

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:) OTA Case No. 19075083
J. WHEELER AND)
K. WHEELER)
_____)

OPINION

Representing the Parties:

For Appellants: Colten Ballinger
For Respondent: Diane M. Deatherage,
Program Specialist III

K. LONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, J. Wheeler and K. Wheeler (appellants) appeal an action by the respondent Franchise Tax Board (FTB) denying appellants’ claims for refund of \$1,407.14 for the 2013 tax year, \$6,558.92 for the 2014 tax year, \$8,673.79 for the 2015 tax year, and \$877.35 for the 2017 tax year.

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

ISSUES¹

1. Whether appellants have established reasonable cause for failing to timely file tax returns for the 2013 and 2014 tax years.²
2. Whether appellants have established reasonable cause for the late payment of tax for the 2015 and 2017 tax years.
3. Whether appellants are entitled to abatement of the applicable interest.

¹ Appellants’ claims for refund for the 2013, 2014, and 2015 tax years included claims for refund of penalties for failure to make payments of estimated tax in each of those years. In this appeal, appellants have not made any assertions regarding these penalties. Accordingly, the estimated tax penalties will not be discussed.

² FTB denied appellants’ 2013 claim for refund as untimely on April 26, 2019. FTB now concedes that appellants’ claim for refund was timely.

FACTUAL FINDINGS

2013 Tax year

1. Through its filing enforcement program, FTB received information that appellants earned sufficient income that required them to file a 2013 California income tax return.
2. Because appellants had not filed a return, FTB issued a Request for Tax Return on March 3, 2015, stating that it received information that appellant-husband earned wage and K-1 income, and requesting that appellants file a 2013 California income tax return, provide evidence that they previously filed a return, or explain why appellants did not have a filing requirement.
3. Appellants did not respond to FTB's Request for Tax Return. FTB issued a Notice of Proposed Assessment (NPA) for the 2013 tax year based on wage and federal Schedule K-1 partnership income data. FTB proposed \$8,648 tax, accrued interest, and a late-filing penalty of \$2,162.
4. Appellants did not respond to the NPA and on September 16, 2015, FTB issued an Income Tax Due Notice for the amount of \$11,156 (\$8,648 tax + \$2,162 late-filing penalty + \$346.61 interest).
5. On October 19, 2015, appellants filed a non-remittance 2013 California resident income tax return, which FTB accepted as filed. On the return, appellants self-assessed total tax of \$4,142, interest, a late-filing penalty of \$1,259, and an underpayment of estimated tax penalty (estimated tax penalty) of \$17.
6. FTB adjusted the late-filing penalty from \$1,259 to \$1,035.50. Because appellants did not remit a payment with their return, FTB also imposed a collection cost recovery fee of \$226.
7. Appellants made payments of \$4,000 on July 12, 2016, and \$1,775.14 on October 10, 2016, satisfying the liability.

2014 Tax Year

8. Appellants untimely filed a non-remittance 2014 California resident income tax return on November 20, 2015, self-assessing total tax of \$17,989, interest, late-filing and late-payment penalties totaling \$4,828, and an estimated tax penalty of \$215.

9. FTB accepted appellants' return as filed. Because appellants did not remit payment, FTB issued a Notice of State Income Tax Due on January 25, 2016. This notice also revised the late-filing penalty to \$4,497.25 and the estimated tax penalty to \$119.43.

2015 Tax Year

10. Appellants timely filed a non-remittance 2015 California resident income tax return on June 14, 2016, self-assessing a total tax of \$22,195 and an estimated tax penalty of \$281.
11. FTB accepted appellants' return as filed and issued a Notice of State Income Tax Due imposing a late-payment penalty of \$4,243.44 and revising the estimated tax penalty to \$280.34.
12. Because appellants did not pay remit payment, FTB issued a Notice of State Income Tax Due on July 5, 2016. FTB also filed a lien and imposed a lien fee of \$13 on appellants.
13. Appellants entered into an installment agreement, and on April 23, 2019, satisfied the liability.

2017 Tax Year

14. Appellants timely filed a non-remittance 2017 California nonresident income tax return on October 10, 2018, self-assessing a total tax of \$5,955.
15. FTB accepted the return as filed. Because appellants did not remit payment, FTB imposed a late-payment penalty of \$506.18. On October 31, 2018, FTB issued a Notice of Tax Return Change informing appellants of the late-payment penalty and accrued interest.
16. Thereafter, appellants entered into an installment agreement and on April 22, 2019, satisfied the liability.

Claims for Refund

17. By letter dated July 7, 2017, appellants requested penalty relief for the 2013, 2014, and 2015 tax years. FTB denied the penalty relief request.
18. On April 23, 2019, appellants filed claims for refund asserting reasonable cause for the abatement of penalties and interest in the following amounts: \$1,407.14 for the 2013 tax

- year;³ \$6,558.92 for the 2014 tax year;⁴ \$8,673.79 for the 2015 tax year;⁵ and \$877.35 for the 2017 tax year.⁶
19. On April 26, 2019, FTB issued a Notice of Action denying appellants' claim for refund for the 2013 tax year. FTB stated the claim for refund was filed after the statutory period for making a claim for refund. On appeal, FTB now states that it should have treated appellants' July 7, 2017 penalty relief request as a claim for refund because appellants had paid the tax liability in full at that time. Accordingly, FTB concedes that the claim for refund for tax year 2013 was timely.
 20. Additionally, on April 26, 2019, FTB issued a Notice of Action denying appellants' claims for refund for the 2014, 2015, and 2017 tax years. FTB asserted that appellants failed to establish that reasonable cause existed to support penalty abatement.
 21. Appellants then filed this timely appeal.

DISCUSSION

Issue 1: Whether appellants have established reasonable cause for failing to timely file tax returns for the 2013 and 2014 tax years.

R&TC section 19131 imposes a late-filing penalty where a taxpayer fails to file a return when due, unless the failure is due to reasonable cause and not willful neglect. The penalty is calculated at five percent of the tax liability for each month the return is past due, up to a maximum of 25 percent. (R&TC, § 19131.) When FTB imposes a penalty, the law presumes that FTB properly imposed the penalty. (*Appeal of Xie*, 2018-OTA-076P.)

³ This amount consists of a late-filing penalty of \$1,035.50 and interest of \$371.64.

⁴ This amount consists of a late-filing penalty of \$4,497.25, an estimated tax penalty of \$119.43, and interest of \$1,942.24.

⁵ This amount consists of a late-payment penalty of \$5,392.44, an estimated tax penalty of \$280.34, and interest of \$2,999.63. In comparing appellants' claim for refund and the total amount of penalties and interest that appellants paid to FTB, we note a difference of \$1.38 (\$8,673.79 claim for refund - \$8,672.41 total penalties and interest paid). It is unclear whether this is due to a typographical error on appellants' part, but it does not affect the outcome of this appeal.

⁶ This amount consists of a late-payment penalty of \$638 and interest of \$238.59. In comparing appellants' claim for refund to the total amount of penalties and interest that appellants paid to FTB, we note a difference of \$0.67 (\$877.35 - \$867.59). It is unclear whether this is due to a typographical error on appellants' part, but it does not affect the outcome of this appeal.

Here, there is no dispute that appellants failed to file timely returns for 2013 and 2014. As such, FTB properly imposed late-filing penalties for the 2013 and 2014 tax years. Appellants also do not dispute the calculation of penalties. Instead appellants assert that there is reasonable cause for their failure to timely file returns for the 2013 and 2014 tax years.

A taxpayer must provide credible and competent evidence supporting a claim of reasonable cause to overcome this presumption of correctness. (*Appeal of Xie, supra.*) To establish reasonable cause, a taxpayer must show that the failure to file timely returns occurred despite the exercise of ordinary business care and prudence, or that cause existed as would prompt an ordinary intelligent and prudent businessman to have so acted under similar circumstances. (*Appeal of Auburn Old Town Gallery, LLC, 2019-OTA-31P.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of GEF Operating, Inc., 2020-OTA-057P.*)

On appeal, appellants assert that in 2013, they relocated to California from Washington to care for sick family members. Appellants argue that they were unaware that their income was subject to tax in California.⁷ Appellants also assert that appellant-wife lost her job and was unable to work during 2013 and 2014, which caused sufficient financial hardship to constitute reasonable cause for failing to timely file a return. Appellants assert that the combined emotional and financial stress resulted in a diagnosis of emotional distress. Finally, appellants argue that despite their hardships, they hired and relied on an accountant to prepare and timely file their returns.

Initially, we note that appellants have only provided unsupported assertions to support their claim of reasonable cause and have not provided any evidence to overcome the presumption that the penalties are correct. Accordingly, appellants have not met their burden of showing reasonable cause exists to abate the late-filing penalties. (*Appeal of Xie, supra.*)

While the foregoing is dispositive, we examine appellants' contentions that reasonable cause exists for their failure to file a timely return. As discussed above, appellants filed a 2013 California resident income tax return (as opposed to a nonresident or part-year resident return). Thus, it appears that appellants were residents of this state for the entirety of 2013. However,

⁷ On appeal, appellants state that they are aware of their tax obligations. We note that assertions made in appellants' opening brief regarding their knowledge conflict with statements made in appellants' claim for refund for 2013. It is unclear from appellants' opening brief if they were aware of their obligation to file a 2013 income tax return at the time a return was due, or if they became aware of their obligation sometime later.

even if appellants relocated to California from Washington in 2013, their ignorance of the law and their California filing requirement does not excuse the failure to file a timely return. (*Appeal of GEF Operating, Inc., supra.*)

As to appellants' financial condition, we note that appellants reported taxable income during 2013 and 2014. According to appellants' returns, appellants received unemployment compensation during the 2013 tax year. Thus, there is some evidence that appellants may have had financial difficulties during the 2013 and 2014 tax years. However, appellants' difficulty paying the tax does not explain why appellants were unable to timely file their returns for these years or establish reasonable cause for the late filing of those returns.

Additionally, the available evidence shows that during the 2013 and 2014 tax years, appellants pursued activities other than timely filing their income tax returns. For example, appellants traveled to the State of Washington, British Columbia, and other locations during those tax years. Appellants continued their travel activity during the 2015 tax year (i.e., the year that appellants' 2014 income tax return was due). Appellants' ability to pursue these other activities during the years at issue suggests that appellants also had ability to timely prepare and file their tax returns for the 2013 and 2014 tax years had they so chosen.

Appellants' claimed reliance on an accountant to file their returns also fails to establish reasonable cause for the late filing of these returns. Every taxpayer has a personal, non-delegable duty to timely file a tax return. (*United States v. Boyle* (1985) 469 U.S. 241, 252.) In other words, this non-delegable duty required appellants to personally ensure the timely filing of their 2013 and 2014 returns.

Finally, appellants have not provided any evidence that they were unable to timely file their returns for health reasons. Illness may constitute reasonable cause for abatement of the late-filing penalty if the illness continuously prevented the taxpayer from filing a timely return. (*Appeal of Feliciano*, 2020-OTA-127P.) However, appellants have not offered any information regarding their claimed illness and how such illness continuously prevented them from filing their returns. Appellants' unsupported assertions are not sufficient to satisfy their burden of proof. (*Appeal of GEF Operating, Inc., supra.*) Thus, based on the foregoing, appellants have failed to show that reasonable cause exists for their failure to file time returns for the 2013 and 2014 tax years.

Issue 2: Whether appellants have established reasonable cause for the late payment of tax for the 2015 and 2017 tax years.

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.)

To establish reasonable cause for the late payment of tax, a taxpayer must show that the failure to make a timely payment of the proper amount of tax occurred despite the exercise of ordinary business care and prudence. (*Appeal of Scanlon*, 2018-OTA-075P.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Friedman*, 2018-OTA-077P.) 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.*) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of GEF Operating, Inc.*, *supra.*)

Here, appellants' contentions regarding the 2015 tax year are similar to those regarding the late-filing penalties for 2013 and 2014. Specifically, appellants assert that during the 2015 tax year, they faced financial difficulties and were required to take pension distributions. Appellants assert that they could not afford to make a timely payment of the resulting tax liability. Appellants contend that they lived paycheck to paycheck and that their income was required to maintain homes in Washington State and California. Finally, appellants assert, without evidence, that they retained a tax preparation company and were advised not to make payments of tax until their tax issues were completely resolved.

Here, appellants have not established, through documentation or otherwise, why they could not make timely payments of tax. Appellants unsupported assertions are not sufficient to satisfy their burden of proof. (*Appeal of GEF Operating, Inc.*, *supra.*) We note that appellants reported significant taxable income for the 2015 tax year. Additionally, the evidence shows that appellants traveled extensively during 2015, and it appears that appellants pursued endeavors other than the timely payment of their tax liability. Finally, although appellants assert that they were advised by a tax professional not to pay the tax at issue, appellants have not provided any evidence of this. Appellants also have not provided any evidence to show what steps were taken

to make timely payments of tax.⁸ Therefore, appellants have not met their burden of proof. Accordingly, we find no basis to abate the late-payment penalty for 2015.

As to 2017, appellants assert that they were unaware that they would have a California tax liability. However, ignorance of the law is not an excuse for failing to meet a statutory requirement. (*Appeal of GEF Operating, Inc., supra.*) Additionally, 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.*) Appellants have failed to establish reasonable cause exists for their failure to file a timely return.

Issue 3: Whether appellants are entitled to abatement of the applicable interest.

The imposition of interest is mandatory, and FTB cannot abate interest except where authorized by law. (R&TC, § 19101(a); *Appeal of Balch*, 2018-OTA-159P.) Interest is not a penalty; it is compensation for the use of money. (*Appeal of Balch, supra.*) Generally, to obtain relief from interest, taxpayers must qualify under R&TC sections 19104, 19112, or 21012. Appellants do not specify why they may be entitled to interest abatement. They do not allege any of these statutory grounds and based on the information in the record, none of these statutory provisions apply. Therefore, appellants have not established that they are entitled to abatement of interest.


⁸The record includes a penalty abatement request which was prepared by a paid representative on appellants' behalf. However, this letter was prepared in 2017, well after taxes were due and the penalty was imposed for the 2015 tax year. Moreover, appellants assert that they hired a different representative for the 2015 year. Thus, we find that the 2017 letter is not evidence of appellants' attempts to timely pay tax in 2015.

HOLDINGS

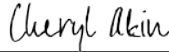
1. Appellants have not established reasonable cause for failing to timely file tax returns for the 2013 and 2014 tax years.
2. Appellants have not established reasonable cause for the late payment of tax for the 2015 and 2017 tax years.
3. Appellants are not entitled to abatement of the applicable interest.


DISPOSITION

FTB’s denials of appellants’ claims for refund for the 2013, 2014, 2015, and 2017 tax years are sustained.

DocuSigned by:

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 Keith T. Long
 Administrative Law Judge

We concur:

DocuSigned by:

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 Cheryl L. Akin
 Administrative Law Judge

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 Amanda Vassigh
 Administrative Law Judge

Date Issued: 12/9/2020