

OFFICE OF TAX APPEALS
STATE OF CALIFORNIA

In the Matter of the Appeal of:

T. DOYLE AND
K. DOYLE

) OTA Case No. 19054797
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OPINION

Representing the Parties:

For Appellants: Jaeyoung Lee, Tax Appeals Assistance Program (TAAP)¹

For Respondent: David Muradyan, Tax Counsel III

E. S. EWING, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 19324, T. Doyle and K. Doyle (appellants) appeal an action by respondent Franchise Tax Board denying appellants’ claim for refund in the amount of \$16,148.95 for the 2017 tax year.²

Office of Tax Appeals Administrative Law Judges Elliott Scott Ewing, Alberto T. Rosas, and Andrea L.H. Long held an oral hearing in this matter on February 3, 2021.³ At the conclusion of the hearing, the record was closed, and this matter was submitted for decision.

ISSUES

1. Whether the late-payment penalty should be abated.
2. Whether the underpayment of estimated tax penalty should be abated.
3. Whether interest should be abated.

¹ Appellants filed the opening brief in this matter. Jocelyn M. Mills with TAAP filed appellants’ first reply brief, and Jaeyoung Lee of TAAP filed appellants’ second reply brief.

² This amount consists of a late-payment penalty of \$9,853.07, an underpayment of estimated tax penalty of \$3,678 and interest of \$2,617.88.

³ The oral hearing was noticed for Sacramento, California, and conducted electronically due to COVID-19.

FACTUAL FINDINGS

1. On September 11, 2017, appellants attempted to make an estimated tax payment in the amount of \$100,000 to be applied to their 2017 tax year on September 14, 2017, using respondent's online electronic payment system (Web Pay). Appellants immediately received an online Web Pay confirmation page which they printed and kept for their records.⁴
2. The Web Pay transaction was rejected by appellants' bank and the payment was not completed.⁵
3. Appellants did not check their bank account to confirm whether the funds had been withdrawn from the account.
4. On or about October 12, 2018, appellants timely filed a 2017 California tax return within the extension period for filing. The return included the \$100,000 estimated tax payment that was previously rejected by appellants' bank as having already been paid to respondent.
5. On or about November 5, 2018, respondent sent appellants a Notice of Tax Return Change – Revised Balance, which sought payment of the underpaid tax and assessed a late-payment penalty, an underpayment of estimated tax penalty, and interest.
6. Appellants paid the balance due and filed a claim for refund requesting abatement of the penalties and related interest based upon reasonable cause. Respondent denied the claim for refund in full.
7. This timely appeal followed.

DISCUSSION

Issue 1: Whether the late-payment penalty should be abated.

R&TC section 19001 provides that the personal income tax “shall be paid at the time and

⁴The Web Pay confirmation page advised appellants that they should “[a]llow up to two business days from the payment date for [their] bank account to reflect [their] payment.”

⁵The payment was rejected because appellants used the account number for an investment account, rather than a checking account number (appellants' bank account had both an investment type account and a checking account linked to it). We note that respondent's Web Pay system instructions and Frequently Asked Questions state that only a regular checking or savings account may be used and that payment cannot be made from money market, certificate of deposit, IRA, or brokerage accounts using respondent's Web Pay system.

place fixed for filing the return (determined without regard to any extension of time for filing the return).” The payment due date in this case was April 17, 2018.⁶ 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. Here, respondent properly imposed the late-payment penalty because appellants failed to timely pay all of the tax due, as shown on the tax return for the 2017 tax year. Appellants do not dispute the payment was late, nor do they dispute respondent’s calculation of the penalty. Therefore, we find that respondent correctly calculated and imposed the penalty. The only question is whether grounds exist to abate the penalty, or some portion thereof.

Reasonable Cause

The late-payment penalty may be abated if the taxpayer shows that the failure to make a timely payment of tax 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, a taxpayer must show that the failure to make a timely payment of the tax due occurred despite the exercise of ordinary business care and prudence. (*Appeal of Triple Crown Baseball LLC*, 2019-OTA-25P.) The taxpayer bears the burden of proving that an ordinarily intelligent and prudent businessperson would have acted similarly under the circumstances. (*Appeal of Moren*, 2019-OTA-176P.) A failure to pay will be considered due to reasonable cause if the taxpayer makes a satisfactory showing that he or she exercised ordinary business care and prudence in providing for the payment of the tax liability and was nevertheless either unable to pay the tax or would suffer undue hardship if he or she paid the tax on the due date. (Treas. Reg. § 301.6651-1(c)(1); *Nasir v. Commissioner*, T.C. Memo. 2011-283.)

Appellants assert that when they immediately received respondent’s Web Pay confirmation on September 11, 2017, they believed the \$100,000 payment had been made and nothing more was left to do at that point. For more than one year from the date of the attempted payment using Web Pay, the record shows that appellants did not check their bank account to confirm whether the payment had actually processed. In fact, appellants only became aware of

⁶In 2018, April 15th fell on a Sunday, and this would usually have moved the filing deadline to the following Monday, April 16th. However, Emancipation Day, a legal holiday in the District of Columbia, was observed on that Monday, which pushed the federal filing deadline to Tuesday, April 17, 2018. California follows the federal tax filing deadline pursuant to California Code of Regulations, title 18, section 18566. Thus, the due date for appellants to file their 2017 California tax return was April 17, 2018.

the failure of the payment when they were notified by respondent on or about November 5, 2018. Appellants assert that because they received respondent's Web Pay confirmation page, they did not think it necessary to check their bank account to confirm whether the payment was actually withdrawn from the account, and that a person exercising ordinary business care and prudence would not have done so.

The question here is whether appellants exercised ordinary business care and prudence in not checking their bank account over a period of more than one year to confirm whether the attempted payment had actually been withdrawn from appellants' bank account. If appellants had not relied solely on respondent's Web Pay confirmation and checked their bank account within a reasonable amount of time following attempted payment, they would have known the funds had not been withdrawn.

Respondent notes that in *Appeal of Scanlon*, 2018-OTA-075P (*Scanlon*), we held that “[w]e 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 [respondent] was in fact paid.” Appellants, however, argue that respondent's reliance on *Scanlon* is misplaced, asserting that *Scanlon* is distinguishable from the instant appeal because the taxpayers in that case had actual knowledge that previous Web Pay payments had failed. Appellants contend that the duty to verify that a scheduled payment has been withdrawn from the bank account noted in *Scanlon* only applies where the taxpayer has some “actual knowledge” of potential errors. Appellants point out that *Scanlon* specifically states, “[i]n light of their actual knowledge of their prior error in 2012, we would expect appellants to have been especially diligent regarding their electronic payments in 2016.”

However, the “especially diligent” language in *Scanlon* does not mean that appellants would only be expected to exercise ordinary business care and prudence by monitoring their bank account where there was actual notice or other knowledge of potential errors. The language merely reinforces, under the facts specific to *Scanlon*, that the exercise of ordinary business care and prudence requires taxpayers to check their bank account to ensure a requested payment was actually made.

In *Scanlon*, we held that the “lack of notice from [respondent] of a failed payment does not negate appellants' duty of prudence and due care to verify that their scheduled payments were successful.” This makes clear that the exercise of ordinary business care and prudence

requires a taxpayer to monitor their bank account to ensure a scheduled payment was in fact paid, regardless of whether respondent notified the taxpayer of any error in the processing of that payment or whether the taxpayer had any “actual knowledge” or notice of a potential issue with the attempted payment or prior payments. We therefore do not agree with appellants that *Scanlon* is distinguishable from this case and find that appellants had a duty to check their bank account to confirm payment, regardless of actual notice or other knowledge of the failed payment.⁷

Appellants also make a similar argument that respondent’s reliance on *Appeal of Friedman*, 2018-OTA-077P (*Friedman*), is also misplaced because *Friedman* is likewise distinguishable from the instant appeal. Appellants point out that, in addition to failing to check their bank account to confirm the payment had actually been successful, the appellants in *Friedman* did not actually complete the Web Pay transaction in the system at the time they were attempting to make the payment. However, *Friedman* and the instant case are analogous because in both cases, there was no notice to appellants of the failure of the payment at the time or near the time the payment was attempted.

Thus, we find that appellants’ reliance solely on respondent’s Web Pay confirmation, and their resulting failure to monitor their bank account to confirm the withdrawal of funds for more than a year following the attempted payment, fails to establish the exercise of ordinary business care and prudence in providing for the timely payment of their 2017 tax liability. Accordingly, appellants have not shown reasonable cause to abate the late-payment penalty.

Equitable Estoppel

Appellants also argue that equitable estoppel should apply and prevent respondent from assessing the penalties and related interest. Equitable estoppel may be raised as a defense against the government only in rare and unusual circumstances and when its application is necessary to prevent manifest injustice. (See *Appeal of Smith* (91-SBE-005) 1991 WL 280345.) The four

⁷ Appellants also argue that “[n]otwithstanding that the respondent may not be a financial institution or a service provider as defined by [the Electronic Funds Transfer Act (EFTA)], the statute nevertheless provides guidance on reasonable conduct in the area of electronic funds transfers. 15 USC section 1693 defines the purpose of EFTA as, ‘provid[ing] a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance systems.’” Presumably appellants are asserting that respondent had a duty to notify appellants that their attempted payment had failed. However, the EFTA is not applicable to respondent. Further, as we noted in *Scanlon*, taxpayers have a duty to monitor their bank account to ensure a scheduled payment is actually processed despite the lack of notice from respondent of a failed payment.

elements of equitable estoppel are: (1) the government agency (respondent) must be shown to have been aware of the actual facts; (2) the government agency (respondent) must be shown to have made an incorrect or inaccurate representation to the relying party (appellants) and intended that its incorrect or inaccurate representation would be acted upon by the relying party (appellants) or have acted in such a way that the relying party (appellants) had a right to believe that the representation was so intended; (3) the relying party (appellants) must be shown to have been ignorant of the actual facts; and (4) the relying party (appellants) must be shown to have detrimentally relied upon the representations or conduct of the government agency (respondent). (*Appeal of Western Colorprint* (78-SBE-071) 1978 WL 3544.) Where one of these elements is missing, there can be no estoppel. (*Hersch v. Citizens Savings & Loan Assn.* (1983) 146 Cal.App.3d 1002, 1011.) The burden of proving estoppel is on the party asserting estoppel. (*Appeal of Campbell* (79-SBE-035) 1979 WL 4076.)

Here, the second element is missing – i.e., that the government agency (respondent) must be shown to have made an incorrect or inaccurate representation to the relying party and intended that its incorrect or inaccurate representation would be acted upon by the relying party (appellants) or have acted in such a way that the relying party (appellants) had a right to believe that the representation was so intended.⁸ We note that respondent’s Web Pay confirmation page is only a confirmation that appellants’ payment request has been received by respondent and not a guarantee that the funds will be withdrawn from the account. The Web Pay confirmation page specifically states that the requester should “[a]llow up to 2 business days from the payment date for your bank account to reflect [their] payment.” Thus, respondent did not incorrectly inform appellants that their payment had actually been made and the doctrine of equitable estoppel is not applicable in this case.

First Time Abatement

Appellants alternatively argue that respondent or this office should adopt a first time abate program like the Internal Revenue Service (IRS) has done. The IRS program, called First Time Abate, provides that the IRS may administratively abate penalties if a taxpayer has timely filed returns and paid taxes due for the past three tax years. However, neither the California Legislature nor respondent has adopted a comparable penalty abatement program, so the IRS

⁸ Because one of the elements is absent, there can be no estoppel. (*Hersch v. Citizens Savings & Loan Assn., supra.*) As a result, we do not address the other three elements.

penalty abatement and appellants' history of timely filing and paying California taxes cannot be used as a basis for abatement of the California late-payment penalty at issue here. (*Scanlon, supra.*)

Issue 2: Whether the underpayment of estimated tax penalty should be abated.

Internal Revenue Code (IRC) section 6654 imposes an addition to tax, which is treated and often referred to as a penalty, when an individual fails to timely pay estimated tax. Subject to certain exceptions not relevant to the issue on appeal, R&TC section 19136 incorporates IRC section 6654. 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. (See IRC, § 6654(b)(2).)

Appellants make the same reasonable cause argument for abatement of the underpayment of estimated tax penalty as they do for the late-payment penalty. However, unlike the late-payment penalty, there is no authority to abate the underpayment of estimated tax penalty based on reasonable cause.⁹ (*Scanlon, supra.*) Therefore, we need not discuss appellants' reasonable cause argument as it relates to this penalty, and the underpayment of estimated tax penalty should not be abated.

Issue 3: Whether interest should be abated.

Interest is not a penalty; it is compensation to the state for a taxpayer's use of the funds, and the law requires respondent to collect interest on past-due liabilities. (*Appeal of Jaegle* (76-SBE-070) 1976 WL 4086.) There is no reasonable cause exception to the imposition of interest. (R&TC, § 19101(a); *Appeal of Moy*, 2019-OTA-057P.) Appellants assert that interest should nevertheless be abated (or reduced) to the extent that the late payment and the underpayment of estimated tax penalties are abated, based upon reasonable cause. However, we find herein that neither the late-payment penalty nor the underpayment of estimated tax penalty should be abated. Thus, the associated interest shall also not be abated.

⁹ There are a few limited exceptions to the penalty (see, e.g., IRC, § 6654(e)(3)(A) & (B)) but appellants do not raise any of them here.

HOLDINGS

1. The late-payment penalty is not abated.
2. The underpayment of estimated tax penalty is not abated.
3. Interest is not abated.

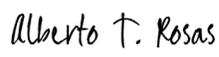
DISPOSITION

We sustain respondent’s action.

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 Elliott Scott Ewing
 Administrative Law Judge

We concur:

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 Alberto T. Rosas
 Administrative Law Judge

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 Andrea L.H. Long
 Administrative Law Judge

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