here.

FTB argues that it correctly calculated and imposed the late-filing penalties, and that appellant does not dispute this. FTB asserts that the only question is whether William Harrison's failure to file by the due date was due to reasonable cause and not due to willful neglect. FTB contends that the circumstances appellant relies upon may have added to his responsibilities, but they do not constitute good cause for the late filing. It asserts that, while illness or other personal

circumstantial may constitute reasonable cause for failing to file when they effectively prevent a taxpayer from filing on time, if the difficulties simply cause the taxpayer to sacrifice the timeliness of one aspect of the his or her affairs to pursue other aspects, the taxpayer must bear the consequences of that choice. Likewise, FTB argues that the normal pressures from operating a business are not good cause for failing to fulfill one's obligation to comply with the tax laws.

We have no independent evidence to show what was going on in William Harrison's life when these returns were due in April 2013 and April 2014. We understand that the dissolution of a marriage and a resulting custody battle may have complicated appellant's life and made it difficult to focus on other matters, but appellant's subjective statement that his circumstances prevented him from filing his returns on time does not establish reasonable cause. Many people manage to file their returns on time while they are in the middle of difficult personal circumstances. Furthermore, appellant indicates his marriage dissolution was done by 2012, months before the 2012 return was due. We are not persuaded that the dissolution and custody dispute prevented him from filing his returns on time. We can also understand the difficulties William Harrison may have had when his company did not have a reliable bookkeeper to help with accounting and tax issues. But again, many businesspersons deal with personnel issues, and the evidence does not establish that these circumstances prevented William Harrison from filing his 2012 and 2013 returns by the due dates. Also, according to Angie Harrison's June 21, 2016 letter to the IRS, appellants did not assume responsibility for her mother's care until late in 2014, and we are not persuaded that these responsibilities prevented William Harrison from filing his 2012 or 2013 returns by the due dates.

Finally, regarding appellant's suggestion that FTB should abate at least some of the penalties and fees because the IRS did, we note that the IRS has a first-time abatement program, through which the IRS abates first-time penalties based only on a taxpayer's good history of timely filings and payments. California law does not allow first-time abatement of penalties based on a taxpayer's good filing history.[6] Based on the evidence, we conclude that William Harrison is not entitled to abatement of the late-filing penalty imposed by FTB for the 2012 and 2013 taxable years.

[6] 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, for example, Assembly Bill No. 1777 (2013-2014 Reg. Sess.).)

FTB imposed a late-filing penalty on Angie Harrison for the 2013 taxable year. The due date for Angie Harrison's 2013 return was April 15, 2014.[7] She did not file her return until March 3, 2016, almost two years late. FTB imposed a late-filing penalty, and Angie Harrison argues that she is entitled to abatement of the penalty on the grounds that her mother's failing health, and the resulting increased responsibilities on appellants to provide her with full-time care, prevented Angie Harrison from filing her 2013 return by the due date.

The death or serious illness of a taxpayer or a member of a taxpayer's immediate family may establish reasonable cause for a failure to pay taxes when due. (See *United States v. Boyle* (1985) 469 U.S 241, 243, fn 1; *McMahan v. Commissioner* (2d Cir. 1997 114 F.3d 366, 369 [both citing the Internal Revenue Manual].) However, the death or illness must be sufficiently and continuously disruptive to prevent a taxpayer's compliance with the law. (*Matter of Carlson* (7th Cir. 1997) 126 F.3d 915, 923; see also *Estate of Stuller, et al. v. United States* (7th Cir. 2016) 811 F.3d 890; *Appeal of Halaburka* (85-SBE-025) 1985 WL 15809; *Appeal of James* (83-SBE-009) 1983 WL 15396.)

Angie Harrison states in her June 21, 2016 letter to the IRS that her mother was hospitalized in October 2014, that she came to live with appellants after her discharge, and that after the discharge her mother continued to receive in-home supportive care from other caregivers, which allowed appellants to continue to work. The evidence shows that there were demands on Angie Harrison's time, beyond those that naturally result from employment and typical family responsibilities. The evidence does not show that Angie Harrison's other responsibilities prevented her from timely filing her 2013 return. We conclude Angie Harrison is not entitled to abatement of the late-filing penalty imposed for the 2013 taxable year.

FTB imposed a late-filing penalty on appellants, jointly, for the 2014 taxable year. Appellants rely on the same circumstances here that each of them, individually, relied upon for their earlier failures to timely file returns: the dissolution of William Harrison's marriage and the resulting custody dispute, his difficulties finding a competent and reliable bookkeeper, and appellants' increased responsibilities to care for Angie Harrison's mother.

Because appellants did not file their joint 2014 return by the automatic extension date, it was due on April 15, 2015. According to William Harrison's letter dated April 18, 2016, the

[7] The due date would have been October 15, 2014, *if* she had filed by that automatic extension date. (Regulation 18567(a).)

dissolution proceeding concluded in 2012, and there is no evidence that this was a significant distraction years later. Likewise, William Harrison alleges that he started having problems with his bookkeeper in 2013 and that they continued for two years. We have already indicated, above, that this circumstance did not constitute reasonable cause even for the earlier missed filing dates. Finally, the evidence does not show that appellants' responsibilities caring for Angie Harrison's mother prevented them from filing their 2014 return on time. They were able to attend to other matters, like employment. We find that it is more likely than not that appellants simply chose to relegate their tax responsibilities to a less important position. On these bases, we find that appellants are not entitled to abatement of the late-filing penalty imposed for the 2014 taxable year.

Issue 2 – Did FTB properly impose the demand penalty on William Harrison for the 2012 taxable year; and, if it did, is William Harrison entitlement to abatement of that penalty?

FTB may add a penalty of 25 percent of the amount of tax determined if a taxpayer fails to make and file a return after notice and demand by the FTB, unless the taxpayer establishes the failure is due to reasonable cause and not willful neglect. (R&TC, § 19133.) The implementing regulation, California Code of Regulations, title 18, section (Regulation) 19133, states that FTB will impose the demand penalty only if the taxpayer fails to timely respond to a current Demand for Tax Return in the manner prescribed, and "the FTB has proposed an assessment of tax 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 for Tax Return in the manner prescribed, *at any time during the four-taxable-year period preceding the taxable year for which the current Demand for Tax Return is issued*." (Regulation 19133(b)(2); emphasis added.)

Subdivision (d) of Regulation 19133 contains two examples of the application of the R&TC section 19133. The first describes a hypothetical wherein a taxpayer, for the first time, did not file a return for the 1999 taxable year. On January 15, 2001, FTB sent a Request to taxpayer, who did not timely reply. The second example builds on the first and states that the same taxpayer also did not file a return for the 2001 taxable year, which prompted FTB to issue a Demand. It goes on to state that, "Because X received an NPA for not filing a return *within the previous four years*, the FTB issues a Demand for Tax Return for the 2001 taxable year. If X fails to timely respond to the Demand for Tax Return, the FTB will issue an NPA that includes

tax, a late filing penalty, interest, and a notice and demand penalty under Revenue and Taxation Code section 19133." (Emphasis added.)

There is a conflict between the language of Regulation 19133(b)(2) and the language of the illustrative examples in subdivision (d). Specifically, subdivision (b)(2) clearly provides that FTB will not impose the demand penalty unless taxpayer had previously failed to timely respond to a Request or Demand and, as a result, FTB had proposed an assessment during the four taxable years before the taxable year at issue. In contrast, the examples appear to indicate either that the penalty may be imposed as long as the prior NPA was issued within the previous four years, or that the penalty may be imposed as long as the prior NPA was issued as a result of taxpayer having failed to file a return during one or more of the four previous years. FTB issued the prior NPA for 2010 to William Harrison in 2012, the same year for which it sought to impose the demand penalty, which is in in violation of the limitation stated in subdivision (b)(2), though arguably consistent with the examples stated in subdivision (d).

In its additional brief, FTB argues that Regulation 19133(b)(2) was intended to limit imposition of the demand penalty to individual taxpayers who had failed to file a return for one or more of the four taxable years immediately preceding the taxable year at issue after receiving a Request or Demand, which resulted in FTB's issuance of an NPA. FTB argues that we should not interpret subdivision (b)(2) literally and that we should resolve the conflict between subdivision (b)(2) and (d) only after deferring to FTB's proposed interpretation, unless that interpretation contradicts the clear language and purpose of subdivision (b)(2).

Citing *Auer* v. *Robbins* (1997) 519 U.S. 452 and two of its progeny,[8] FTB contends that the conflict between subdivisions (b)(2) and (d) renders the regulation ambiguous and that FTB's interpretation of the regulation is entitled to great deference, sometimes referred to as *Auer* deference. FTB argues it is clear from the rulemaking history for Regulation 19133 that the intent was to soften the potentially harsh effect of R&TC section 19133 by limiting FTB's imposition of the penalty to "repeat non-filers." Rulemaking file documents provided by FTB support this assertion and indicate that "repeat non-filers" were individual taxpayers who had received a proposed assessment of tax, after receiving and failing to respond to a Request or Demand, within the previous four years. FTB also points out that both the Board of Equalization

[8] *Talk Am., Inc.* v. *Mich. Bell Tel.* Co. (2011) 564 U.S. 50, 59; *Chase Bank USA, N.A.* v. *McCoy* (2011) 562 U.S. 195, 207.)

(BOE) and the Office of Tax Appeals (OTA) have sustained FTB's imposition of the penalty when the prior NPA was issued in the taxable year at issue in the appeal.

Finally, FTB rejects any suggestion that language in an example is entitled to less weight or consideration than the regulatory language that precedes the example. FTB argues that the examples are simply part of the regulation, that the entire regulation must be read as a whole, and that, to the extent there is an ambiguity, we should defer to FTB's "consistent and contemporaneous application of the regulation."

An opposing view is that Regulation 19133(b)(2) unambiguously provides that, in order to impose the demand penalty, FTB must have issued an NPA to the taxpayer, following the taxpayer's failure to timely respond to a previous Request or Demand, during the four-taxable-year period preceding the taxable year for which the current Request or Demand is issued. Proponents of this view note that the term "taxable year" is defined as "the calendar year or the fiscal year upon the basis of which the taxable income is computed under this part, and that if no fiscal year has been established, "taxable year" means the calendar year." (R&TC, § 17010.) The opposing view takes the position that issuance of a prior NPA earlier in the same year as the year at issue is insufficient, regardless of whether the taxpayer is a repeat non-filer, and that the conflicting language in the examples of subdivision (d) are merely illustrative and not entitled to the same weight as the language of subdivisions (a) through (c). Thus, under the opposing view, FTB may impose a demand penalty on William Harrison for the 2012 taxable year only if FTB issued an NPA to appellant during 2008, 2009, 2010, or 2011 following the taxpayer's failure to timely respond to a Request or Demand.

R&TC section 19133, which authorizes FTB to impose the demand penalty, contains none of the limitations with which we are now concerned. At some point, long after the penalty was first available, FTB became concerned about the harshness of the statute that allowed a 25-percent penalty when a taxpayer failed to timely respond to a Request or Demand, even for a first-time non-filer. According to documents contained in FTB's rulemaking file, Regulation 19133 was intended to limit FTB's exercise of its statutory authority to impose the penalty to taxpayers who were repeat non-filers to whom FTB had issued a prior NPA following the taxpayer's failure to timely respond to a Request or Demand. Initially, FTB staff proposed looking back to the prior taxable year to determine who was a repeat non-filer, but the proposal was modified to allow FTB to look back four years. According to FTB's brief, FTB

implemented this policy change on January 1, 2001, almost four years before the effective date of Regulation 19133.[9]

FTB states that Regulation 19133 was promulgated to codify the new policy "limiting the imposition of the Demand Penalty to taxpayers who had received an NPA, following a Request or Demand Notice, for one of the four preceding taxable years." We question whether the policy just described would further the goal of the Board[10] that the penalty would be imposed only on repeat non-filers. The rulemaking materials and the language of Regulation 19133 indicate that the Board's intent was to limit application of the demand penalty to taxpayers who had shown a willingness to not file their returns at least twice during a four-year period and who had been made aware of the consequences of doing so by having an NPA issued to them after they failed to respond to a Request or Demand. Yet, under this policy, FTB could impose the demand penalty even if it issues an NPA for one or more of the four preceding years after the taxable year for which FTB seeks to impose the demand penalty.

Regulation 19133(b)(2) clearly establishes two requirements for imposition of the penalty: (1) the taxpayer must have failed to respond to a current Request; and (2) FTB must have proposed an assessment of tax, after the taxpayer failed to timely respond to prior Request or Demand, during the prior four taxable years. As written, the key event for the second requirement is FTB's issuance of an NPA after the taxpayer has failed to timely respond to a Request or Demand. In other words, before the penalty could be imposed, four things must have happened: (1) the taxpayer must have failed to file a required return; (2) FTB must have sent taxpayer a Request or Demand to file that return (or provide information); (3) taxpayer must have failed to timely (and properly) respond to that Request or Demand; and (4) as a result, FTB must have proposed an assessment for that taxable year. Because the last event in the cycle, the proposed assessment, must have happened during the prior four taxable years, this also guarantees that all of the events occurred prior to the taxable year for which FTB seeks to impose the demand penalty. The reference in Regulation 19133(b)(2) to "prior four taxable years" creates the anomaly that brings us to this discussion: when FTB issues the prior NPA during the

[9] We note that FTB's brief states that it "reprogrammed its filing enforcement program to impose the Demand Penalty for a taxable year only upon those non-filers who had received an NPA, following a Request . . . , *in* one of the four preceding taxable years." (Emphasis added.) We note that this is the exact same policy evidenced by Regulation 19133(b)(2), and suspect that FTB meant to say " . . . *for* one of the preceding taxable years."

[10] This and any subsequent references to "Board" are to three-member FTB board.

same taxable year for which the current demand penalty is under consideration, subdivision (b)(2) does not permit imposition of the penalty, regardless of the fact that the taxpayer is a repeat non-filer, as defined above. The examples in subdivision (d), however, appear to allow FTB to impose the penalty as long as the prior proposed assessment occurred "within the previous four years."

The United States Supreme Court recently examined the rules for the interpretation and construction of an agency's regulations, particularly the circumstances that warrant *Auer* deference to an agency's interpretation of its own regulation, in *Kisor v. Wilkie* (2019) 139 S.Ct. 2400 (*Kisor*). While the *Kisor* Court declined to overrule *Bowles v. Seminole Rock & Sand Co*. (1945) 325 U.S. 410 or *Auer v. Robbins*, *supra*, the seminal decisions that established the rules for deferring to an agency's interpretation, it recognized the limited scope of the doctrine. *Kisor* tells us that "the possibility of deference can arise only if a regulation is genuinely ambiguous . . . , even after a court has resorted to all the standard tools of interpretation. (*Kisor, supra,* 139 S.Ct. 2400 at p. 2414.)

Before we can determine whether the regulation is ambiguous, we must determine what constitutes the regulation, or, more specifically, whether the examples are entitled to consideration and weight equal to that afforded to the language that precedes them. We are not persuaded by FTB's argument that they are, at least not for the purpose of determining whether an ambiguity exists. The examples are in the regulation because FTB included them there as subdivision (d), but, as stated in Regulation 19133(d), "The . . . examples are intended to illustrate the provisions of this regulation." The examples merely describe FTB's interpretation of the regulation that precedes them. If FTB had not included the examples in the regulation, and if FTB appeared before us to propose the interpretation of Regulation 19133 it now proposes, we would not be inclined to accept its interpretation because it is inconsistent with the clear language of Regulation 19133(b)(2). We see no reason to treat an illustrative example that conflicts with the clear regulatory language differently. There is no question that the clear regulatory language of subdivision (b)(2) tells us how Regulation 19133 is to be applied, or that the second example contained in subdivision (d) reflects an interpretation inconsistent with that clear regulatory language. It has been stated that "examples set forth in regulations remain persuasive authority *so long as they do not conflict with the regulations themselves*." (*Cook v. Commissioner* (7th Cir. 2001) 269 F.3d 854, 858; emphasis added.) This at least suggests that

conflicts between regulatory language and illustrative examples should be resolved in favor of the regulatory language. We agree.

As stated in *Kisor*,

> If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means—and the court must give it effect, as the court would any law. Otherwise said, the core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over. . . . But if the law gives an answer—if there is only one reasonable construction of a regulation—then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."

(*Kisor*, *supra*, 139 S.Ct. 2400 at p. 2415.) We find that there is only one reasonable construction of Regulation 19133, one based on the clear language of subdivision (b)(2). Therefore, because FTB did not propose an assessment of tax under the authority of R&TC section 19087(a), after the appellant failed to timely respond to a Request or Demand, at any time during the four-taxable-year period preceding the 2012 taxable year, we find that FTB did not properly impose the demand penalty on William Harrison for the 2012 taxable year.

Issue 3 – Are appellants entitled to abatement of the collection cost recovery fees imposed on William Harrison for the 2012 taxable year and on Angie Harrison for the 2013 taxable year, and the filing enforcement cost recovery fee imposed on William Harrison for the 2012 taxable year?

R&TC section 19254 requires FTB to impose collection cost recovery fees and filing enforcement cost recovery fees. FTB imposes a collection cost recovery fee when it notifies a taxpayer that the continued failure to pay an amount due may result in collection action, including imposition of the fee and the taxpayer fails to pay the amount when due. It imposes a filing enforcement cost recovery fee when a taxpayer fails to file a return within 25 days after a formal legal demand to file a return is mailed to the taxpayer.[11] The amount of the fees is set annually to reflect actual collection and enforcement costs. The statute does not allow for abatement of or relief from these fees, even on a showing that the failure to pay was due to reasonable cause. (See *Appeal of Myers* (2001-SBE-001) 2001 WL 37126924.)

[11] Organizations that are exempt under R&TC section 23701 are not subject to the fee.

The parties request that the fees be abated, apparently on the grounds that their failure to file and pay timely was due to reasonable cause, and because the IRS abated some penalties or fees.

FTB argues that it notified appellant that there would be collection action if he failed to pay on time, and that such action could include imposition of the fees.[12] It asserts that there are no grounds, statutory or otherwise, to abate the fees.

The evidence establishes that William Harrison failed to file his 2012 return within the time allowed by the Demand and the statute, and that he failed to pay the amount due after FTB had notified him that his continued failure to pay an amount due may result in collection action, including imposition of the fee. It shows that Angie Harrison failed to file her 2013 return within the time allowed by the Request and the statute, and that she failed to pay the amount due after FTB had notified her that her continued failure to pay an amount due may result in collection action, including imposition of the fee. Appellants do not contend otherwise. Given that the law does not allow abatement of these fees on a showing of reasonable cause, we cannot consider appellant's arguments that the fees should be abated on that basis. We find that the parties are not entitled to abatement of the filing enforcement or collection cost recovery fees imposed on them for the 2012 or 2013 taxable years.

Issue 4 – Are appellants entitled to abatement of the installment agreement fee imposed on William Harrison in 2013 and on appellants in 2014?

The law requires FTB to impose specialized tax service fees when, as relevant here, it grants a taxpayer's request to participate in an installment payment program. (R&TC, § 19591.) The fee for individual taxpayers to participate in an installment payment program is $34. (Regulation 19591(b)(1)(A).) There is no provision in the law that allows the fees to be abated or relieved. Therefore, appellants not entitled to abatement of the installment agreement fees.

[12] The "Income Tax Due Notice" sent to appellant states that if payment in full is not received within 30 days, FTB may take collect action. It also states, "See enclosed FTB 1140, *Personal Income Tax Collections Information*." Although a copy of that form was not provided, we know that it states that FTB will charge the taxpayer cost recovery fees if FTB must take collection action to resolve filing and payment delinquencies. It also states that cost recovery fees may include a filing enforcement fee and a collection fee, among others, and it cites to. Government Code section 16583.1 and R&TC sections 19254, 19209, 19221, 19233, and 19234. Appellants do not dispute that they received FTB 1140.

Issue 5 – Are the appellants entitled to abatement of interest?

Interest is not a penalty, but merely compensation to the state for a taxpayer's use of the funds, and the law requires FTB to collect interest on past-due taxes. (R&TC, § 19101(a); *Appeal of Yamachi* (77-SBE-095) 1977 WL 3905; *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.) FTB can abate interest when the interest is attributable to unreasonable error or delay by an FTB officer or employee while performing a ministerial or managerial act in his or her official capacity. (R&TC, § 19104(a).)

William Harrison requests interest abatement for 2012 and 2013; Angie Harrison requests interest abatement for 2013; and both appellants request interest abatement for 2014. However, none of the appellants have alleged or proved unreasonable error or delay by an FTB officer or employee. All argue that there is reasonable cause to abate interest, but that is not a basis for abatement. Consequently, we conclude that none of the appellants are entitled to interest abatement for the taxable years in question.

Issue 6 – Are appellants entitled to abatement of the 2014 estimated tax penalty?

Subject to certain exceptions not relevant here, FTB must impose a penalty on a taxpayer who fails to make adequate estimated tax payments. (R&TC, § 19136;[13] Internal Revenue Code (IRC), § 6654.) Estimated tax payments are due four times a year, on: April 15, June 15, September 15 of the taxable year, and on January 15 of the following tax year. (IRC, § 6654(c).) This penalty is typically imposed when joint filers still owe more $500 or more in taxes after credit for all installment payments (including amounts withheld through payroll deductions and amounts paid in periodic installments). (R&TC, § 19136(c)(2); *Appeal of Mazdyasni* (2018-OTA-049P).) There is nothing in the law that allows a taxpayer relief from the penalty based solely on a showing of reasonable cause.[14]

[13] R&TC section 19136 was amended effective January 1, 2017. We apply the former section 19136 here.

[14] IRC section 6654(e)(3) provides two avenues upon which the addition to tax may be waived, neither of which find support in the evidence here. The first, under IRC section 6654(e)(3)(A), authorizes the government to waive the addition to tax if it determines that, "by reason of casualty, disaster, or other unusual circumstances the imposition of such addition to tax would be against equity and good conscience." The second, under IRC section 6654(e)(3)(B), authorizes waiver if the IRS (or here, the FTB) determines that (i) during the applicable tax year or the preceding year, the taxpayer either retired after having attained age 62, or became disabled, *and* (ii) the underpayment was due to "reasonable cause" and not due to willful neglect.

Appellants have not alleged or proved a factual or legal basis for abatement of the penalty. Furthermore, we find that no basis for abatement exists. Therefore, we conclude that appellants are not entitled to abatement of the 2014 estimated tax penalty.

HOLDINGS

1. Appellants are not entitled to abatement of any of the late-filing penalties.
2. FTB did not properly impose the demand penalty on William Harrison for the 2012 taxable year; therefore, FTB shall abate it.
3. Appellants are not entitled to abatement of the collection cost recovery fees imposed on William Harrison for the 2012 taxable year and on Angie Harrison for the 2013 taxable year, or the filing enforcement cost recovery fee imposed on William Harrison for the 2012 taxable year.
4. Appellants are not entitled to abatement of the installment agreement fee imposed on William Harrison in 2013 and on appellants in 2014.
5. Appellants are not entitled to abatement of any of the interest accrued.
6. Appellants are not entitled to abatement of the 2014 estimated tax penalty.

DISPOSITION

The demand penalty imposed on William Harrison for the 2012 taxable year shall be abated and refunded, with interest as appropriate, but FTB's denials of the subject claims for refund are in all other respects sustained.

DocuSigned by:
Michael F. Geary
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Michael F. Geary
Administrative Law Judge

We concur:

DocuSigned by:
Alberto T. Rosas
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Alberto T. Rosas
Administrative Law Judge

DocuSigned by:
Joczielle Cruz
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Joczielle Cruz
Staff Services Analyst, on behalf of
Douglas Bramhall
Administrative Law Judge

Date Issued: 1/7/2020