

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

A. DAO

) OTA Case No. 20056194
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OPINION

Representing the Parties:

For Appellant:

A. Dao

For Respondent:

Leoangelo C. Cristobal, Tax Counsel

A. WONG, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, A. Dao (appellant) appeals respondent Franchise Tax Board’s (FTB) action denying appellant’s claim for refund of \$950, plus applicable interest, for the 2019 tax year.

Appellant waived the right to an oral hearing; therefore, we are deciding this matter based on the written record.

ISSUES

1. Whether there is reasonable cause to abate the mandatory electronic payment (e-pay) penalty.
2. Whether appellant is entitled to abatement of interest.

FACTUAL FINDINGS

1. Since the 2017 tax year, appellant has been required to electronically remit payments to FTB.
2. Appellant’s deadline to electronically remit his final estimated tax payment for the 2019 tax year was January 15, 2020.
3. On January 13, 2020, appellant remitted an estimated tax payment of \$95,000 by check.
4. Because appellant did not electronically remit payment, FTB imposed a mandatory e-pay penalty of \$950, plus applicable interest.

5. Per FTB records, interest began accruing on the mandatory e-pay penalty on January 27, 2020.
6. On February 3, 2020, FTB issued a State Income Tax Balance Due Notice to appellant for the mandatory e-pay penalty of \$950.00, plus interest of \$0.91.
7. On March 18, 2020, FTB issued an Income Tax Due Notice to appellant for the mandatory e-pay penalty of \$950.00, plus interest of \$6.64.
8. On March 23, 2020, appellant paid the mandatory e-pay penalty of \$950.00, plus interest of \$6.64. Appellant filed a claim for refund for these amounts on April 6, 2020.
9. On April 24, 2020, FTB denied appellant's claim for refund. This timely appeal followed.

DISCUSSION

Issue 1: Whether there is reasonable cause to abate the mandatory e-pay penalty.

Individual taxpayers are required to electronically remit all payments to FTB once they meet either of the following two conditions for any taxable year beginning on or after January 1, 2009: (1) their estimated tax payment or extension payment exceeds \$20,000; or (2) their total tax liability exceeds \$80,000. (R&TC, § 19011.5(a).) “Electronically remit” means to send payment through use of any of the electronic payment applications provided by FTB, including a pay by phone option (when made available by FTB). (R&TC, § 19011.5(f)(1).) “Pay by phone” means a method that allows a taxpayer to authorize a transfer of funds from a financial institution using telephonic technology. (R&TC, § 19011.5(f)(2).)

Failure to electronically remit payment (i.e., paying by non-electronic means) will result in a mandatory e-pay penalty of one percent of the amount paid unless the taxpayer shows that this failure was for reasonable cause and not the result of willful neglect. (R&TC, § 19011.5(c).) That is, the mandatory e-pay penalty may be abated if a taxpayer shows that the failure to electronically remit payment occurred despite the exercise of ordinary business care and prudence. (See *Appeal of Porreca*, 2018-OTA-095P.)

When FTB imposes a penalty, the law presumes that the penalty was imposed correctly. (*Appeal of Xie*, 2018-OTA-076P.) The taxpayer bears the burden of proving reasonable cause to abate the mandatory e-pay penalty. (*Appeal of Porreca*, *supra*.)

Appellant does not dispute the imposition or calculation of the penalty and FTB has not alleged willful neglect; therefore, we only examine whether there is reasonable cause to abate the penalty.

On appeal, appellant contends that the FTB website was down and not working properly each time he sought to make an electronic payment in January 2020. Specifically, appellant contends that both he and his accountant made three attempts each (i.e., six attempts total) to check the FTB website in January 2020, but the website would not accept electronic payments. Thus, in order to avoid “non-payment” or “underpayment” penalties, appellant argues that his only choice was to pay by physical check.

In support of his position, appellant provides a screenshot of a “system unavailable” webpage. The screenshot is undated and does not include the web address appellant attempted to access. It does contain FTB’s logo, the words “Web Pay,” and the following text: “Our system is currently unavailable. Please try your request again later. To see if FTB’s Website is undergoing system maintenance at this time, visit the scheduled maintenance page.” Below this text is a copyright/privacy notice (“Copyright © 2020 State of California | Privacy Notice”).

In reply, FTB makes two counterarguments. First, FTB contends that it has no record of its Web Pay system being down during January 2020. In support, FTB provided a declaration dated July 21, 2020, and signed under penalty of perjury by a supervisor in the e-Programs and Budget Section of its Filing Division. In this declaration, the supervisor states that, during January 2020, tens of thousands of Web Pay requests were submitted to FTB daily and, upon personal review, he found no indication of any systemic issues with FTB’s Web Pay system during that time.

Second, FTB argues that appellant had four other options to avoid any penalties besides paying by physical check, but utilized none of them: (1) elect to discontinue making payments electronically; (2) request a waiver of the e-pay requirement; (3) utilize FTB’s pay-by-phone option; or (4) contact FTB before the January 15, 2020 deadline to discuss appellant’s Web Pay issues.¹ FTB contends that a similarly situated taxpayer exercising ordinary business care and

¹ In response to appellant’s opening brief in which he expresses his preference for making payments electronically “as I have always in the past,” FTB also argues that appellant is not entitled to abatement of a first-time penalty based on a history of good compliance. We did not construe appellant’s statement in his opening brief as a request for abatement on this basis, but note that FTB has no such first-time abatement program (unlike the

prudence would have utilized one of these options. Because appellant has failed to demonstrate that he attempted to utilize any of these options, FTB concludes that abatement of the mandatory e-pay penalty is not warranted.

Because the law presumes that FTB properly imposed the mandatory e-pay penalty, appellant bears the burden of proving otherwise. Although appellant contends that he and his accountant were unable to access FTB’s website to electronically remit payment on six separate occasions in January 2020, his supporting documentation—a single screenshot of a “system unavailable” webpage relating to FTB’s Web Pay system—is undated (apart from a 2020 copyright notice). Without a specific date, appellant’s documentation fails to substantiate his assertion that both he and his accountant were unable to access or use FTB’s Web Pay system in the time period leading up to his January 13, 2020 payment by check for the 2019 tax year. After coupling appellant’s failure to substantiate his assertion with FTB’s declaration that its Web Pay system suffered no issues during January 2020, we conclude that appellant has failed to carry his burden to show that the failure to e-pay was for reasonable cause.²

Issue 2: Whether appellant is entitled to abatement of interest.

Interest will be imposed with respect to the mandatory e-pay penalty only if the penalty is not paid within 15 calendar days from the date of notice and demand thereof; in that case, interest will be imposed only for the period from the date of the notice and demand to the date of payment. (R&TC, § 19101(c)(2)(A).) Interest is not a penalty but is merely compensation for a taxpayer’s use of the money. (*Appeal of GEF Operating, Inc.*, 2020-OTA-057P.) There is no reasonable cause exception to the imposition of interest. (*Ibid.*)

On appeal, appellant requests that interest be abated, but he has not identified any basis to do so. Nevertheless, FTB concedes that partial abatement of interest is warranted.

Here, interest began accruing on the mandatory e-pay penalty on January 27, 2020. FTB issued a State Income Tax Balance Due Notice (notice) regarding the mandatory e-pay penalty—as well as \$0.91 in interest—to appellant on February 3, 2020. Appellant did not pay the penalty

IRS). (See *Appeal of Porreca, supra* [stating that California law allows abatement only on a showing that the failure to e-pay was due to reasonable cause and not due to willful neglect].)

² Because appellant has failed to show that his failure to e-pay was for reasonable cause, we need not address whether appellant’s options besides paying by check, as proposed by FTB in its second counterargument, would have constituted the exercise of ordinary business care and prudence.


within 15 calendar days of this notice (i.e., by February 18, 2020), so interest was properly imposed with respect to the mandatory e-pay penalty. However, per R&TC section 19101(c)(2)(A), interest should only have begun to accrue from February 3, 2020, the date of FTB’s notice, not January 27, 2020. Accordingly, FTB concedes to abate the \$0.91 in interest that accrued from January 27, 2020, to February 3, 2020. Otherwise, because appellant failed to identify a basis for interest abatement, we deny appellant’s request to abate interest accrued from February 3, 2020, to March 23, 2020.

HOLDINGS


1. Appellant has failed to show that his failure to e-pay was due to reasonable cause and not willful neglect.
2. Appellant is entitled to the abatement of \$0.91 in interest, which accrued from January 27, 2020, to February 3, 2020.


DISPOSITION

Per FTB’s concession on appeal, we reverse FTB’s action as to \$0.91 in interest, which accrued from January 27, 2020, to February 3, 2020. We sustain FTB’s action in all other respects.

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 Andrew Wong
 Administrative Law Judge

We concur:

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 Teresa A. Stanley
 Administrative Law Judge

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 Daniel K. Cho
 Administrative Law Judge

Date Issued: 2/17/2021