

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

D. GARIBALDI) OTA Case No. 19125630
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)**OPINION**

Representing the Parties:

For Appellant:

Benjamin A. Hurwitz, CPA

For Respondent:

Christopher T. Tuttle, Tax Counsel

S. RIDENOUR, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, D. Garibaldi (appellant) appeals an action by respondent Franchise Tax Board (FTB) denying appellant's claim for refund for the 2018 tax year.

Appellant waived the 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 failing to make a timely payment of tax.
2. Whether appellant has established that the underpayment of estimated tax penalty (estimated tax penalty) should be abated.
3. Whether appellant has established a basis for abatement of interest.

FACTUAL FINDINGS

1. On December 14, 2018, appellant attempted to make an estimated tax payment of \$80,000 toward his 2018 tax liability through FTB's Web Pay system. However, appellant provided invalid bank information, and FTB was unable to process the payment.

2. Appellant timely filed his 2018 California Resident Income Tax Return (Form 540), reporting the estimated tax payment, a self-assessed underpayment of estimated tax penalty, and a total amount due, which appellant remitted with the return.
3. On June 10, 2019, FTB sent a Notice of Return Change – Revised Balance (Notice), notifying appellant that FTB adjusted his return due to an error found on his return (i.e., the reported estimated tax payment was not remitted). The Notice calculated a revised balance due that included the imposition of a late-payment penalty and an increase in appellant’s self-reported underpayment of estimated tax penalty, plus applicable interest.
4. Appellant paid the outstanding liability and filed a claim for refund, requesting abatement of the penalties and interest based on reasonable cause and a history of tax compliance.
5. FTB denied the refund claim, and appellant filed this timely appeal.

DISCUSSION

Issue 1: Whether appellant has established reasonable cause for failing to make a timely payment of tax.

R&TC section 19132 provides that a late-payment penalty is imposed when a taxpayer fails to pay the amount shown as due on the return on or before the due date of the return. 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 was not due to willful neglect. (R&TC, § 19132(a)(1).) To establish reasonable cause for the late payment of tax, the taxpayer must show that the failure to make a timely payment of the proper amount occurred despite the exercise of ordinary business care and prudence. (*Appeal of Friedman*, 2018-OTA-077P.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Ibid.*) The failure to timely remit the balance due on a tax liability caused by an oversight does not, by itself, constitute reasonable cause. (*Ibid.*)

Appellant argues that the late-payment penalty should be abated based on reasonable cause and a history of filing and payment compliance. Appellant contends that he attempted to make a timely payment; however, there was an oversight, and “[d]ue to reasons that were not [appellant’s] doing,” the payment was not processed. While appellant does not expand further on those contentions, appellant provides two documents as support. First, appellant provides a

printout of a screenshot from the Web Pay service titled “Web Pay – Confirmation,” which indicates the date of the payment *request*, lists payment and bank information, and specifies to allow up to two business days from the payment date for appellant’s bank account to reflect his payment. Second, appellant provides a copy of a confirmation subsequently emailed from FTB titled “Confirmation Web Pay *Scheduled*” (emphasis added), which confirms that FTB received the payment *request*. The confirmation email states to “[a]llow up 2 business days from the payment date for your bank account to reflect your payment,” and explains that if there are insufficient funds, the bank information was incorrect, or the account was closed, the financial institution may reject the payment request.

However, neither document provides confirmation of successful payment. The “Web Pay – Confirmation” confirms a request to debit a bank account be made, and the “Confirmation Web Pay Scheduled” confirms that FTB received the payment request for the amount and date provided. As such, appellant received confirmation that the payment had been *requested*, not that the payment was *made*. Indeed, the requested payment was not made on the scheduled date since appellant provided invalid bank information. We believe a reasonably prudent taxpayer would verify their banking information prior to submitting the payment request. Moreover, both confirmations specified to “[a]llow up 2 business days from the payment date for your bank account to reflect your payment.” Thus, appellant should have been aware of the failed payment when his bank account did not reflect a payment shortly after the payment date. We would expect reasonably prudent businesspersons exercising due care and diligence to monitor their bank account and determine whether a scheduled payment to FTB was in fact processed. (See *Appeal of Scanlon*, 2018-OTA-075P.) Failing to enter correct bank information into the Web Pay system and failing to check the bank account balance for confirmation of payment do not demonstrate due diligence and do not show reasonable cause. (See *Appeal of Friedman*, *supra*.) Accordingly, we find that appellant has not established reasonable cause to abate the late-payment penalty.

Regarding appellant’s reference to his history of tax compliance, we note that the Internal Revenue Service (IRS) administers a program called “First Time Abate” through which the IRS abates first-time penalties if a taxpayer has timely filed returns and paid taxes due for the preceding three years. However, FTB has no such program, and California law

allows abatement only on a showing that the failure to pay was due to reasonable cause.¹ As the evidence shows that appellant's failure to pay was not due to reasonable cause, there is no basis to abate the late-payment penalty.

Issue 2: Whether appellant has established that the estimated tax penalty should be abated.

R&TC section 19136 incorporates by reference, with certain exceptions, Internal Revenue Code (IRC) section 6654, which imposes an estimated tax penalty for failure to timely make estimated tax payments. The estimated tax penalty is similar to an interest charge and applies from the due date of the estimated tax payment until the date it is paid. (*Appeal of Saltzman*, 2019-OTA-070P; IRC, § 6654(b)(2).)

There is no provision in the IRC or R&TC that allows the estimated tax penalty to be abated based solely on a finding of reasonable cause.² As a result, there is no general reasonable cause exception to imposition of the estimated tax penalty. (*Appeal of Johnson*, 2018-OTA-119P.) The estimated tax penalty is mandatory unless the taxpayer establishes that a statutory exception applies. (*Ibid.*) IRC section 6654(e)(3)(A) provides that the taxing agency may waive the estimated tax penalty if it determines that by reason of casualty, disaster, or other unusual circumstances that the imposition of the estimated tax penalty would be against equity and good conscience.

Appellant contends that the penalty should be abated based on reasonable cause and “in the interest of equitable treatment” to appellant. Under IRC section 6654(e)(3)(A), the issue is whether appellant's circumstances constitute a “casualty, disaster, or other unusual circumstances” that would cause the imposition of the estimated tax penalty to be “against equity and good conscience.” The exception for unusual circumstances is considerably narrower than reasonable cause. (IRS Field Service Advisory (Jun. 2, 1994) 1994 WL 1725487.) Appellant has not alleged or shown that he suffered from a “casualty, disaster, or other unusual circumstances” such that the addition to tax would be “against equity and good conscience”

¹ 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 Assem. Bill No. 1777 (2013-2014 Reg. Sess.).)

² Nevertheless, the taxing agency may waive the estimated tax penalty if it determines that the failure to make an estimated tax payment was due to reasonable cause and the absence of willful neglect, *and* the taxpayer retired after reaching age 62 or became disabled in the taxable 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 was over the age of 62 and retired; therefore, we do not discuss this further.

under IRC section 6654(e)(3)(A). Appellant also argues that reasonable cause exists as a sufficient basis for abating all penalties imposed. As discussed above, reasonable cause alone is not a sufficient basis for abating the underpayment of estimated tax penalty. Based on the foregoing, appellant has failed to show that the underpayment of estimated tax penalty should be abated.

Issue 3: Whether appellant has established a basis for abatement of interest.

Imposing interest on a tax deficiency is mandatory. (R&TC, § 19101(a).) Interest is also charged for a late-payment penalty from the original due date of the return to the date the penalty is paid. (R&TC, § 19101(c)(2)(B).) Interest is not a penalty but is compensation for the taxpayer's use of money after it should have been paid to the state, and it can only be abated in certain limited situations when authorized by law. (*Appeal of Moy*, 2019-OTA-057P.) There is no reasonable cause exception to the imposition of interest. (*Ibid.*)

To obtain interest abatement, appellant must qualify under one of the following statutes: R&TC section 19104, 21012, or 19112. R&TC section 19104 does not apply here because appellant does not allege, and the evidence does not show, that the interest at issue is attributable, in whole or in part, to any unreasonable error or delay by an officer or employee of FTB when performing a ministerial or managerial act. R&TC section 21012 does not apply as FTB did not provide appellant with any requested written advice. Lastly, the Office of Tax Appeals does not have jurisdiction to review FTB's denial of a waiver of interest under R&TC section 19112, which requires a showing of extreme financial hardship. (*Appeal of Moy, supra.*) Appellant has thus not demonstrated that he is entitled to interest abatement.

HOLDINGS

1. Appellant has not established reasonable cause for failing to make a timely payment of tax.
2. Appellant has not established that the estimated tax penalty should be abated.
3. Appellant has not established a basis for abatement of interest.

DISPOSITION

FTB's action in denying appellant's claim for refund is sustained.

DocuSigned by:
Sheriene Anne Ridenour
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Sheriene Anne Ridenour
Administrative Law Judge

We concur:

DocuSigned by:
Teresa A. Stanley
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Teresa A. Stanley
Administrative Law Judge

DocuSigned by:
Amanda Vassigh
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Amanda Vassigh
Administrative Law Judge

Date Issued: 10/27/2020